Constitutional processes in Canada and the EU compared

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Preface

Most of the papers submitted for this report were presented at conferences co-organised and funded by the Nordic Association for Canadian Studies (NACS) and ARENA – Centre for European Studies. Some further papers have been solicited in an effort to cover at least central portions of the large canvas that has been set up here.

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Introduction

The negative referendum results in France and the Netherlands are signs of a deep gap between the EU’s leaders and the European people(s). The referenda brought home that the Union’s executive-style politics is a central component in its democratic legitimacy deficit: ‘The [French and Dutch] referendum became a means of reasserting control over political classes that had acquiesced in excessive transfers of authority’ (Siedentop 2005).

Albeit frequently hailed as a key to the Union’s success the Union’s executive-style politics is ill equipped to handle democratic constitutional politics. The European Council sits on top of a much larger system of executive-run and expert-supported practical problem-solving and political accommodation, which is also in charge of treaty-making/change. This latter task is formalised in the Intergovernmental Conference (IGC) which has played a crucial role in the gradual development of the Union’s material constitution. Albeit this works as a constitutional arrangement in social practice terms; it does not carry with it the symbolic aura of the formal constitution; neither can it draw on the normative sanction of the democratic constitution.

Executive-style vs. democratic constitutional politics

In substantive terms the Draft Treaty establishing a Constitution for Europe essentially consolidated the Union’s material constitutional arrangement and was not a dramatic break with the past. But in symbolic terms, the Laeken process that produced it was different: It was the most explicit and visible case
wherein the terminology and normative standards of democratic constitutionalism were applied to the EU level (Kokott and Rüth 2003; Fossum and Menéndez 2005). But these standards were applied in a setting still very much controlled by executives. The tension between the IGC’s practical problem-orientation and constitutionalism’s attention to high symbolism and fundamental principles has played itself out during the process of forging the constitution, as well as during its ratification.

In model terms, the IGC has its roots in closed, executive-run interstate diplomacy; whereas democratic constitutionalism is rooted in the open, representative constitutional assembly. The Laeken process incorporated both elements in a difficult tension: rather than replace the Convention was inserted into the IGC process.

The Union now appears to be at a critical crossroads: should it continue down the road of democratic constitutionalisation or should it abandon its constitutional vocation? This is actually less of a crossroads, and more of a dilemma: If it chooses the latter, the question is how to grapple with the fact that the system in place already works as a material constitution?

On this reading the critical challenge currently facing the Union is to continue down the route of further democratization. Since the EU is not a state, this inevitably brings up the deeper issue: can democracy be disassociated from its putative nation-state foundation? Can supranational and highly complex multinational entities be made to function democratically?

**Global transformations**

If the EU is a unique entity, the assumption is that there is no comparable entity with a parallel developmental pattern or trajectory that we can hold the EU up against. There are two points that enable us to raise doubts about this assertion. The first is that if the EU is part of a larger pattern of transformation of the nation-state, and the sources of this transformation stem as much from outside the EU as from within it, then states and the conditions under which they operate may also undergo so important changes that there is merit in looking for comparable entities. As I try to show in Chapter 1, in a world wherein the nation-state is itself undergoing important transformations the EU may be less unique than might be assumed. One important development that is part of the transformation of the Westphalian state system is the emergence of rights and law enforcement beyond the nation-state. This as Erik Eriksen argues in Chapter 2 forms a vital impetus to a cosmopolitan order. Eriksen finds the EU a natural candidate for cosmopolitization. A similar argument can also be applied to Canada (see Chapter 1).
globalisation and cosmopolitization has sparked a wider reconsideration of the relation between what have been seen as constitutive components of nationally based democracy. One critical dimension is the relation between citizenship and national identity. Melissa Williams in Chapter 3 critiques the notion of citizenship-as-identity and argues for the need to consider citizenship as less embedded in assumptions of territorially-bounded membership. It is far from coincidental – and actually reflects the character of these entities – that the most critical accounts and innovative proposals have come from and/or been animated by the experiences of the EU and Canada.

Meta-constitutional politics compared
Second, within a changing setting there might be merits in comparing entities that are different but which face similar challenges and seek to handle these in similar manners.

In meta-constitutional terms Canada is probably the most relevant case to compare the EU with. Albeit a state, Canada’s being a contested state shares with the EU a long-drawn and deeply contested search for an institutional-constitutional framework that all relevant parties can agree to. Both Canada and the EU are essentially contested entities, which have, throughout their existence, faced the challenge of forging a sense of unity in the absence of agreement on the fundamental nature of the polity. Both have also existed for a long time under constitutional systems not explicitly founded on the principle of popular sovereignty. Both have sought to develop new and innovative constitutional and other ways of reconciling the tension between what Ben Crum in Chapter 4 (on the European Union) refers to as a Union of citizens and of states. In both entities the debate has revolved around the need to reconcile competing conceptions of community, as well as to reconcile individual vs. group-based vs. collective rights.

Canada’s way of handling these challenges in constitutional process terms parallels that of the EU. Initially this happened through executive-style politics and an intergovernmental approach to constitution making. The Canadian parallel to the IGC is the comprehensive system of intergovernmental relations with the First Ministers’ Council (FMC) at its apex. It operates as a collective as well as through a range of bi- and multilateral meetings, in a manner quite similar to that of the EU.

1 Canada has one of the world’s longest lasting constitutions (BNA Act 1867), based on representative democracy, but this was bequeathed upon the country by its colonial mother, the UK. For assessments of the EU’s constitutional arrangement, see Weiler 1995, 1999; Grimm 1995. The EU, rather than based on one constitutional demos, is better thought of as based on a unique constitution of multiple demos (cf. Weiler 2002).
But in some contrast to the EU Canada has undergone a profound constitutional transition, in both substantive and procedural terms. This took place in the aftermath of the patriation of the Constitution in 1982, which was the first time that Canadians sought to found themselves as a people (Russell 1993). The main substantive change, the Charter of Rights and Freedoms was cast as a core symbol of democratic constitutionalism. But also in Canada the far more open approach to constitutional change unfolded within a framework still steeped in executive constitution making.

The patriation process sparked deep conflicts; the province of Quebec refused to sign the Constitution Act; and the population was mobilised around different visions of Canada. Its aftermath ushered in the most comprehensive process of constitutional debate ever undertaken, so that ‘Canada surely had a lock on the entry in the Guinness Book of Records for the sheer volume of constitutional talk’ (Russell 1993: 177). Mary Dawson, Associate Deputy Minister and responsible for drafting all constitutional amendments since 1981, in Chapter 5 gives her account of the major constitutional initiatives in this period.

A critical issue that has run through this decades-long process of constitutional deliberation has been how to balance democratic constitutionalism and executive-style accommodation. In Chapter 6, Alan Cairns describes the character of and reasons behind this transition and discerns major lessons from what he terms as a transition from a ‘Governments’ constitution’ based on federalism and parliamentary government to a ‘Citizens’ constitution’ clothed in the symbolism of popular sovereignty. But a vital component of the Citizens’ constitution, the Canadian Charter, was imbued with a complex conception of democratic constitutionalism. It contained several provisions that sought to ensure that the forging of a constitutional demos be compatible with the protection (and promotion) of group-based and communal difference.

The Charter was therefore not a clean break with the past. It contained provisions for and was inserted into a legal-institutional framework which had enabled Canada to develop unique strategies of accommodating difference and diversity: ‘Canada is a world leader in three of the most important areas of ethnocultural relations: immigration, indigenous peoples, and the accommodation of minority nationalisms’ (Kymlicka 1998: 1, 2–3).

A further interesting parallel between Canada and the EU – in obvious contrast to the U.S. – is the strong insistence on social solidarity. Canada is a welfare state but did not entrench social rights in the Charter, whereas the
EU did. The question is whether this might help solidify the Union as a guardian of social solidarity. In Chapter 7, Agustin Menéndez discusses the legal status of social rights in the EU Charter with a view to their possible future role.

But even within what many laud as Canada’s main achievements, progressive multiculturalism, there is a parallel with contemporary Europe: as David Laycock notes in Chapter 8, these are critiqued and opposed by the political right. Laycock argues that quite surprisingly the Right in its opposition to equality rights seeks to reconfigure popular sovereignty.

**Coming together or holding together**

The EU is often considered as an entity in the making or a coming-together entity. Canada on the other hand is often couched as a holding-together entity. Albeit quite descriptive of what has taken place, neither works fully today.

On Canada, as Alan Cairns shows in Chapter 9, the possible effects of the separation of Quebec from the rest-of-Canada, does not only spark efforts at holding together but also how the rest of the country should come together if such an eventuality were to arise.

On the EU, in today’s more uncertain situation, the issue for the Union is also not simply that of coming together but holding together. In Chapter 10 Jo Shaw in an article written before the French and Dutch referenda discusses what may happen if the Constitutional Treaty is not ratified. The ratification failures could be interpreted as having somehow reshuffled the balance between coming together and holding together, in that the latter concern has gained more prominence. If anything this might also increase the relevance of the Canadian parallel.

These chapters can be read as bits and pieces of a larger puzzle that when properly assembled will yield vital insights into how complex multinational entities can and should grapple in a post-Westphalian world. They can also be read as important contributions on their own to some of the core challenges facing modern complex societies.
References


Chapter 1

The Transformation of the Nation-state
The EU and Canada Compared

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Introduction
The European Union (EU) is often depicted as a novel type of entity. It is both multinational and poly-ethnic. It is committed to democratic principles, but pursues these within a complex supranational structure that is neither a state nor a nation.

But how unique is the EU? There are many ways of exploring this. One obvious approach is through comparison. The general inclination among students of the EU has been to compare it with the US. In this chapter I propose instead to compare the EU with Canada, which is also a highly complex multinational and poly-ethnic entity, which never succeeded in becoming one nation. The EU can be seen as a case of forging a new type of entity out of existing nation-states, whereas Canada has never fitted the one-

2 The author gratefully acknowledges constructive comments and suggestions for clarification/change from the editors of the above volume, participants at the Lisbon seminar, an ARENA seminar in the fall of 2003, and individual comments and suggestions from Alan C. Cairns, Jeff Checkel, Mary Dawson, Erik O. Eriksen, David Laycock, Johan P. Olsen and Helene Sjursen.
3 For definitions of these terms see Kymlicka 1995, 1998.
nation mould. Both contain elements that deviate from the nation-state mould but neither makes up an outright departure from this. They are both better thought of as cases of transformation.

These processes might have democratic potential. This could stem from a greater degree of inclusivity and reflexivity than is possible within the nation-state framework. The claim that I will discuss in this chapter is that these two entities converge in their greater inclusivity and reflexivity.

To substantiate this I first need to demonstrate that when it comes to the question of nation-state transformation, Canada is a more appropriate case for comparison than is the US. The US is a sovereign state with a national identity (albeit one that is not based on the classical referents to nation), whereas Canada is a state but not a nation. Historically, one powerful portrayal has been that of two nations warring within the bosom of one state. Its cultural and ethnic complexity has increased greatly in the post-war period. Today, it is variously referred to as a post-national entity, a multinational and poly-ethnic federation, a confederation etc. These traits might also make it particularly susceptible to further transformation. Further, Canada has already for decades experienced far more uncertainty as to its territorial and cultural make-up than has the U.S. This has also shown up in several decades of what is called ‘mega constitutional politics’ and which involves a broad-based discussion on the constitutional essentials of the polity, combined with large-scale efforts at change. This debate and the change efforts could be relevant to our understanding of transformation of the nation-state. Finally, Canada shares with many of the Member States of the EU a more solidaristic conception of community than has the U.S. This solidaristic trait could be of relevance to the direction and substance of transformation. In sum, then, Canada may be a particularly useful case for comparison with the EU in order to shed light on the prospects for peaceful and democratic transformation of the nation-state.

In the next section, I will outline a set of criteria that permit the assessment of

\[\text{\footnotesize \cite{Fossum2014}}\]
the extent to which the two entities deviate from the nation-state model, seen as template and not as empirical reality. The criteria are set up to permit us to assess the issue of inclusivity and reflexivity. On the basis of this I will try to substantiate a claim to the effect that the transformations can have democratic potential.

**The transformation of the nation-state**

The state is a political institution and an organisational form, whereas the nation is a cultural community and an idea. To Weber (1991: 78) the state is ‘a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’. This definition only applies to the nation-state form of state (Kaldor 1995: 73).

The state is sovereign. The classical doctrine of sovereignty states that:

- first, no one can be the subject of more than one sovereign;
- second, only one sovereign power can prevail within a territory;
- third, all citizens possess the same status and rights;
- and fourth, the bond between citizen and sovereign excludes the alien.

(Linkater 1996: 95)

The international system of states is marked by anarchy in the sense that sovereign states do not recognise any superior authority (Bull 1977; Waltz 1979; Held 1993; Morgenthau 1993; Linklater 1996, 1998).

**Nation** refers to a specific type of community based on a form of solidarity. This form of solidarity translates into a sense of community – both of which are maintained and shaped by patterns of communication and interaction (Anderson 1991; Deutsch 1994). A nation is an invented or even imagined community (Anderson 1991), i.e. some symbols and aspects of a community’s past are highlighted at the behest of others: ‘Only the symbolic construction of “a people” makes the modern state into a nation-state’ (Habermas 2001: 64).

National identity derives from: historic territory; ‘common myths and historical memories; common, mass public culture; common legal rights and duties for all members; [and] (5) a common economy with territorial mobility for members’ (Smith 1991: 14). National identity is based on the conception of a collective national consciousness, whose sources are culturally based, but...
need not be predetermined or given, and can be forged. Nationalism as a doctrine of popular freedom, sovereignty and self-determination, not the type of community associated with the nation has given the phenomenon such political force and ubiquity. Nationalism is so pervasive that it can be deemed the dominant ideology today (Smith 1991).

The nation-state represents a blend of two principles that have historically been in tension with each other, namely state sovereignty (which highlights the link between sovereign authority and territory) and national sovereignty (which stresses sovereign authority and a defined population) (cf. Barkin and Cronin 1994: 108) or what will here be referred to as national self-determination.

Nation-state formation was a political project, with an ideology and a set of architects. The nation-state is an institutionalised means of exclusion of those not deemed to belong to that particular nation. The criteria of access and of exclusion are based on whether outsiders comply with some aspect of cultural and ethnic and historic community, and not with individuals' mutual recognition of each other. Nationally based democracy confines the notion of self-rule to those who are acknowledged as nationals of the state. In a system of nation-states, democracy is thus confined by and to the nation.

Today, states have become far more closely linked together than before across the whole range of political, social, cultural, economic and legal domains. Tight links are amplified by the revolution in microelectronics, in information technology and in computers. New international and transnational actors have emerged. States are faced with a whole range of boundary-spanning problems pertaining to the environment, international crime, terrorism, tax evasion and so forth. These and other pressing problems reveal grave inadequacies in the state as a problem-solving entity. The developments listed above also affect its ability to claim sole allegiance, and the very legitimacy of such a claim, as well.

Today's process is unprecedented in both spatio-temporal and organisational terms. Global flows are far more extensive, intensive, have a far higher velocity and also impact than earlier processes of globalisation. Contemporary

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1 There are different views as to how 'thick' this sense of community and belonging is and from where it is derived. A widely accepted distinction is between civic and ethnic nation. Cf. Hutchinson and Smith 2000.

2 There are several problems of democracy that are amplified in such a system. For one, territorial borders cannot be altered by democratic means. Further, in a democracy the people cannot determine who the people are, i.e., establish viable criteria for exclusion (Offe 2000).
globalization is also more strongly institutionalised than before, through international treaties and conventions, regimes, networks and patterns of interaction and contact. The present situation is unique in its confluence of factors and processes (Held et al. 2000). A nation-state, set up as an institutional arrangement to exclude those not deemed to belong, is today faced with the prospect of decisional exclusion in that many of the decisions affecting it are made elsewhere.

In the below I present a set of relevant criteria for assessing the EU and Canada as cases of transformation of the nation-state. The first set speaks to mapping the deviation; the second to the development of alternative doctrines, as part of democratic experimentation and reflexivity; and the third to constitutional debate and change, also intrinsic parts of constitutional reflexivity (Bohman 2004). On the first, that of empirical mapping, the criteria pertain to:

a) The extent to which these two entities deviate from core elements of nation-state based sovereignty and identity. Such transformations could come through:
   - supranational or international bodies or arrangements that tie states up and undermine their sovereignty;
   - incompatibility between state sovereignty (link authority-territory) and national self-determination (link authority-defined population) but without the entity breaking up;
   - non-state transnational and international actors that seek and propound other types of allegiance than those associated with the nation-state, and the entrenchment of such in institutional structures so as to form viable alternatives to national identity and sense of attachment; and
   - the orientation of politics along divisions and cleavages other than those associated with sovereignty and national identity.

To fully understand a transformation we need to know the point of departure, the process of change, and the end result. The indicators above speak foremost to departure and process and less so to result.

Today there is no consensus on the result, i.e., what a democratically viable non-state, non-nation entity might be. In a similar vein, there is hardly a clear

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9 Hedley Bull has noted that: ‘if nationalist separatist groups were content to reject the sovereignty of the states to which they are at present subject, but at the same time refrained from advancing any claims to sovereign statehood themselves, some genuine innovation in the structure of the world political system might take place.’ (Cited in Linklater 1996: 79).
blueprint for the EU or for Canada. But there may be self-conscious efforts at developing new justifications and solutions. I have chosen to examine the transformations through the criteria of inclusion and reflexivity. With inclusion I refer to physical inclusion of non-nationals, as well as the taking into account of the interests and concerns of non-nationals. Both are matters of degree – more inclusiveness than within a nation-state, less than in a global community. With reflexivity, is meant the extent to which the polity is open to challenge, reinterpretation and amendment. It entails a process that is open to deliberative challenge, a process of critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity.

The second set of criteria look for alternative doctrines:

b) The espousing of more inclusive and reflexive doctrines to replace nationalism; and their entrenchment in policy programmes and institutional arrangements.

Reflexivity could also manifest itself in the search for new terms or a new terminology of association that speak to a more inclusive form of association than nation. This would be particularly effective if it entailed efforts at forging such terms into a coherent alternative vocabulary of association. The reason for this focus on terms is because there is a distinct vocabulary of the nation-state. When the nation-state was established in Europe ‘the whole European vocabulary of association […] was ransacked for suitable expressions with which to describe and to appraise the formal character of a modern European state’ (Oakeshott 1975: 320). This vocabulary is also highly malleable. Many actors and analysts are also committed nationalists and may even subsume novel phenomena under old rubrics, hence downplay the actual magnitude of change. An indicator of converging change is the presence of a similar search for suitable vocabulary in each entity.

Finally, to get a better sense of the magnitude of reflexivity in a given polity it is necessary to examine:

c) Whether there is an ongoing discussion of constitutional essentials and a willingness and ability to entrench whatever agreement is reached in binding constitutional shape.

This presupposes understanding of the link between constitution and reflexivity: Constitutions ‘are neither simply institutional designs nor merely
first-order legislative practices, but rather also make issues of social order and
democracy itself open to deliberative decision-making as it is reflexively
institutionalized’ (Bohman 2004: 323). Constitutional contestation (over the
substance of the constitution as well as over how it is forged and amended) is
therefore also part of the terrain where reflexivity unfolds.

The next section addresses the first set of criteria (a) and provides a mapping
of the extent to which the EU and Canada depart from the central tenets of
the nation-state model. In the following section, which deals mainly with the
second set of criteria (b), the discussion focuses on alternative doctrines and
vocabulary. This also helps shed light on the third criterion (c), whether these
issues touch on constitutional essentials. A proper assessment of the extent to
which alternative doctrines and discussions become embedded in policy
programmes and institutional and constitutional arrangements requires far
more space than is available here. The same applies to the degree to which
these notions are generally accepted. I make some references to their standing
but do not provide a comprehensive assessment here either. In the last main
section of the chapter, I discuss whether there are ongoing discussions of
constitutional essentials, and whether these are confined to the level of elites,
or whether they encompass all or most of society. Their degree of openness
of course is vital to the democratic quality of these processes.

**Departing from the nation–state mould?**
**The EU and Canada assessed**

Today, state sovereignty is challenged by major transformations within the
realm of international law. The first is the recognition of individuals and
groups as legal subjects of international law. Second, the realm of
international law is shifting from primarily being focused on political and
geopolitical matters to an increased focus on regulation of economic, social,
communication and environmental matters. Third, is the change in the
sources of international law – which far more than before include
international treaties or conventions, international custom and practice, and
‘the underlying principles of law recognized by “civilized nations”’ (Held et
al. 2000: 63). This has also led to an increased focus on the relation between
the individual and her own government. ‘International law recognizes powers
and constraints, and rights and duties, which have qualified the principle of
state sovereignty in a number of important respects; sovereignty *per se* is no
longer a straightforward guarantee of international legitimacy. Entrenched in
certain legal instruments is the view that a legitimate state must be a
democratic state that upholds certain common values’ (Held et al. 2000: 65).
These legal developments are not uniform across the globe and have been carried further in Europe than anywhere else. This applies to the European Convention of Human Rights (ECHR of 4 November 1950) and also to European Union Law (the two converge in the field of human rights). The ECHR permits citizens to initiate proceedings against their own governments. The Court is outside of the jurisdiction of the states, and its judgements are de facto legally binding on the states.

Within this framework, states are no longer free to treat their own citizens as they think fit… The European Convention on Human Rights is most explicit in connecting democracy with state legitimacy, as is the statute of the Council of Europe, which makes a commitment to democracy a condition of membership.

(Held et al. 2000: 68-9)

The most explicit curtailments of state sovereignty have occurred in Western Europe, where the greatest transformations of international law have taken place. Here these are bolstered and sustained by a supranational structure of governance.

A supranational European Union

The EU embeds this legal system in a supranational structure of governance, another obvious curtailment of state sovereignty. In institutional terms, the EU is a highly complex entity, which holds a number of features that set it apart from any state (Schmitter 1992, 1996, 2000; Preuss 1996; Weiler 1995). It is a complex mixture of supranational, transnational and intergovernmental features. Its legal system claims preponderance over national systems and has direct effect on the Member States, in the areas within its jurisdiction. Many analysts also claim that the EU has a constitution. The European Parliament, the Court of Justice and the Commission are supranational institutions and are institutionally committed to further integration. But the Member States continue to see themselves as the ‘masters of the treaties’, and each Member State has the right to veto treaty changes, thus retaining a strong ‘statist’ imprint on the EU. This is also retained in some of the institutions. The Council is an intergovernmental body but permits an extensive amount of ‘pooling of sovereignty’ through a consensual decision process ensured by complex voting systems (based on co-decision, co-operation and consultation).

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10 This is a unique type of non-state based constitutional treaty (cf. Weiler 1995, 1999; Grimm 1995). It has also been referred to as a material constitution (Eriksen et al. 2004).
The EU has not been granted international recognition on a par with a state. It also defies conventional conceptions of sovereignty as consistency between a set of rules and the territory on which they operate. On the one hand its rules and regulations spread well beyond its formal bounds. It has signed the EEA agreement with the EFTA states, which effectively extends much of the *acquis communautaire* to these countries, and has signed association agreements with applicant countries. On the other hand, it does not have a clearly defined territory on which its own institutions work in an exclusive manner. In that sense it is perhaps better to think of as marked by variable geometry. This has many sources, among which are treaty provisions permitting further integration, as well as a wide range of exemptions. Some countries have exemptions from treaty provisions (Denmark has among others exemptions from European citizenship), some Member States have opted out of the Euro, and some are not members of the Schengen Agreement (UK, Ireland), whereas non-members such as Norway and Iceland are. It does not have a clearly established centre of authority. Nor is it entirely clear where its sovereignty is ultimately located. The EU is no doubt the most radical current peaceful attempt to depart from the prevailing doctrine of state sovereignty and national identity. As a novel system of binding interstate interaction it poses a direct challenge to the still prevailing conception of the international system, the Westphalian one.

European citizenship is also different from established nation-state based conceptions:

> Union citizenship is not so much a relation of the individual vis-à-vis Community institutions, but rather a particular legal status vis-à-vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals  

(Preuss 1998: 147)

European citizenship reflects the *explicit inclusion of non-nationals* into the operations of every Member State. In this context, we are reminded of the tenuous and contextual link between citizenship and national identity. Citizenship and national identity, as Jürgen Habermas reminds us, are not conceptually linked, although they may be so empirically.

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11 The UK and Ireland take part in some of the fields of Schengen co-operation, see [http://europa.eu.int/scadplus/leg/en/cig/q4000s.htm#i1](http://europa.eu.int/scadplus/leg/en/cig/q4000s.htm#i1).
Such distinct status is not confined to EU citizens. Although there is an important distinction between European citizens and third-country citizens resident in the EU, the latter also have some rights, which vary considerably from one Member State to the other (Habermas 1996: 495ff). Terms such as *post-national citizenship* and *denizenship* have been used to depict their role. In the Union there is thus a range of different categories of territorial inclusion, and where different degrees of inclusion are associated with different compositions of rights.

In the EU there is no single language, ethnic group or nation that can command majority support. There is no overarching European identity (although there are numerous efforts to create such). The European Union at present consists of 25 Member States (4 are federal or quasi-federal), it has 20 official and working languages, numerous minority nationalisms and ethnic minorities (some of which cross state bounds), and regional movements.

In sum, the EU is emblematic of a major transformation in Western Europe, in that its unprecedented system of law, and supranational institutions and border-transcending/eliminating arrangements tie the Member States (and affiliated states) up and weaken or undermine their sovereignty. The Union itself is not based on established conceptions of sovereignty. It also propounds a *post-national* type of allegiance that is thinner than that of nationalism.

Western Europe, however, is not unique with regard to the changes that are taking place. How extensive are these in Canada?

*Multinational* Canada or post-national Canada

Canada is recognised as a sovereign state and is one of the oldest constitutional democracies in the world. But there are several aspects of its external connections and internal relations that, when taken together, leave it with weaker territorial control than we associate with a sovereign state and deep tensions between state sovereignty and national self-determination.

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12 For the definition of this term and how it differs from the conventional model of citizenship, see Soysal 1994.

13 A *denizen* can be defined as a long-term resident ‘who possess[es] substantial rights and privileges... The denizenship model [of citizenship] depicts changes in citizenship as an expansion of scope on a *territorial* basis: the principle of domicile augments the principle of nationality. Denizens acquire certain membership rights by virtue of living and working in host countries’ (Soysal 1994: 138-9). Soysal critiques this model for being confined to the nation-state model.

14 Such a political identity is forged through embrace of democratic norms and human rights (Habermas 2001; Curtin 1997; Eriksen and Fossum 2000).
The most important external aspect is the (initial CAFTA and later) NAFTA agreement that Canada entered into with the US and Mexico in 1994. The status of NAFTA in constitutional terms is contested, but it is clear that Canada through NAFTA is tied up in a semi-continental economic agreement, which places limits on its sovereignty. This is a far more explicitly economic arrangement than is the EU. It is a system of state restraint combined with corporate empowerment, and without compensatory or market correcting measures. The shock of 11 September ignited a Canadian search for measures to ensure continued open borders, whilst responding to American security concerns.

The external constraint is linked up with a great measure of internal uncertainty. This is foremost but far from exclusively related to the spectre of Quebec secession. The question of the status of Quebec in the federation has been debated throughout Canada’s gradual transition from colony to independent state. Formally speaking, it was only in 1982 that Canada patriated its constitution (effected in Britain), through the Constitution Act 1982, and declared that the constitution emanated from the Canadian people (cf. Russell 1993: 3). The province of Quebec has still not formally signed this Act. In political terms, the lack of Quebec’s acceptance of portions of this Act has helped keep alive the larger question of the role of Quebec within the Canadian federation. This is one of several grounds for considering whether Canada may represent a lasting departure from the nation-state model.

The sceptre of Quebec separation has cast uncertainty on the question of the territorial make-up of the country. At present the threat of Quebec separation has abated, as was evident in the 2003 Quebec election and in public opinion polls. But the memory of the latest referendum in 1995 (the second such referendum), where 49.4 per cent voted Yes, whereas 50.58 per cent voted No (the No side won by only 54,288 votes), still lingers. If Quebec were to separate, the Rest-of-Canada would have to reconstitute itself - a very difficult process due to the strong centrifugal pressures inside the federation.

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15 Some depict it as having constitution-like features (Schneiderman 1996; Clarkson 2003) whereas others see it as a confederal type of arrangement, which delimits state sovereignty in certain areas (Abbott 2001: 171). It has limited direct effect, confers a form of property rights on foreign investors and prevents expropriation and nationalisation.


17 The external and internal dimension is also linked in that the CAFTA agreement that the NAFTA was more strongly supported in the province of Quebec than in most of the Rest-of-Canada.

18 There is considerable uncertainty and disagreement as to how the Rest-of-Canada is to
There was also not agreement as to what territory would make up an eventual independent Quebec, a problem that was compounded by pleas for partition. Partitionists claimed that if Canada was divisible then so should also Quebec be.¹⁹

In the aftermath of the referendum, the question of Quebec separation was taken to the Supreme Court which handed down its advisory opinion in 1998.²⁰ It stated that Quebec has no legal right – under Canadian or international law – to unilaterally secede from Canada. But it went on to note that:

> Our democratic institutions accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.²¹

The federal government in 1999, through the so-called Clarity Act (An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference) established a set of more specific procedural guidelines for how secession might proceed.

Canada is the only country to have spelled out a set of democratic procedures for separation or break-up.²² These apply not only to Quebec, but to any province. Actual negotiations with a province would not be bilateral – between the federal government and the relevant province - but would be conducted among all the governments of the provinces and the federal

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¹⁹ The leader of the Reform Party, Preston Manning has noted that ‘if Canada is divisible, as long as the process employed respects the rule of law and the principle of democratic consent, then Quebec is divisible by the application of the same processes and the same principles.’ Remarks by Preston Manning, M.P. Leader of the Official Opposition, House of Commons – 10 February 1998, printed in Hansard.


²¹ Ibid.

²² Note that the Draft Treaty establishing a Constitution for Europe contains a provision (Article I-60) that permits voluntary withdrawal from the Union (European Convention 2003).
government. Territorial uncertainty has helped spawn decentralisation, and the Canadian federation is one of the most decentralised ones in the world.

Uncertainty - in territorial and jurisdictional terms – is also likely to emanate from extensive claims for aboriginal self-government. This will not break up the country, but will likely produce a far more complex conception of the location of sovereignty and the nature of citizenship and may complicate the relations between Quebec and the Rest-of-Canada.

Together with weakened sovereignty and territorial and jurisdictional uncertainty, Canada is also marked by contestations over nationalism. A major concern is how to maintain even a semblance of national unity. Although there is a clear majority of English-speakers, there are four sets of national identifications that are currently being propounded: a) Rest-of-Canada Canadian nationalism (or Canada-without-Quebec nationalism), b) Quebecois nationalism, c) Aboriginal nationalism, and d) Canadian nationalism (Canada as it exists today). At present no national identity can legitimately claim to be the overarching one. For Canada as a whole, language as a basis for identity is highly divisive. The same applies to ethnicity. Originally the tension was between English and French. These groups occupied special status, as ‘Founding Nations’. This status has now been challenged by aboriginal peoples, who refer to themselves as ‘First Nations’.

These problems have taken on added importance due to increased diversity. The country has, as a result of large-scale immigration from all parts of the world and in particular the so-called Third World, become far more ethnically diverse. In 2001, 18.4 per cent of the population was foreign-born. In relative terms, this is far more than the US, the other major country with immigration-induced pluralism. Leslie Laczko (1994: 38) sees Canada as an outlier or extreme case of diversity among modern industrialised countries: ‘it contains more types of pluralism than these others do [United States, Belgium and Switzerland]. It is this combination of types of pluralism that makes Canada distinctive.’

This brief assessment has revealed that the EU is a new type of supranational arrangement that weakens the sovereignty of the nation-states and that also helps transform both members and affiliated states. Canada is tied up in
transnational arrangements that weaken its sovereignty. Even more relevant are internal tensions that create deep incompatibilities between the principles of state sovereignty and national self-determination. Canada has never resolved the fundamental question as to where sovereignty is ultimately to be located.  

Both the EU and Canada are multinational, poly-ethnic, and multicultural. The EU does not only challenge established conceptions of state but also of nation. It is increasingly being labelled a post-national entity. Some also see Canada as post-national.

Emergence of new types of actors and transnationalisation of established actors

These developments in Europe and Canada are part of patterns of action that cut across national bounds and territorial cleavages, and they are carried by a whole host of different actors. Historically, at the international level, the politics of recognition of unique identity revolved precisely around the protection and propounding of national identity. This was institutionally privileged in the Westphalian system. Today, social movements such as the women’s movement, aboriginal organisations, gay and lesbian organisations, organisations for the disabled, for anti-war activists and environmentalists and ecologists have become increasingly internationalised. Similarly, the globalisation of human rights helps reinforce the political mobilisation of groups and communities that assert rights and identities. In some cases, these developments serve to challenge existing nation-states and bring forth issues of human rights and human dignity, in other cases established democratic standards may themselves be challenged.

To varying degrees the non-national groups and social movements referred to above are proponents of a politics of recognition of identities that are not privileged by the Westphalian system: ‘The increased prominence of the politics of recognition is one key indicator of movement beyond the

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25 For this point consult Cairns 1995 and Russell 1993. Russell notes that ‘the Canadian people may have become constitutionally sovereign without having constituted themselves a people. The Canadian people or peoples have not explicitly affirmed a common understanding of the political community they share.’ (Russell 1993: 235)

26 Northrop Frye has noted that Canada ‘has passed from a pre-national to a post-national phase without ever having become a nation’ (cited in Lipset 1990: 6).


28 With regard to the latter, extreme right-wing and neo-nazi groups also seek to ‘go global’ and exploit new technologies. Their objective however is often to close states from foreign people and influences, and nourish ethnically homogeneous societies.
The Transformation of the Nation-state


In Europe, the integration process enhances transnational activity, formation of networks, and organisations. In Canada, there has been a significant mobilisation of social movements, such as the women’s movement, aboriginals, gays and lesbians. Albeit often part of wider international networks, social movements and groups have played critical roles in both Western Europe (at the national and European levels) and in Canada. The European integration process helps forge such transnational groups, through the establishment of a new level of governance, funding, and new institutional access points (such as the EP, the ECJ, the Commission and the system of Comitology). Canada’s ethnic heterogeneity affects its foreign policy: it spurs increased demands for liberalisation of immigration and refugee laws and helps put the government under pressure to take side in and action on conflicts outside the country (Riddell-Dixon 2003). Its ethnic heterogeneity thus contributes to make Canada particularly sensitive to international developments, through the experiences, networks, and concerns that the various groups bring forth, and which are amplified through the Charter, international agreements and conventions, and official endorsement of multiculturalism and heterogeneity.

These developments correspond with, draw from and themselves help spur, the emergence of a whole range of new actors on the international arena. Of particular note is the great surge in transnational and international social movement activism. These may be benign or malign, as the recent spate of terrorist activity has testified to. Their commitment to democratic procedures varies considerably, albeit they can and do contribute to heightened reflexivity and contestation, they help nationalise and localise global patterns and problems, as well as globalise national and local issues and questions. In that sense individual states face the dual challenge of integration and fragmentation - from ‘above’ as well as from ‘below’ by increasingly assertive social movements and regions.

The argument thus far has been that the two entities exhibit a significant measure of divergence from some of the core traits of the nation-state model. This is most explicit in Europe, where supranational institutions that greatly weaken state sovereignty have been established. To a lesser extent, it also applies to Canada, due to its membership in NAFTA and in particular because of its unresolved constitutional questions which pertain to the territorial integrity and very existence of the state. Both entities are extremely diverse in cultural terms and neither forms a coherent and agreed-upon
nation. They foster transnational activity, and they help sustain non-state actors at the international level, and the orientation of politics along non-territorial divisions. Insofar as there is a systemic transformation afoot it appears to result more from transformation of states and emergence of new quasi-state actors such as the EU than from the emergence of new non-state and social movement actors, however.

These patterns of change may have democratic potential, in that some of them reflect increased inclusiveness and peaceful co-existence within complex and highly diverse settings. The question is how reflexive these are and also whether the changes are part of conscious efforts or programmes of action bent on altering essential components of the nation-state model, whether such are given normative justifications, and whether action follows talk, in the sense that they show up as constitutional concerns and are part of constitutional change programmes.

Objectives/self-conceptions: new doctrines?
Official statements and even constitutional documents reveal that the political elites are aware that the two entities differ from conventional nation-states. 29

The European Union
The founders of the EU were acutely aware of the excesses of nationalism after having gone through two devastating world wars. A central objective in establishing the EU was to preserve peace through legally binding co-operation. Deeply embedded in the EU then is the desire to develop new forms of political association. Jean Monnet and Altiero Spinelli, two of the most influential figures in the movement towards European unity, envisaged the formation of a political system that built upon but transformed and transcended the nation-state, also in terms of its end product. Monnet saw the EU as an experiment and was less clear on the nature of resultant entity than was Spinelli who envisaged a European federation (Holland 1996: 102). The process has been marked by a close interaction between the development of theories of integration and the development of strategies of integration

29 With awareness is not implied agreement. For instance, in the Canadian case, there is considerable such endorsement among the political elites at the federal level – including the Supreme Court – but often not shared by elites at the provincial level. For instance, many provincial elites, especially in Western Canada, in Ontario under the Conservatives (1995-2003) and in a particular way in Quebec, do not endorse the view that Canada should substantially differ from conventional nation-states, in particular with regard to inclusiveness and reflexivity. A similar argument pertains to the New Rights in Canada, see Laycock 2001 and further his contribution to this volume. Even more significant such variations in endorsement are found in Europe.
The Transformation of the Nation-state

(Wallace cited in Murray and Rich 1996: 4). The dominant ones are functionalism, federalism and neo-functionalism.

But although there is a distinctive ‘Community Method’ of integration, the pattern of integration has not proceeded towards a clear, predetermined goal. The integration process is better seen as a testing ground of ideas, principles, procedures, institutional arrangements and policies.30 It has been contested throughout from defenders of the nation-state, from de Gaulle to Thatcher, to Berlusconi.

The general principles that the EU has appealed to, in particular post-Maastricht are universal in their orientation. They refer to democracy, the rule of law, solidarity, subsidiarity, tolerance and respect for difference and diversity. These leave considerable room for institutional and even polity choice.

There is also currently in Europe a process of ransacking of vocabulary of association similar to that which took place with the emergence of the modern European state. To clarify its nature as polity some analysts resort to the vocabulary of federalism, such as cooperative confederation (Bulmer 1996), or quasi-federal entity (Sbragia 1992; Murray and Rich 1996: 13). To cite one prominent contributor, Joseph Weiler argues that the EU has developed a unique federal arrangement, the normative hallmark of which is the principle of constitutional tolerance. This is based on two core components. The first is the consolidation of democracy within and among Member States. The second is the explicit rejection of the One Nation ideal and the recognition that;

the Union … is to remain a union among distinct peoples, distinct political identities, distinct political communities… The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance.

(Weiler 2001: 68)

As Weiler notes in a more recent article;

in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic

30 ‘(T)here has never been a basic template or "structural ideal”’ (Walker 2003).
tolerance to be bound by precepts articulated, not by ‘my people’, but by a community composed of distinct political communities: a people, if you wish, of ‘others’.

(Weiler 2002: 568)

The EU, therefore, is accepting of different conceptions and visions of what the polity is, and ought to be. In a similar vein Ulrich Preuss underscores the unique character of the EU’s institutional-constitutional structure: dynamism, complementarity with the Member States’ constitutions, polycentricity, and dual legitimacy basis. These are features that set the EU apart from the nation-state. They permit the EU to accommodate a much greater degree of complexity and diversity than does any state. Preuss’ argument can be construed as a plea for prioritizing federalism over statism, and for developing a new combination of federalism and democracy in a non-state entity (Preuss 1996).

Other analysts see the EU as a system of multi-level governance, such as a multi-level polity (Marks et al. 1996; Hooghe and Marks 2003), a new kind of commonwealth (McCormick 1999: 191), or a mixed commonwealth (Bellamy and Castiglione 1997), or condominio, consortio (Schmitter 1992, 1996); others think of it as some form of transition, such as partial polity (Wallace 1993: 101) or post-national entity (Curtin 1997; Habermas 1998, 2001) or post-modern entity (Ruggie 1993); and others still think of it in globalist terms, such as cosmopolitanism (Held 1993, 1995; Linklater 1996, 1998). These are new terms that depict a more complex and less definite relation between territory and identity. Old pre-nation principles have also been redesigned to try to capture the institutionally complex and asymmetrical nature of this multi-level entity, such as subsidiarity (cf. Schmitter 1996). New principles of governance such as deliberative supranationalism have been coined to designate the manner in which experts and state representatives deliberate within the ambit of transnational networks. These terms reveal that there is a wide-ranging effort at exploration of new concepts and principles and assessments of their normative status.

This wealth of designations demonstrates that the EU is an essentially contested project, in polity terms. This contestation has not precluded the adoption, as entrenched in the treaties and policy statements, of the core principles of the democratic constitutional state, namely democracy, rule of law, justice and solidarity. The standard of democracy and rule of law is applied to the EU and also as entrance requirements for applicants. The EU thus not only projects these standards unto future members but also reciprocally asserts that
these are the standards that it has to comply with. This could be construed as a self-reinforcing cycle of reciprocal obligation, a cycle that by its very existence renders the bounds between the Union and its outside world less relevant.

These developments notwithstanding, during the 1980s and 1990s, the pace of integration proceeded much further than did efforts on the part of the responsible elites to clarify the nature of the entity that they are constructing. The last few years has seen a revival of debate, touched off by the German foreign minister Joschka Fischer’s speech at the Humboldt University in Berlin on 12 May 2000, where he propagated a European federation - not a European nation-state. This speech sparked considerable debate and responses have since emerged from numerous heads of state and academic analysts (cf. Joerges et al. 2000).

Despite the leaders’ hesitation to clarify the nature of the overall European integration project, the integration process has to a considerable extent come to focus on the core components of reflexivity, notably rights. The Charter of Fundamental Rights of the European Union (2000), proclaimed at Nice but not part of the Treaties (although incorporated in the Convention’s Draft), was the most explicit commitment to individual rights ever presented by the European Union. The Charter holds provisions on civil, political, social and economic rights - to ensure the dignity of the person, to safeguard essential freedoms, to ensure equality, to foster solidarity, to provide a European citizenship, and to provide for justice. Its provisions are similar to most charters and bills of rights, and it is also more updated than most such. It contains, as did the Canadian Charter also provisions for group-based rights, albeit weaker in group promoting terms than the Canadian.

The Charter then in turn also helped propel the process of constitutional clarification further. First announced at Nice in December 2000 was a commitment on the part of the EU to embark on a comprehensive debate on the future of Europe. This was amplified at the Laeken Summit in December 2001, which decided to establish a Convention on the Future of Europe. Through this Constitutional Convention the EU embarked on a proper constitutional debate, the result of which has thus far been the Convention’s Draft Treaty establishing a Constitution for Europe.

31 See Eriksen et al. 2005 for further details.
32 Its legal status is more than mere political declaration, however. Cf. Lenearts and de Smijter 2001 and Menéndez 2002.
The Convention’s draft was adopted by the Intergovernmental Conference in Brussels in June 2004, and now awaits ratification in all 25 Member States. As is clear from its Preface and provisions, it is simultaneously a testimony to Europe’s diversity, and an attempt to evoke a spirit of commonality and community. It speaks not to a set of Europe-specific and confining values, but to universal ones. Europe is cast as a ‘civilization’, not as a cultural community.

PREFACE OF THE DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus ‘United in diversity’ Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope…

(European Council 2004)

The Preamble speaks to the need to transcend the ancient divisions of Europe, divisions that have been sustained by exclusive national identities. The onus is on forging a common destiny. The common project is not spelled out through the explication of a clear alternative doctrine. It is rather presented as a search for unity and commonality, a search that is particularly mindful of the rights of the individual, and which also takes Europe’s
diversity into account. It thus presents Europe more as a meeting-place for different visions than as a hammered-out alternative project. This was also very evident in the Convention's deliberations, in the many constitutional proposals, and in the submissions to the plenary debates, working groups and proposed articles. The Preamble and the Draft speak to the need to develop a mode of allegiance that is more inclusive than nationalism. The openness in the Preamble and the Draft is itself both a testimony to reflexivity and an encouragement to continue the process of self-reflection.

In sum, the EU clearly departs from the nation in terms of inclusiveness and accommodation of difference; it also at present has embarked on a large-scale effort at self-reflection, to establish its constitutional essentials. The Union is inclusive in that non-nationals (in other Member States and in affiliated states) are accorded rights; it is also inclusive in that it is open to membership and has included many new members over time. How far this will extend has still not been settled (Turkey has been accepted as a future applicant). The Union, however, in aggregate terms, is becoming less open to non-Europeans. The element of other-regard referred to as part of inclusivity is also apparent in the commitment to social solidarity and a European social model.

Canada
Throughout its history, there have been numerous nation-builders in Canada – in the federal capital in Ottawa, in the capital of Quebec in Quebec city, and even in provincial capitals, and in the 600 or so First Nations communities. They do not share the same project. The sheer multitude of self-professed national projects is testimony to the failure to reach agreement on a coherent sense of a Canadian nation. Precisely what type of community it is has been contested. Is it a community of communities, a failed nation, a federation, a multinational federation, a confederation, or a post-national, or even postmodern entity? Samuel LaSelva (1996: 165) notes

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53 Articles I.1-4 and 7-9 spell out values and objectives, rights and freedoms. Article I.5 states that the ‘Union shall respect the national identities of its Member States’ but locates these in their legal-constitutional institutions and not in unique cultures or ways of life. Article I.4.2 explicitly rules out discrimination on grounds of nationality.

54 This is very clearly expressed in the Charter of Fundamental Rights of the European Union (2000), as well as in the treaties and in various policy measures and commitments from the EU, although the Union’s ability to realise this from own competences and means is highly circumscribed.

55 When asked in 1999 to define the Canadian identity, the Minister of Intergovernmental Affairs, Stéphane Dion, said that it consisted of respect for basic rights and respect for diversity (speech to the 7th Triennial NACS Conference, Reykjavik, Iceland, August 1999). This is quite different from how a nationalist would designate his/her country.
that ‘Canada is regarded as a difficult country to justify, even by those who accept the distinction [between ethnic and civic nationalism] and understand the implications of civic nationhood’.

The Canadian effort to establish an agreed-upon constitutional arrangement made it enter the realm of ‘mega constitutional politics’:

First, mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from the first. Precisely because of the fundamental nature of the issues in dispute - their tendency to touch citizens’ sense of identity and self-worth - mega constitutional politics is exceptionally emotional and intense. When a country’s constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns.

(Russell 1993: 75)

Mega constitutional politics can take place within an established constitutional framework, but is more appropriately labelled as constitution-making, as in principle the entire constitutional system is ‘up for grabs’ (Russell 1993). This process has touched on virtually all aspects of the political system and society and has produced a wide array of radical proposals for how to address these challenges. As an illustration of the most comprehensive public statement of the diversity of Canada, consider Section 2.1 of the Charlottetown Accord 1992, the latest - and failed - attempt to reach an agreed-upon constitutional settlement. This section was an attempt to be a vehicle through which everyone could see themselves (in reaction to Meech Lake which had focused exclusively on Quebec):

THE CHARLOTTETOWN ACCORD (SECTION 2.1)
(a) Canada is a democracy committed to a parliamentary and federal system of government and the rule of law;
(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
(c) Quebec constitutes within Canada a distinct society, which
includes a French-speaking majority, a unique culture and a civil law tradition;
(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
(g) Canadians are committed to the equality of female and male persons; and
(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

This section depicts a vision of Canada, not as one nation or even as one community, but as a complex and composite community of communities, each of which is worthy of equal recognition and respect. The section can be seen as a reflection of how imbued with considerations of justice – individual and collective – the process of forging constitutional agreement had become following the ‘Canada Round’ of extensive consultation on the content of the constitutional reform package, and also how difficult it had become to agree on one common conception of Canadianism.\(^{36}\) The section is also evocative of the need to conceptually break out of the nation-state template if the much more complex terrain of identity politics and justice considerations that mark multinational and poly-ethnic entities is to be understood and handled.

This section and to some extent also the Charlottetown Accord offered a kind of deep diversity type solution to how to understand Canadianness. The reasons for rejecting it differed widely. Many people voted against the Accord because they felt they had more in common than was reflected in the Accord.\(^{37}\)

What is interesting is that the Canadian experience has also generated a sense in Canada that its uniqueness and its struggles have brought forth something

\(^{36}\) The Accord was subsequently critiqued from many quarters because of its comprehensive nature, which mobilised so many overlapping antagonists to the values and perceived outcomes of the Accord. For a comprehensive discussion see Johnston et al. 1996.

\(^{37}\) Johnston et al. (1996: 147) note that ‘voters for the most part saw the Accord as an expression of the politics of group accommodation’.
valuable: ‘The Canadian approach to diversity strengthens Canada’s reputation as a just and fair society. Canada is renowned for its rich cultural mosaic and the Canadian model has become an example for the rest of the world.’ The general principles that are used to depict Canada are cultural and linguistic tolerance, inclusive community, federalism, interregional sharing, democracy, rule of law, and equality of opportunity, as well as respect for and accommodation of difference.

Federalism has played a key role in the accommodation of difference, but has been ‘stretched’ or extended, precisely to accommodate deviations from the nation-state model. As noted above, federalism as principle and as mode of attachment is distinct from nation and a federation need not be a state: ‘the federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty’ (LaSelva 1996: 165). In no other country is this tension more apparent than in today’s Canada. Analysts use the term federation and confederation almost interchangeably, with few attempts to differentiate between them. They also supplement the federal component with other terms such as ‘multinational federation’ (Resnick 1994; Gagnon and Tully 2001), ‘asymmetrical federalism’ (Webber 1994), and pluralist federalism, executive federalism, and federalism as cultural compact. The attempts to grapple with the whole complex of identity politics and the accommodation of multiple forms of difference have led to a whole new vocabulary to properly depict the types and forms of difference that make up Canada. Relevant terms to depict the entity are cultural mosaic (as opposed to the American notion of melting-pot), pluralistic civilisation (LaSelva 1996: 165), and multicultural and poly-ethnic society. Charles Taylor has argued that Canada is marked by ‘deep diversity’ and James Tully has talked of the need for ‘diversity awareness’.

Federalism, thus cast wide, has always been part of the Canadian experiment. To Sam LaSelva, the Canadian experiment has been that of creating a political nationality through federalism. The existence of a French-Canadian (mainly catholic) and an English-Canadian (majority protestant) community meant that the essential challenge was to create a sense of common allegiance, whilst also respecting the uniqueness of each group. This was a very different challenge from that facing the American founders. ‘Canadian nationalism
presupposes Canadian federalism, which in turn rests on a complex form of fraternity that can promote a just society characterized by a humanistic liberalism and democratic dialogue’ (LaSelva 1996: iiix). To address this, Canada had to develop its own special version of federalism. LaSelva attributes this to one of the founders, George-Étienne Cartier, and argues that this notion is based on federalism as a way of life.

For Cartier, the justification of federalism was ... that it accommodated distinct identities within the political framework of a great nation. The very divisions of federalism, when correctly drawn and coupled with a suitable scheme of minority rights, were for him what sustained the Canadian nation.

(LaSelva 1996:189)

 Such accommodation of difference presupposed tolerance, co-operation, mutual accommodation, and minority justice. The requisite sense of attachment is not nationalism but fraternity. Nationalists appeal to the value of fraternity but confine it to one group, or culture or language community, whereas federalists expand it: ‘the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life’ (LaSelva 1996: 27). Intrinsic to this idea of fraternity are a reflexivity and other-regard that break down the distinction between us and them intrinsic to nationalism.

The idea of fraternity can be seen to have structured inter-cultural relations within Canada. It marks those that seek to hold the country together, as well as those that seek to separate from it. What gives Quebec nationalism its strength, as Charles Taylor (1993) has noted, is recognition. The quest for recognition revolves around the need to ensure recognition of the special status of Quebec, as a distinct nation or society within Canada. Even most Quebec sovereignists insist on a formal arrangement with Canada after Quebec independence. They have opted for sovereignty-association, or some other close relationship with Canada, rather than complete independence. For instance, on 12 June 1995, 5 months before the Quebec referendum, the key proponents for sovereignty signed an agreement which would commit the Quebec government to propose ‘a treaty on a new economic and political Partnership’ with Canada after a successful referendum on sovereignty (cited in McRoberts 1997: 225)." A significant aspect of Quebec separatism is the redefinition of the terms of communion rather than outright separation from Canada.

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40 Lucien Bouchard, leader of the Quebec separatists in the federal parliament proposed that the nature of this partnership could be inspired by the European Community.
Aboriginal nationalism is certainly not about separation from Canada but about redefinition of the terms of co-existence so that their uniqueness and cultural traditions are properly preserved.\(^41\) This has manifested itself in a demand for aboriginal self-government.

Large-scale immigration has greatly increased the ethnic diversity of the country. The diversity of Canada has long been officially recognised and propounded through minority rights and *multiculturalism*. The country is officially bilingual and multicultural.\(^42\) It offers official recognition of immigrant ethnicity. Multiculturalism *as doctrine* is premised on the notion of integrating immigrants from diverse cultural backgrounds into society – without eliminating their characteristics. It seeks to avoid the twin evils of assimilation and ethnic separation or ghettoisation. It is also an ideology that speaks to interethnic tolerance and the benefits that accrue to society from its diversity (Norman 2001). This doctrine is premised on the notion that integration or incorporation of people from different backgrounds is a two-way process, which places requirements on those that integrate, but also on those who are already there. The essence is to heighten social inclusiveness as well as self-reflection on the part of both the arriving minority(ies) and the receiving majority, to ensure a process of mutual accommodation and change. Analysts find that the Canadian multiculturalism programme has been informed by these notions, although it is contested how well it has done.\(^43\) They also claim that it has contributed to heightening awareness of difference and the need for accommodating difference and diversity (Kymlicka 1995, 1998). Multiculturalism’s approach to socialisation and incorporation is different from that of nationalism, which is far more attuned to integrating people into a set mould, or into a community with a clear sense of itself and its national identity.

Multiculturalism as doctrine is about the just integration of immigrants. The concern with justice has also been incorporated into Canadian foreign policy, through the official embrace of the notion of *human security*.

\(^{41}\) Canada also retains vestiges of the internal colonial past, such as specific legal categories for native people. These are reformed and converted into rights to self-government – a complex status of simultaneous inclusion and exclusion from Canadian society and government.

\(^{42}\) The Canadian multiculturalism policy was introduced in 1971 and in 1988 it became officially enshrined in the Multiculturalism Act. The policy had four objectives: ‘to support the cultural development of ethnocultural groups; to help members of ethnocultural groups overcome barriers to full participation in Canadian society; to promote creative encounters and interchange among all ethnocultural groups; and to assist new Canadians in acquiring at least one of Canada’s official languages’ (Kymlicka 1998: 15).

\(^{43}\) It should also be noted that the very doctrine of multiculturalism is debated and challenged.
For Canada, human security is an approach to foreign policy that puts people – their rights, their safety and their lives - first. Our objective is to build a world where universal humanitarian standards and the rule of law protect all people; where those who violate these standards are held accountable; and where our international institutions are equipped to defend and enforce those standards. In short, a world where people can live in freedom from fear.  

This doctrine bespeaks a notion of global responsibility. It highlights the need for a consistent pursuit of justice, a pursuit that does not stop at the state’s borders. The same commitment is found in that one of the core aims of Canadian foreign policy since 1995 has been to project Canadian values and culture abroad. These values are: 'respect for democracy, the rule of law, human rights, and the environment.'

Insofar as there is a divide between Europe and America, as Kagan (2003) suggests, in human security terms Canada’s foreign policy stance has a neo-Kantian orientation and is closer to that of the majority of states in Western Europe. Canada also did not support the US invasion of Iraq.

But for the notion of global responsibility to be consistent, a further test of consistency is whether the polity is willing to have the outside world apply the same standards to it. In other words, are they willing to have human rights norms and universal conceptions of justice and fairness determine their critical internal issues, in particular issues of vital importance to sovereignty, such as secession?

As noted above, in the aftermath of the Quebec referendum, the federal Canadian government sought to clarify the legal framework surrounding possible future Quebec referenda. The Court was careful to note that the issue had to be determined politically. But it did however also note that:

The ultimate success of [an unconstitutional declaration of secession leading to a de facto secession] … would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession, having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to

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grant or withhold recognition.\footnote{Canada Supreme Court, \textit{Reference Re Secession of Quebec}, [1998] 2 SCR 217.}

This statement can be construed as a warning not to proceed unless the condition of reciprocity is complied with. But its emphasising legitimacy can also be seen as a powerful reminder of the need to act in a manner consistent with international standards of legitimacy. Given the different commitments to such in practical politics, it would not be consistent with the principle to require that the international community should serve as the source of standards of legitimacy. It is significant however in the sense that Canada is the first country to have developed democratic procedures for such a serious act as secession and possible break-up of the state.

In sum, in Canada we see the emergence of doctrines to replace nationalism. These are to a large extent justifications from the practice of handling diversity. Will Kymlicka has noted that:

Canada is a world leader in three of the most important areas of ethnocultural relations: immigration, indigenous peoples, and the accommodation of minority nationalisms. Many other countries have one or more of these forms of diversity, but very few have all three, and none has the same wealth of historical experience in dealing with them.

(Kymlicka 1998: 1, 2-3)

New terms have been developed, most of which have roots in federalism, but which could also be seen as terminological innovations, in that they differ from the terminology associated with the nation-state, and open up for considerably more flexible terms of association. They speak to inclusiveness and reflexivity. It is not clear that they form a coherent set of principles to denote an alternative mode of association. In Canada, many groups and collectives still aspire to become nations. The term ‘nation’ is increasingly disassociated from state, in particular in relation to aboriginals or ‘First Nations’ who see each aboriginal community – however small – as a nation. But such a designation may not only serve to further weaken the semantic association between nation and state. The question is also whether such usage might actually eliminate the distinctive features of nation and open up for a new and more precise vocabulary of association.

This brief presentation has revealed that both in the EU and in Canada new doctrines have been developed that are far more inclusive than those of
nationalism. In both entities, whilst they have developed such and also put these into practice, it is still not clear how far these will serve as explicit departures from the nation-state framework. There are different views and positions. Academics have played a critical role in devising the justifications of many of the policies and practices that have been developed. In fact, in many cases academics and intellectuals have had to try to fill the void left by the architects’ and practitioners failure to spell out what kind of structure they are erecting and what kind of justifications such require. This has sparked a wider search to understand the nature, magnitude and implications of the challenges that these entities face and have led to a range of novel solutions.  

‘Europe’ appears as a meeting ground or place for ideas and visions, not a clearly hammered out intellectual project. This also applies to Canada, where there are also competing visions. In the next section we will look closer at the constitutional debates in the two entities.

**Democratic constitutional conversations?**

As noted above, one indicator of reflexivity is whether there is an ongoing discussion of constitutional essentials. The substance of the debates has been touched on above and has revealed that this has been the case. But for this to be truly reflexive it has to be open and inclusive of all those potentially affected. The main focus here will be on core aspects of the organisation of the process of debate.

**Constitution making through intergovernmental diplomacy**

Historically speaking, neither entity appears to come close to the notion of open, democratic constitutional conversation. Both the EU and Canada long sought to fashion constitution-type settlements in a manner borrowed from the realm of international politics. In both Canada and the EU, the key actors have been state officials (heads of governments and their supportive staffs). They have come together in intergovernmental fora, and have sought to fashion agreements of a constitutional nature in a closed manner, akin to interstate diplomacy. Their multinational character had essentially forced them to step outside of the single nation-state framework and instead adopt models from the international society of states.

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In the EU, treaty changes have been made within a specially designated European Council, labelled Intergovernmental Conference (IGC). Treaty changes are negotiated by executive heads of government and their respective staffs, in a formal system of summity, with the European Council at its apex, rather than in specifically designated constitutional conferences. Every Member State has the right of veto. Ratification procedures vary, from parliamentary ratification to popular referendum. In formal terms, the European Parliament has a very limited role in the process. This system has lasted up to and including the Treaty of Nice and important elements will be retained even if the Convention’s draft is ratified.

The system of treaty change that has emerged in the EU, finds an obvious parallel in the Canadian First Ministers’ Conference (FMC), which consists of the Prime Minister and all the Provincial Premiers, or First Ministers. It is this body that has played the most important role in the numerous efforts to fashion constitutional change in Canada. A critical feature of Canada is that there has never been agreement on how constitutional changes should be organised, neither has there been agreement on a constitutional amendment formula. In the absence of such agreement the heads of governments adopted an approach similar to that which marks international diplomacy. This was a flexible arrangement and permitted both bilateral dealings between Ottawa and Quebec, and multilateral ones among all First Ministers.

In democratic legitimacy terms, the Canadian system is based on a similar logic as that which marks constitution making in the EU, insofar as each participating government is popularly elected; each First Minister is held accountable by the relevant legislative assembly; and each First Minister has the de facto power to veto a proposal. A main difference with the EU of course is that the federal Canadian parliament is a player on par with the provincial ones, whereas the EP is not in the EU.

The FMC completely dominated constitution making/change up until 1980. Since then, the process of Canadian constitution making has become much more open and complex, but the executive heads have never relinquished their role as the core actors in constitutional change.

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49 There are rules on constitutional change. Since 1982, Canada has had a comprehensive set of five constitutional amendment formulas. Before that time, the rules for change within Canada were incomplete; hence it had to go to the UK for major changes. But the key point is that the rules are not agreed upon.

50 This has frustrated many MEPs, cf. European Parliament (1995). The EP has the right of assent only.
Democratising constitution making

In both cases, these ‘international diplomacy’ arrangements have been widely critiqued for being closed, elitist and illegitimate and they have been democratised.

In Canada, the initial impetus for change was not popular mobilisation, but the socio-political transformation of the province of Quebec, with the upsurge of its nationalism and separatism, from the late 1960s. Quebec was conceived by many as a nation on a par with the Rest-of-Canada, and often espoused a two-nation view of Canada. 51 This was challenged by the other provinces, which argued that the federal principle entails provincial equality: no single province should have unique weight or importance in constitutional deliberations. Neither of these two principles - national and provincial equality - has been fully accepted. The federal government under Pierre Trudeau sought to break this deadlock, through the inclusion of the Charter of Rights and Freedoms in the new Constitution Act (1982). The Charter gave constitutional prominence to a third principle of equality, that of equality of citizens. 52 The Charter institutionalised and constitutionalised reflexivity through rights. But the Charter gave this a particular twist: it also included group rights which meant that certain groups (minority linguistic rights, aboriginal rights, gender rights, and rights for ethnic minorities) were given special constitutional attention. It also included a government override, a so-called notwithstanding clause (Section 33), which enabled governments to opt out of some of the rights provisions of the Charter (sections 2, 7-15, for renewable periods of 5 years each). The Charter thus contained within itself a complex and original mixture of individualist and collectivist principles.

The more narrow political purpose of the Charter was to deflect political attention away from Quebec nationalism and federal-provincial concerns. The group-based rights in the Charter gave special attention to social movement types of identity over more conventional ones associated with territorially based nationalism, in an explicit effort to weaken the governments’ – in particular provincial ones’ – hold on the population. Language provisions to make the country bi-lingual were explicit efforts to weaken the association of French with the province of Quebec. At the same time, the notwithstanding clause raised concerns in those groups, especially women, whose (equality) rights would be subject to government override.

51 Quebec was not consistently portraying itself as a distinct nation and asked for different things over the years.

52 For more comprehensive accounts of these ‘three equalities’ see Cairns (1991b: 77-100, 1995: 216-37).
The Charter spoke to every citizen as a rights holder and a stake-holder in the constitution and the process of constitutional change, and served to deeply alter the debate on how comprehensive constitutional changes should be organised (Cairns 1991a, 1992, 1995). The ensuing ‘Charter mobilisation’ greatly increased the number of self-conceived constitutional stake-holders, in particular women’s groups, gays and lesbians, Aboriginals, immigrants and disabled people. Some of the groups given special attention in the Charter issued demands for direct participation in the process of intergovernmental negotiations, and Aboriginals or First Nations groups later obtained such. They and numerous other groups and persons demanded a truly consultative and open process, i.e., one based on debates and deliberations at all stages of the process, and there were also demands for a popular referendum to sanction the proposed changes. At various stages many of the demands were met.

The inclusion of the Charter and the popular mobilisation did not rally people around one conception of Canada, but instead helped spark a period of mega-constitutional politics. Canada is unique in that it has been involved in mega constitutional politics for so long (from the mid-1960s to the mid 1990s). A mega politics constitutional setting is marked by multilogues, discussions ‘among many members of various kinds…’ (Tully 2001: 21). There is an enormous amount of deliberation, but it is so multifaceted as to make it very hard to reach consensus. Mega constitutional politics is also marked by great concern with the legitimacy aspects of process, a concern that is generally injected into the process by those who feel left out. They bring up the critical issue of how to organise constitution making in such a manner as to render it legitimate in the eyes of all stakeholders?

To illustrate this, consider the two latest efforts at constitutional change. The Meech Lake Accord 1987 was presented as an attempt to accommodate Quebec’s demands for recognition as a distinct society within Canada, and thus induce it to sign the Constitution and accept the Charter. The other provinces refused to make this a bilateral agreement and prevailed. The Accord was forged through the pre-Charter intergovernmental mode. It was negotiated among all the heads of governments and their staffs in a classical intergovernmental fashion. It sparked strong popular resentment and mobilisation, especially among the groups that were recently empowered by the Charter to see themselves as constitutional actors: women’s groups, aboriginals and ethnic minorities. The Accord was subsequently rejected by the legislative assembly in Manitoba and the province of Newfoundland. Popular mobilisation played a significant role in this rejection.
The next effort, the Charlottetown Accord 1992, was the most open and experimental process ever in Canada. One and a half years of public discussion and large scale popular consultation preceded the intergovernmental negotiations. The main bodies were, in Quebec, the Belanger–Campeau Commission (which consisted of 36 representatives: political parties, business, labour, the cooperative movement, the arts, education and municipalities) held public hearings and so did political parties. In the rest of Canada a much more extensive process was launched. The Citizens’ Forum on Canada’s Future engaged 400,000 Canadians in discussions on the future of the country. A federal parliamentary committee was established to interact with provincial and territorial representative bodies and to conduct public consultations: ‘(f)or the first time since Confederation an attempt would be made to conduct constitutional negotiations through interlegislative rather than intergovernmental channels’ (Russell 1993: 168). The other provinces and territories also established popular consultative processes. A parallel process of consultation with the aboriginal peoples was also organised and linked up to the federal parliamentary committee. Later on, 5 regional mini­conventions were held (organised by the federal government) on consecutive weekends, with 200 invited participants each (politicians, experts, interest­groups and ‘ordinary citizens’). The Beaudoin­Dobbie federal parliamentary committee summarized the debates and produced a 125 page-report. The debate preceding this report had been the most extensive ever undertaken:

Besides the official constitutional forums sponsored by governments and legislatures, there had been a myriad of panel discussions, study groups, and town-hall meetings sponsored by all kinds of organizations – business and labour, schools, universities, churches, synagogues, service clubs, interest groups, and neighbourhood organisations. Canada surely had a lock on the entry in the Guinness Book of Records for the sheer volume of constitutional talk.

(Russell 1993: 177)

But it was hardly a country-wide debate – there were two parallel debates, one in Quebec and the other in the Rest-of-Canada.

After the Beaudoin-Dobbie report, the heads of government came together. Here representatives from 4 Aboriginal organisations were also present, together with large staffs, although otherwise organised in the intergovernmental manner. The result was sought ratified in two referenda – one in Quebec, the other in the Rest-of-Canada - that were held on the same day. Both referenda failed.
The failure of the Charlottetown Accord saw the end of mega constitutional politics. Since then further changes have taken place within the constitutional structure, and the threshold for formal constitutional change has been raised considerably. For instance, the provinces of British Columbia, Alberta and Saskatchewan introduced mandatory referendum requirements in connection with constitutional change. Provinces governments had never given up on seeing themselves as constitutional veto players, but now their respective populations would be directly consulted. These high thresholds against formal constitutional change could affect the conception of, as well as conduct, of constitutional conversation.

But high thresholds to formal change have not precluded significant actual changes. During Charlottetown it became clear that there was wide agreement that the plight of aboriginals was a more pressing issue than that of Quebec’s demand for special constitutional status. The governments proceeded with this, through their acknowledgement of aboriginals’ inherent right to self-government and title to land, as set out in the Constitution Act 1982. This ‘has brought about a partial reconceptualization of the constitutional identity of Canada as a whole, yet without any formal constitutional change’ (Tully 2001: 23). This example shows that it is possible to retain a constitutional conversation that results in significant changes, even in the absence of formal constitutional change.

In sum, then, Canadians have gone from a highly elitist system to broad-based popular consultations and comprehensive debates. The Charter was of critical importance to the popular empowerment and democratisation of the process of constitutional change. How has the European process changed?

In Europe, the popular opposition during the ratification of the Maastricht Treaty placed the question of the legitimacy of the EU on top of the political agenda. This had limited overall effect on the organising of the process, until after the Nice Treaty process (2000). Nice had been marked by high tensions and weak results. It became clear to many of the decision-makers that the executive-led and intergovernmental approach to constitution making was itself a part of the problem, and was no longer tenable. Further

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54 Those in charge of the process refrained from couching it in constitutional terms. For an assessment of the debate on the EU’s legitimacy during Amsterdam, see Fossum 2000.
changes to the Treaties were seen to be needed to face the upcoming large-scale enlargement, itself an event of major constitutional importance (cf. Weiler 2002).

The critics could point to a viable and far more democratic alternative. At the same time as the Nice Treaty was being negotiated, the European Charter of Fundamental Rights was drafted, by a deliberative body, a self-proclaimed Convention. This was the first time that a body with a substantial majority of parliamentarians (46 out of 62 members) participated in a process of a constitutional nature at the EU level. This process was far more open than IGCs (cf. De Schutter 2003). The Charter Convention demonstrates that the Convention approach is a marked improvement on earlier processes of a constitutional nature, in terms of openness, transparency and accountability (cf. De Schutter 2003; Fossum 2003).

But as a vehicle to institutionalise reflexivity, the European Charter was far more constrained than the Canadian Charter. As noted, it was proclaimed at the Nice IGC Meeting in December 2000, but was not part of the Treaty. If eventually included in the Constitution, which the Convention’s draft proposes, its scope of application will nevertheless be constrained by horizontal clauses (51-4), and it will be tied into the weak citizenship provisions of EU law.

Nevertheless, the European Charter has already affected the overall conduct of constitution making in the Union. The Constitutional Convention was modelled on the Charter Convention. It was also made up of a majority of parliamentarians (46 out of 66 voting members, and 26 out of 39 from the non-voting candidate countries). The applicant countries were present in the same proportion as were the Member States. The Convention was intended to serve as a preparatory body and instructed to produce one – or several – proposals for the IGC that started its work in October 2003. The mandate was very wide, including that of considering the question of a European constitution. The Constitutional Convention’s Draft Constitution represents a considerable change from the system in place, and there appears to be agreement among analysts that it has been more successful than would have been an IGC.

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55 Open hearings with representatives from civil society (SN 1872/00) were held and hundreds of NGOs submitted briefs to the Convention, which are available on the internet.
56 Among the most important changes were: incorporation of the Charter of Fundamental Rights in the Constitution; recognition of the legal personality of the Union; elimination of the pillar structure; recognition of the supremacy of EU law; reduction and simplification of the instruments for law making and the decision-making procedures, plus the introduction of a
The Convention was set up as a deliberative and consultative body. Its working method was based on openness and transparency (most of the documents and the deliberations were publicly accessible) and its work has been informed by central tenets of deliberation (Maurer 2003; Magnette 2004; Fossum and Menéndez 2005). It no doubt suffered from representative defects (Shaw 2003, Closa 2004), but was far more representative than earlier treaty preparatory bodies had been. It also sparked discussions in the Member and applicant States, but the overall level of awareness of its work in Europe is quite low.  

The Convention’s work was deeply affected by its being part of a system of constitution making that is dominated by governments. In the last stages of its work, it did revert more to a bargaining forum, akin to an IGC. The Convention’s work would have to be scrutinised by and ultimately made subject to the approval of each Member State in the IGC and in the ratification stage. This fact deeply shaped and affected its work. This forward linkage aspect could mean that whatever agreements were struck in the Convention would have greater probability of lasting through the IGC. But it could also affect negatively the Convention’s legitimacy as a deliberative body.

To sum up, both the European Union and Canada have modified their previous approaches to constitution making borrowed from the realm of international diplomacy and replaced these with more democratic means of constitution making. There is a clear parallel. Critical to this transition to a more democratic approach has been the insertion of Charters into the constitutions. Charter-insertion has put in relief the democratic deficiencies in the intergovernmental mode of constitution making. In response, more open and inclusive and deliberative, options have been sought. In both cases, the formal bodies involve parliamentarians in the majority, combined with popular consultations and popular referenda. But in both cases, these arrangements have been inserted into processes where governments still play a central role. The overall process dynamics are quite parallel (Charlottetown vs. Laeken). Put sharply, the process starts out in an open manner, with quite extensive public consultations, and these lead to a constitutional proposal. 

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hierarchy of legal acts; delineation (although far from unambiguous) of the distribution of competences; generalization of qualified majority voting in the Council and the designating of co-decision as the standard procedure (albeit subject to important exceptions); changes to the Council presidency (elected for a once renewable term of 2.5 years); a right of voluntary withdrawal from the Union; a popular right of initiative.

57 In June 2003, in the 25 current and future Member States, 45 per cent of those asked had heard about the Convention (Eurobarometer 142/2, November 2003).
Then the heads of governments come together and negotiate in closed settings to strike an agreement. After that the result is subjected to ratification where all subunits (EU Member States, Canadian provinces) have (de facto in Canada) veto power. Subunit referenda figure in both entities.

In both cases, we see that the democratisation of process is accompanied by an often frantic search for agreed-upon procedures. The deliberations have focused on both substantive issues but also on how and in what sense citizens should be represented in constitution making. The ongoing nature of constitution making in both cases could be construed as the embrace of a notion of constitution as conversation. Speaking to the Canadian experience, Simone Chambers (1998: 144) argues that the notion of constitution as contract is deficient, as ‘contracts cannot accommodate deep diversity’. The point is that the complex issues that are involved, cannot be settled at a privileged moment and once and for all, and instead require reconceptualising constitution as ongoing conversation. James Tully (1995: 209, 2002) takes this further in his conception of what he thinks should be the nature of contemporary constitutionalism: ‘Both the philosophy and practice consist in the negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent.’ In a similar vein, both the analysis of the European Constitution – its depiction as a Wandelverfassung, a constitution in continuous change, and European constitutional experience – speak to a conversational or deliberative approach to the constitution.

The notion of constitution as conversation no doubt has merit, but it understates those aspects of the constitution that there is agreement upon. In both cases, there has been agreement on constitutional essentials; in particular fundamental rights. Their agreement and inclusion in the constitution also provides the foundation for an ongoing constitutional conversation.

Conclusion
This chapter has examined the question of the uniqueness of the EU, through comparing it with Canada. The two were seen as deviating from central tenets of the nation-state model and the claim was that we find elements of convergence, with democratic potential. The larger issue here is the potential for democratic transformation of the nation-state.

It was shown that these two entities deviate in significant respects from the notions of sovereignty and national identity that we associate with the nation-state model. These deviations were less the results of architeconic blueprints and more responses to historical and contemporary contingencies. Both
entities exhibit highly complex and multifaceted conceptions of identity and belonging which are more inclusive and other-regarding than those of nationalism. They were both informed by alternative doctrines to nationalism, which resulted from practical experiences with handling complexity and from comprehensive and ongoing processes of self-examination and constitutional introspection. They are alternatives to nationalism, but they are contested. Their novelty is also questionable, as they are informed by the normative standards that we associate with the democratic constitutional state.

Both entities have altered their constitutional systems through the embrace of the central tenet of modern constitutionalism: individual rights. The increased salience of individual rights at the international level (UN, ECHR) is reflected and amplified in their respective constitutional systems, and have indirectly helped generate an onus on consistency between internal and external affairs. The state is generally held to be Janus-faced, with one face looking outwards and the other inwards. Here we confront two entities that break down some of this distinction (Canada in relation to the outside world, the EU mainly in the relations to (and among) the Member States but also through enlargement). In so doing, they address some of the limitations of the nation-state, but at the same time they come to confront new and other problems.

In both places this has been a process where the constitutional amplification of a rights-based mode of legitimation has spawned reactions from the complex national and regional and cultural and institutional settings into which it has been injected. The EU and Canada are and have been highly contested entities, and much energy has been expended on institutionalising reflexivity. The doctrines, policies, institutional and even constitutional arrangements can all be seen as attempts to deal with the particular problems posed by complexity, such as ‘multilogues’, breakdown of communication (non-deliberative disagreement) and intolerance. This has also shaped their very conception of constitution – with a strong onus on conversation – as it has been widely recognised that many of the issues cannot be settled once and for all in a contractual arrangement.

The two entities can be compared not only because they both deviate from some of the tenets of the nation-state, but also because many of the problems they grapple with are similar, some of the ways in which they have developed and sought to address the problems are similar, and some of the sought-after solutions have similarities. For instance, the Canadian experience with Charter-inserted constitutional transformation should be an interesting
example to consider in relation to the EU which seems on the verge of formally adopting the Charter, and where European elites have claimed to be willing to embark on something akin to mega-constitutional politics (cf. Declaration 23, Treaty of Nice; Laeken Declaration; Constitutional Convention). The Canadian case can be used as a template to assess how committed Europeans are to such a process.

The present IGC process in Europe has similarities with the Charlottetown process. In both cases the open process of consultation succeeded in coming up with an agreement that was subsequently handed to heads of governments and made subject to complex ratification (including popular referenda). Given these similarities, it would be useful to see how much the European experience deviates from that of Canada – which could shed further light on the relative uniqueness of the EU.

The Canadian experience also provides valuable insights into the many pitfalls and challenges, as well as the learning processes and changes in social valuations that such comprehensive processes bring forth. On the challenges: How to organise a situation of tense and emotionally laden multilogues? How to prevent deliberative disagreement from degenerating into non-deliberative disagreement? Can a constitutional conversation be sustained in a setting of high barriers to formal constitutional change? On the achievements and failures, we are left with a tricky question: how to interpret failure? On the one hand the Canadians have failed to strike constitutional agreement on at least 3 major occasions, but at the same time, the political landscape has undergone significant changes, here referred to in terms of greatly heightened reflexivity. Previously marginalised and ostracised groups have been recognised as valuable contributors to society and even as central constitutional players (aboriginals). Basic constitutional principles (democracy, rule of law, fundamental rights) have also remained unchallenged throughout the process.

To conclude, then, the two entities studied here may be considered as ‘vanguards’, as they hold important traits of democratic deviation from the standard tenets of the nation-state. Given this, it is necessary to probe more deeply into the intellectual debates that are conducted in the two entities, as well as to look more closely at how the processes of transformation play themselves out. Comparison is needed also to prevent the mistakes in one place from being repeated in the other, and to make sure that the lessons learnt in one place are communicated to others so as to facilitate their embrace.
References


The Transformation of the Nation-state


The European view is that Europe seeks to create a genuine rule-based international order suitable to the circumstances of the post-cold war world. That world, free of sharp ideological conflicts and large scale military competition, is one that gives substantially more room for consensus, dialogue and negotiation as ways of settling disputes.

(Francis Fukuyama 2002)

Introduction

It was in Europe the modern system of states was invented and it is Europe that has come farthest in changing it.* We witness a significant development

* This paper was originally prepared for a Jean Monnet Lecture at the University of Copenhagen, 31 March 2004. A shorter variant of this paper was also read at the conference on 'Popular sovereignty and human rights in multi-national and poly-ethnic entities: Constitutional processes in Canada and the EU compared', at the University of Oslo on 19 April 2004 and in Madrid at the Instituto Universitario de Investigación Ortega Y Gasset in May 2004, and at the CIDEL workshop: 'From civilian to military power: the European Union at a crossroads?', Oslo, 22-23 October 2004. I am grateful for comments from the participants. In particular I would like to thank Agustín J. Menéndez, Marika Lerch, Helene Sjursen, Anne Elizabeth Ste and Geir Kværk.
of rights and law enforcement beyond the nation state. Processes of institution building at the European level are challenging the fundamental building blocs of democratic rule in Europe and constrain the will power of the states. Consider for example the sanctions imposed on Austria in 2000 by the fourteen other Member States for letting Haider’s Freedom Party – a rightwing, ‘racist’ party - into government. It was the Member States that decided to impose sanctions against Austria, but the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. That a new order is underway is perhaps most clearly revealed in the initiative taken to incorporate a Charter of Fundamental Rights of the European Union into the new Constitutional Treaty of the EU.

What is at stake with the institutionalization of human rights beyond the nation state is the sovereignty of the modern state as laid down in the Westphalian order in 1648. Prohibition of violence against sovereign states was here prioritized over the protection of human rights. The rulers’ external sovereignty was safeguarded. The international order became founded on the principles of co-existence and non-interference among sovereign states. The latter principle, however, can not prohibit genocide or other crimes against humanity and can not be sustained in normative terms. But who is to be the guarantor of supranational rights in the absence of a world government?

The principle of state sovereignty, which international law after the Treaty of Westphalia 1648 warranted, is a principle that has protected the most odious regimes. It was only when Hitler–Germany attacked Poland that World War II broke out, not when the persecution of Jews started. This also indicates the limitations of nationally founded and confined democracy. While human rights are universal and refer to humanity as such, democracy refers to a particular community of legal consociates who come together to make binding collective decisions. The validity of the laws is derived from the decision-making processes of a sovereign community. The propensity to adopt rights, then, depends on the quality of the political process in a particular community. But a particular state may fail in respecting the rights and liberties of their citizens as well as other states’ legitimate interests. Even though the contradiction between rights and democracy is, in principle, a false one, since there can be no democracy without the protection of individual rights, and since rights are not valid unless they have been democratically enacted; in practical terms there is a contradiction as democracy is only institutionalised at the level of the nation state. That is in particular states with very different political cultures, and which are geared
toward self-maintenance: the primary responsibility of the decision-makers are their own constituency. The state is so to say limited by the people:

The individual may say for himself: ‘Fiat justitia, pereat mundus (Let justice be done, even if the world perish)’, but the state has no right to say so in the name of those who are in its care.

(Morgenthau 1993: 12)

Hence, democracies may be illiberal (Zakaria 2003). To resolve the tension between human rights and democracy the authors of the law must at the same time be its addressees. Cosmopolitan democracy where actors see themselves as citizens of the world and not merely of their countries is therefore required.

The question arises whether a Bill of Rights at the regional level, in the EU, can close the gap between abstract human rights and the need for democratic legitimation. Is it a means to resolve the tension between popular sovereignty and human rights? In addition to submitting national practices to supranational review, the EU has incorporated human rights considerations into its external relations. What does this tell us about the nature of the Union? But first, what is the problem with human rights politics?

**Domesticating the state of nature**

When people’s basic rights are violated, and especially when murder and ethnic cleansing (ethnocide) are taking place something has to be done, our moral conscience tells us. The growth in international law ever since its inception and in particular the system of rights embedded in the UN represent the transformation of moral rights and duties into political and legal measures. The purpose of such institutions was first to constrain the willpower of nation states in their external relations to other states. The politics of human rights by means of systematic legalisation of international relations implies the domestication of the existing state of nature between states.

But institutions above the nation state are needed also to constrain the internal willpower of the state, i.e., the power exerted over its citizens. Article 28 of *The United Nations Universal Declaration of Human Rights* (1948) made it clear that there is a right to a lawful international order: ‘Everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realized’.
In the last decades we have witnessed a significant development of rights and law enforcement beyond the nation state. Human rights are institutionalised in international courts, in tribunals and increasingly also in politico-judicial bodies over and above the state that control resources for enforcing norm compliance. Examples are the international criminal tribunals for Rwanda and the former Yugoslavia, The International Criminal Court, the UN and the EU. In addition, European states have incorporated ‘The European Convention for the Protection of Human Rights and Fundamental Freedoms’ and many of its protocols into their domestic legal systems. These developments are constrained by the limitations of the international law regime as it is based on the principle of unanimity and as it lacks executive power. The Charter of the United Nations prohibits violence but forbids intervention in the internal affairs of a state. However, this is not the only difficulty of the existing international human rights’ regime.

The main problem with human rights as the sole basis for international politics is due to their non-institutionalized form. Human rights exhibit a categorical structure – they have a strong moral content: ‘Human dignity shall be respected at all costs!’ Borders of states or collectives do not make the same strong claim – ‘they do not feel pain’. In case of violations of basic human rights, our human reason is roused to indignation and urge for action: When compared with crimes against humanity, and when all other options are exhausted, the international society should be enabled to act, even with military force. Human rights are universal – they point to an ideal republic; they appeal to humanity as such, to the interests of irreplaceable human beings. But human rights when conceived abstractly do not pay attention to the context – e.g. to the specific situation and ethical-cultural values – and may violate other equally valid norms and important concerns. As human rights do not respect borders or collectives, as they appeal to humanity as such, they may threaten local communities, deep-rooted loyalties and value-based relationships. When you know what is right, you are obliged to act whatever the consequences. This is among the problems of human rights politics. It stems from the cosmopolitan universalistic idea of doing good regardless of borders which set the European nation states on missions defending and proclaiming human rights across the globe, a mission that the US sought to take over in the late twentieth century (Eder and Giesen 2001: 265).

This cosmopolitan mission faces significant difficulties. The general problem comes down to the following: in concrete situations there will be collisions of human rights as more than one justified norm may be called upon. To choose
the correct norm requires interpretation of situations and sometimes the balancing and weightening of rights (Günther 1993; Alexy 1996). Human rights, which can be correct by abstract moral standards, by the rational will of autonomous persons, require not only positivization and codification in a legal system of interpretation and adjudication, but furthermore democratic legitimation and public deliberation to be correctly implemented.

Another problem with the politics of human rights is its arbitrariness at this stage of institutionalisation. They are enforced at random. Some states are being punished for their violations of human rights while others are not. There are sanctions against Iran, Cuba and North-Korea, but not against Israel or USA. Some may violate international law with impunity. The politics of human rights is criticised for being based on the will-power of the US and its allies, not on universal principles applied equally to all. Human rights talk may very well only be window-dressing, covering up for the self-interested motives of big states. All too often ideals are a sham — they are open to manipulation and interest-politics and renewed imperialism. Human rights politics is often power politics in disguise (cp. Schmitt 1932).

The solution to the twin problem of the politics of human rights — the problem of norm collisions and of arbitrariness — is positivisation and constitutionalisation. Legally entrenched rights confer upon everybody the same obligations and connect enactment to democratic procedures. Increasingly, this is actually taking place as human rights are incorporated both in international law and in the constitutions of the nation states. As a consequence human rights are no longer merely moral categories but are positivised as legal rights and made binding through the sanctioning power of the administrative apparatus of the states. This has changed the very concept of sovereignty. The growth of international law limits the principle of popular sovereignty. Today for (at least some) states to be recognized as sovereign they have to respect basic civil and political rights. In principle, then, only a democratic state is a sovereign state and in such a state the majority can not (openly) suppress minorities. As states have become

\[\text{1}\] Otherwise the danger prevails that agents and 'leading beneficiaries of globalisation will construct notions of world order and transnational citizenship which allow them to pursue their interests without much accountability to wider constituencies' (Falk 1994: 127–40). See also Linklater 1998.
increasingly interdependent and intertwined the parameters of power politics have changed.²

The problem of arbitrariness in the enforcement of norms in the international order is not resolved. The urgent task is to domesticate the existing state of nature among belligerent nations by transforming the international law into a law of global citizens – cosmopolitan law. Thus there is a need for political institutions that are capable of non-arbitrary and consistent norm enforcement, and in the advent of a democratised and empowered UN, regional institutions like the EU are of the utmost significance. Does the Charter of Fundamental Rights contribute to a cosmopolitan order?

Chartering Europe

The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council in June 1999.³ In October 1999, at the Tampere European Council, it was decided to establish a 62-member Convention (headed by the former German President Roman Herzog, elected at the first meeting) to draft a Charter of Fundamental Rights of the European Union. The Convention consisted of (a) representatives of the Heads of State or Government of the Member States, (b) one representative of the President of the European Commission, (c) sixteen members of the EP, and (d) thirty members of the Member State Parliaments (two from each of the Member States). It was led by a Praesidium of five. This was the first time that the EP was represented in the same manner as the Member State governments and the national parliaments in a process of a constitutional nature – based on the convention method. A convention is an assembly with constitutional overtones that proceed by the logic of deliberation and reason giving.

At the December 2000 Summit in Nice the Charter was solemnly proclaimed. The eventual incorporation into the Treaties was to be decided by the ‘next’ IGC. All articles on the rights of EU citizens in the Treaty of the Union have now been collected in one document of 54 articles, inspired by the ECHR (without replacing it), the Social Charters adopted by the Council of Europe and by the Community and the case-law of the European Court of Justice (ECJ). The Charter adds to the fundamental rights of Union

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³ For an analysis see Eriksen et al. 2003, in particular the chapters by De Schutter, Menéndez and Schönlau.
citizens by expressing the principles of humanism and democracy. In the words of the preamble of the Charter:

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

(Charter of Fundamental Rights 2000: 8)

The Charter contains provisions on civil, political, social and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to provide for justice. The number and range of rights that are listed are comprehensive, and the protection of social rights is now included as a basic commitment for the Union. The Charter enumerates several ‘rights to solidarity’ even though the realisation of these is not within the actual competence of the Union. They nevertheless constitute vital reasons for exceptions to market freedoms (Menéndez 2003: 192). Hence, the EU can no longer be seen merely as a market project, if it ever could.

In addition to provisions which most charters and bills of rights hold and which pertain to such clauses as the right to life, security, and dignity, there are numerous articles that seek to respond directly to contemporary issues and challenges. For instance, there are clauses on protection of personal data (Article 8), freedom of research (Article 13), protection of cultural diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), and protection of the environment (Article 37). The Charter also contains a right to good administration (Article 41). It contains several articles on non-discrimination and equality before the law. Article 21, section 1, states that:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

(Charter of Fundamental Rights 2000)
Section 2 contains a clause banning discrimination on grounds of nationality. In the preamble it is also stressed that ‘(...) [i]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments (...)’. Its forward looking quality is perhaps most strikingly underscored in Article 3, which prohibits the cloning of human beings. It is an unequivocally modern set of rights directed to the problems of pluralist and complex societies in a changing environment. The Charter is sensitive to the problems of globalised risk societies. It is a modern and up to date charter. But why does the EU need a bill of rights to bolster its activity in the first place?

**Predictability and security**

The Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. As all are protected by the same rights, arbitrariness and uncertainty decrease. The principle of legal certainty is currently secured only in a limited sense at the Community level. The citizen can not be sure what rights she really is entitled to. The founding treaties of the European Community contained no reference to fundamental rights. As integration deepened, and as the Community came to have more far-reaching effects on the daily lives of citizens, the need for explicit mention of fundamental rights was realized. They came to the fore in 1964 when the European Court of Justice set out the doctrine of supremacy of EC law over national law. This was objected to by Italy and Germany because EC law, in contrast to their national constitutions, did not protect human rights. The Community is not bound by the ECHR in the same way as the subscribing Member States. The EU is not itself a signatory to the Convention.

Another source of initiative of making a charter of fundamental rights is the argument that the EU which is ‘(...) a staunch defender of human rights externally’ ‘(...) lacks a fully-fledged human rights policy’. And further, ‘(...) the Union can only achieve the leadership role to which it aspires through the example it sets’ (Alston and Weiler 1999: 4-5). A constitutionalized bill of rights provides the EU with the legal competence required to carry on being a firm promoter of human rights worldwide. It is difficult to be a champion of cosmopolitan law and urge others to institutionalize human rights when one is not prepared to do so oneself. When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6(2) of the Treaty on European Union (TEU) by spelling out the specific obligations of the institutions.
Towards a Cosmopolitan EU?

Generally, bills of rights empower the judges to protect liberty and hinder that democracy by means of majority vote crushes individual rights (Brennan 1989: 432). A bill of rights, even one that is not more than the codification of existing law, decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The EU Charter is, however, found wanting. It is weakly developed with regard to citizenship rights as a person must be citizen of a Member State to qualify as a citizen of the Union, and with regard to political rights. The Charter does not properly protect the public autonomy of the citizens (Fossum 2003). The onus is on human rights, which undoubtedly has been strengthened but it has not introduced 'any concrete policy changes nor altered anything significant within the existing legal, political and constitutional framework' (de Búrca 2001: 129).

There are other limitations of the Charter: It only applies to the actions of the EU institutions and the Member States’ authorities, and it is not designed to replace other forms of fundamental rights protection. Section 1 states that the Charter will only be made to apply to the ‘institutions and bodies of the Union’ and only to the Member States ‘when they are implementing Union law’. Article 51 (Section 2) states that the Charter does ‘not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. But most importantly, it was not made binding. It was not included in the Nice Treaty – only solemnly proclaimed.

Some, notably Joseph Weiler (2004), contends that there is a legitimacy problem with regard to the manner the Charter was forged. Although the Charter was not made by a specifically designated Constitutional convention and thus lacks legitimacy, it is a public document that was written by political actors, by parliamentarians. The deliberations were relatively open and inclusive and the Convention method was deemed a success. It is also a question of how much genuine popular participation is needed when the Charter is merely systematizing the existing legal material in Europe (Menéndez 2004a), when it can be seen as a result of the fusion of constitutional traditions in Europe which reflect a shared political culture (Habermas 2004).

Now one needs to know whether the EU actually subscribes to a cosmopolitan perspective, founded on the rights of the individual, her autonomy and dignity, and on her right to participate in a lawful order. The French Declaration of the Rights of Man and Citizen (1789), Article 6 reads:
Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes. All citizens, being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents."

The problem of establishing a perfect civil constitution depends, according to Kant (1797), on creating law-based external relations between states. Legal disputes should be settled by an impartial and powerful third party. ‘For no-one can coerce anyone else other than through the public law and its executor, the head of state, while everyone else can resist the others in the same way and to the same degree’ (Kant 1797: 75). The question as regards the EU is, first, whether cosmopolitanism actually feeds into the reform process of the Union itself — viz., whether the Charter is going to be binding and, secondly, whether it actually informs the external relations of the Union?

**Constitutionalising Europe**

As mentioned in the introduction, events in the aftermath of the sanctions imposed on Austria in 2000 by the fourteen other Member States for letting a rightwing, ‘racist’ party into government suggest that there is a willingness to turn the EU into an instrument for upholding democratic principles and respect for fundamental rights. As mentioned, the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. The Treaty of Nice includes an amendment of Article 7 TEU that further specifies the concrete procedures to follow in case of a ‘clear risk of a serious breach’ on the side of one Member State. Moreover, when the Treaty of Nice will come into force, a qualified majority vote will be enough to take action against the recalcitrant Member State. This development of rights protection and polity-building is now carried further.

The Convention on the Future of Europe started its work in February 2002 and concluded its work in June/July 2003. It is now widely depicted as a Constitutional Convention. Its membership was modeled on the Charter Convention, with a majority of parliamentarians. 46 out of 66 voting members, and 26 out of 39 from the candidate countries were

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1 Cited from Laquer and Rubin 1979: 119.
2 Article 7 of the Treaty of the European Union, as amended by the Treaty of Nice.
3 See Eriksen et al. 2004, especially the chapters by Closa, Fossum and Magnette.
parliamentarians. Its mandate was broader, its working method included working groups, and the applicant states had a number of representatives present, as active, participating, observers. The Convention succeeded in forging agreement on a single constitutional proposal 2003, which the IGC accepted (with some minor amendments) in June 2004, and which is going to be subjected to hard-won ratification processes in the Member States in the years to come.

The Constitutional Treaty contains the following basic changes:  

- Incorporation of the Charter of Fundamental rights into the Constitution (Part II, Articles 61–114)
- Recognition of the Union’s legal personality (Part I, Article 7)
- The partly abolishment of the pillar structure
- Recognition of the primacy of Union law (Part I, Article 6)
- Reduction and simplification of the legislative instruments and decision-making procedures, as well as the introduction of a hierarchy of legal acts (Part I, Articles 33–39)
- A clearer division of competences between the Union and the Member States (Part I, Articles 12–18)
- Decision-making by qualified majority as the main principle in the Council of Ministers (Part I, Article 25). Decisions to be adopted jointly by the Council of Ministers and the European Parliament on the basis of proposals from the Commission (Part I, Article 34–1, with reference to Part III, Article 396, though with important exceptions)
- The election of a President of the European Council for a term of two and a half years (Part I, Article 22)
- A Union Minister for Foreign Affairs (Part I, Article 28)
- A citizens’ right initiative (Part I, Article 47–4)
- Voluntary withdrawal from the Union (Part I, Article 60)

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Meaning the structure of three categories of cooperation with different areas of competence: the economic community (pillar I); the common foreign- and security policy (pillar II); and the cooperation in the fields of justice and home affairs (pillar III). This is evident from the following articles: Part I, Article 7 on the legal personality of the Union; Article 34 on legislative acts, with reference to Part III, Article 396 on decision-making procedures; and Part I, Article 25 on qualified majority.
Efforts have, thus, been taken to make the emerging constitutional structure comply with democratic principles. It is a document that not only creates a new EU president, a foreign minister and enhances EU action in defense and foreign policy; the European parliament will have more power and national vetoes will be removed in several areas. The weakening of the pillars, the endowing of the EU with legal personality, the incorporation of the Charter of Fundamental Rights, the strengthened role of the EP and the generalization of co-decision and qualified majority voting as general principles means real democratization of the Union. And so does the strengthening of national (parliamentary) involvement in EU activities.10

The proposed reforms will, short of making the Union fully democratic, make it more coherent, transparent and participatory. Increasingly the legal order of Europe confers rights upon the citizens and subjects law-making to the will of the citizens. The EU has achieved an element of supranational normativity based on the principles of fundamental rights, rule of law, and democracy. However, the Member States remain key players. Among other things they retain control of the Union’s sources of funds, the Council structure is strengthened - unanimity is demanded as regards fiscal policy and CFSP and CSDP11 - and they still control the power of constitutional amendment – ‘also in future, Treaty amendments will require unanimity and ratification by all the Member States’ (Kokott and Rüth 2003: 1343). The Constitutional Treaty is an attempt to find a new balance between a Europe of states and a Europe of citizens. This double purpose and legitimacy basis of the EU is reflected in the framing of the first paragraph of the Constitutional Treaty:

Article I-1: Establishment of the Union
1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.

The Constitutional Treaty is not a concord among citizens, but neither is it merely a contract among states. The states continue to be the masters of the Treaties, but once it is ratified (if it ever is) this may change in so far it has

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9 The content was not reopened but included unaltered as Part II of the Constitutional Treaty.
10 Deliberative democracy has also had its impact: Article I-47 of the Constitutional Treaty states that the Union institutions shall 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.'
11 Common Foreign and Security Policy and Common Security and Defence Policy.
Towards a Cosmopolitan EU?

been subjected to an inclusive European wide public debate and has been reflectively endorsed by the citizens. Only in this case can it live up to its name – a Constitution for Europe – as it can claim to embody ‘the will of the people’ and hence achieve a legitimacy basis superior to that of state interests. Thus, the prospects of a cosmopolitan Europe. But are EU’s external relations consistent with such a view?

**Cosmopolitan policies or just cheap talk?**

For a long time the Community subscribed to democracy and human rights as the basic principles of membership. Portugal, Spain and Greece were not admitted before they had abolished totalitarianism and changed their form of government. In a report to the June 1992 Lisbon European Council, the Commission re-stated that there were certain fundamental conditions for membership: Only European states could become members of the EU; candidate states must have a democratic constitution and they must respect the principles of human rights. This is reiterated in the criteria for membership set by the Copenhagen European Council (1993). In order to become a member of the EU a state must be able to fulfil the following three conditions:

- it must have a functioning market economy with the capacity to cope with competitive pressures and market forces within the EU;
- it must have achieved stability of institutions guaranteeing democracy, the rule of law and human rights;
- and it must be able to take on the obligations of EU membership, including adherence to the aims of economic and political union.

Also when it comes to trade and international cooperation in general there is a commitment to democracy and human rights. The EU insists on the respect of minority rights in third countries – non-European Countries - and there is political conditionality on aid and trade agreements. \(^{12}\) ‘The offer of trade and association agreements, technical and development assistance, political dialogue, diplomatic recognition, and other instruments is now usually made conditional on respect for human rights’ (Smith 2003: 111). Since 1995 the

\(^{12}\) ‘To expand and deepen relations with other countries and regions, the EU holds regular summit meetings with its main partners like the United States, Japan, Canada and, more recently, Russia and India, as well as regional dialogues with countries in the Mediterranean, the Middle East, Asia and Latin America. Although these relationships focused mainly on trade issues at the beginning, they have expanded over the years to cover investment, economic cooperation, finance, energy, science and technology and environmental protection as well as political matters such as the global war on terror, international crime and drug trafficking, and human rights.’ [http://europa.eu.int/pol/ext/overview_en.htm](http://europa.eu.int/pol/ext/overview_en.htm).
‘human-rights clause’ is supposed to be incorporated in all cooperation and association agreements. So far more than 20 agreements have been signed (ibid. 112). There is more emphasis on the protection of civil and political rights compared to social and economic ones. The Union’s initiatives from 1998 on the death penalty and torture testify to this. Not only have all EU Member States abolished it; the EU has also raised the issue on a bilateral and multilateral basis worldwide, and through the UN. The list of countries having abolished capital punishment as a result of EU pressure is impressive. The EU has affected the human rights situation, the abolishment or reduction of capital punishment in Cyprus and Poland, Albania and Ukraine, Azerbaijan and Turkmenistan, Turkey and Russia through different kinds of means and measures (Manners 2002: 249-50). In Turkey there has been a political avalanche with respect to democratization and human rights, especially since 2002: ‘Achievements included the abolition of death penalty, easing of restrictions on broadcasting and education in minority languages, shortened police detention periods, and lifting of the state of emergency in the formerly troubled Southeast’ (Avci 2005: 137-8). Further, the Union has cut direct budgetary support to Zimbabwe, to the Ivory Coast, to Haiti and to Liberia. The EU has stalled on deepening relations with Russia, Croatia, Pakistan and Algeria due to breaches of basic human rights.

The ‘revamping’ of the EU’s foreign policy has already been translated into further, more specific guidelines. The Council has produced its ‘Guidelines on Human Rights Dialogue’… The Commission has presented a Communication on EU Election Assistance and Observation… and on conflict prevention… the Cotonou agreement with the African, Caribbean and Pacific (ACP) states of 23 June 2000 has extended the human rights clause to a multilateral setting.

(Menéndez 2004b: 246)

The Commission has adopted several cooperation instruments for regional and bilateral relations and the EU holds regular summit meetings with its

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13 ‘In 1998 it launched an initiative to promote the abolition of the death penalty in third countries by using diplomatic instruments such as demarches, declarations and dialogue’ (Smith 2003: 108).
15 ‘Communication from the Commission on EU election assistance and observation’, European Commission, 11 April 2000.
main partners. It has developed so-called partnership and co-operation agreements, ‘aiming to establish an area of prosperity and good neighborliness’,\(^\text{17}\) with many countries and it has prompted a new regionalism.

New regionalism appear to constitute a relatively safe space within which Europe can display identity and norm difference from the US: The EU can lay down an identity marker of what it perceives to as a more humane governance model in its relations with the developing world, without have to confront or contradict US power head-on. (Grugel 2004: 621)\(^\text{18}\)

The EU whose biggest members have been colonial powers, exports the rule of law, democracy and human rights: ‘It is perhaps a paradox to note that the continent which once ruled through the physical impositions of imperialism is now coming to set word standards in normative terms’ (Rosecrance 1998: 22).

These policies are reflective of the value basis of the Union. However, one may ask whether this is mainly cheap talk. Is the EU consistent, does it apply the same principles on themselves and their members, and do they apply them consistently on third countries – or merely in places where it is not very costly? To the latter, the EU certainly is not consistent as non-European Countries are being treated differently. For example, Russia is merely marginally sanctioned for its wars in Chechnya (although it threatens with imposing stronger sanctions). Israel is being threatened of being sanctioned because of its policies towards the Palestinians, but sanctions have not been carried out (yet). Uzbekistan is another example of countries where ‘the “essential elements’ clause” is not upheld rigorously despite of widespread torture and lack of reform’ (European Voice 18–24 March 2004: 15). These examples indicate the lack of consistency in EU external policies, hence the criticism of hypocrisy and the allegation of window-dressing. There is also the complaint that there is more emphasis on the protection of civil and political rights compared to social and economic ones and that the commercial interests take precedence, which the present urge for lifting the embargo on China seems to substantiate. But it is beyond doubt that the human rights politics of the Union costs and is not without sacrifices, as e.g.,


\(^{18}\) For the debate on the nature of the EU compared to the US see e.g.: Haseler 2004; Lieven 2004; Lindberg 2005; Nicolaidis and Howse 2001; Reid 2004; Rifkin 2004.
the Enlargement and the support to former Yugoslavia testify to. While
Enlargement reveals a common value-base in Europe, the establishment of a
common foreign and security policy demonstrates the salience of rights, viz.,
the proclivity to let ones actions be subjected to higher ranging principles (cp.

However, it is also a question of whether punishment is the best way of
promoting change of development. ‘The inclusion of an essential elements
clause is not intended to signify a negative or punitive approach. It is, instead,
meant to promote dialogue and positive measures’ (External Relations
Commissioner, Chris Patten in European Voice op.cit). The EU prefers
positive and soft measures. But when compared with crimes against
humanity, and when all other options are exhausted, the international society
should be enabled to act, even with military force, we are, as mentioned,
instructed by moral reason. Needless to say, the EU is not a borderless
organisation.

Bounded justice?
Citizenship is a means for setting the conditions for inclusion/exclusion of
any given society. A European citizenship was inaugurated by the Maastricht
Treaty (1992) and comprises a right of residence in other Member States,
voting rights based on residence in local and European parliamentary
elections, diplomatic protection in third countries, and the rights to make
petitions to the European Parliament and to make complaints to the
European Ombudsman. It was strengthened in the Amsterdam Treaty in
order to democratize the Union and is firmly stated in the Constitutional
Treaty but still premised on national membership. More than 10 million
individuals are ‘third country nationals’ in Europe and cannot get a Union
citizenship. In reality, Union citizenship increases exclusion of large groups. It
was strengthened in the Amsterdam Treaty in order to democratize the
Union and is firmly stated in the Constitutional Treaty but still premised on
national membership. More than 10 million individuals are ‘third country
nationals’ in Europe and cannot get a Union citizenship. In reality, the Union
citizenship may increase exclusion of large groups. One should, however, be
aware of the dynamic aspect of European citizenship as it has been extended
with every Treaty change and is co-evolving with national developments. It
is held to be reflecting an ongoing process of establishing a more open, just
and democratic community of citizen: ‘the dynamic of citizenship results
from the cross-application of norms so that membership becomes more
inclusive by extending rights, and rights become instrumental for securing
However, there is no sign of the EU developing a borderless cosmopolitan entity because immigration is strictly regulated and third country nationals have only limited protection as the asylum policy of the Union as well as the actual level of protection of citizenship rights of minorities testify to. Critics find the EU extremely bounded when it comes to immigration and the rights of third country nationals. According to Schengen II the ‘internal borders may be crossed at any point without any checks on persons being carried out’, but the fact remains that non-EU (and non-EEA) citizens are not granted the same right to free movement. Minority issues have been high on the agenda during the enlargement process, but it is contested whether they are yet part of the ‘aquis communautaire’ – the total corpus of EEC/EU law; treaty provisions, regulations and policy directives. It is covered by the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE). The ‘respect for and protection of minorities’ has been one of prominent EU-imposed Copenhagen criteria which the candidate countries have had to fulfill in the last decade. Some analysts fear they vanish from the EU-scene once the candidate states acquire full EU membership (cp. Kveinen 2000). This fear is due to the lack of institutionalization of a human rights policy in the EU.

The real problem of the Community is the absence of a human rights policy, with everything this entails: a Commissioner, a Directorate General, a budget and a horizontal action plan for making effective those rights already granted by the Treaties and judicially protected by the various levels of European Courts.

(Weiler 2004: 65)

The EU is not cosmopolitan in the sense that it aspires (or could aspire) to a world organization – a world state – but in the sense that it subscribes to the principles of human rights, democracy and rule of law also for dealing with international affairs, hence underscoring the cosmopolitan law of the peoples. In a cosmopolitan perspective the borders of the EU are to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world. In this perspective the borders of the EU should be drawn with regard to functional requirements both for itself and for other regions all

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19 See Beck and Grande 2004 for a different take on what a cosmopolitan Europe means. Their ‘kosmopolitische Europa’ is not confined to the EU but stretches from Los Angeles and Vancouver to Wladiwostok (Beck and Grande 2004: 23).
within the constraints of a reformed and rights-enforcing UN. The latter needs to be democratised and made into a polity with sanction-based means of law enforcement.

The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.

(Kant 1797: 47)

Hence, the need for a law-based supranational order. But why is such an order really needed – what does exactly the action coordinative effect of the law consists in?

The true republic and the rule of law

According to cosmopolitans, the urgent task is to domesticate the existing state of nature between countries by means of human rights, the transformation of international law into a law of global citizens. The EU is the most promising example of a post-national powerful regional organisation and one which increasingly becomes a role model for other regions (in Asia, South America and Africa). The effort to include the EU Charter of human rights in the new Constitutional Treaty is a strong indication of heightened consistency between externally projected and internally applied standards. The principle of popular sovereignty is, thus, in a way in the process of transformed into a law for the citizens of the world. We witness the abolishment of force through right, to talk with Kelsen (1944), a development that was initiated by modernity. But what is the role of force in such an order? Presently there are no European prisons, no European army and no European police corps, but is the eventual establishment of such detrimental to cosmopolitanism? There is an internal link between coercion and morality in a law-based order. A real republic depends on bodies above the nation state that citizens can appeal to when their rights are threatened.

From the Enlightenment stems the trust in written constitutions and judicial review as a means to civilize the relations among men as well as among nations. Law is a functional complement to politics and morality as it stabilizes behavioural expectations and solves the collective action problem. In general terms the problem of collective action has to do with overcoming the problem of contra-finalité, in which each actors’ egoistic behavior leads to results devastating to everybody’s interest, and the problem of suboptimality. The latter designates the situation in which all members opt for a solution
aware that all the others members will do as well and that all would have benefited from another strategy. If another solution had been chosen all would have come out better. Game theorists model this as a Prisoner's Dilemma game in which strategic action leads to collective action problems. When the consumption of a public good can not be restricted actors have an incentive not to co-operate because they may risk contributing more than they receive, and hence be in a 'sucker' position (Axelrod 1990: 8). This is why legal norms with attendant sanctions are needed in order to coordinate actions in case of conflict over outcomes. The law is a system of action that transforms agreements into binding decisions. It is the means through which political goals can be realized also against opposition.

Pure agreements on their hand do not warrant collective action or the delegation of sovereignty. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply unless all others also comply. Due to weakness of will, and as long as citizens are not reassured that the violation of norms will not be left unsanctioned, general and spontaneous compliance is endangered. Without the treat of force there will be no political association! The medium of law stabilizes behavioural expectation in two ways. First, it alleviates *coordination problems* by signaling which rule to follow in practical situations (Luhmann 1995: 136). In this way it is also a functional complement to morality as the latter can not tell what one should do in particular contexts. Many justified norms may apply, but which is the correct one in this particular situation can not be inferred from the bare existence of moral agreements. Even angels need ‘a system of laws in order to know the right thing to do’ (Honore 1992: 3).

Secondly, sanctioning of non-compliance and defecting make it less risky for actors to act in a morally adequate manner. People may comply with the law out of self-interest because it is expensive not to do so. Law is then not merely a constraint on morality, but is in fact enabling such while it makes it possible for actors to behave correctly without personal losses. By sanctioning non-compliance and preventing violence, law-based orders make it possible for its members to act in accordance with their own conscience, out of a sense of duty (Apel 1998: 755).

In order to ensure justice at the world level, or at least to be able to sanction norm breaches such as human rights violations and crimes against humanity there is, thus, need for a system that lays down the law equally binding on all. It is a rather thin normative basis for such an order as it must be based only on what human beings have in common, viz., their right to freedom,
equality, dignity, democracy and the like that are listed in human rights declarations and basic rights stipulations of modern constitutions. The question is how much power the custodian of such an order – the EU, the UN – should have and what kind of organization it should be. It follows from the preceding analysis that the threat of sanctions is an intrinsic part of the law. That is, even though the law should comply with moral tenets so that it can be followed out of insight into what is right, and which is required for it to be a means for justice, it cannot achieve legitimacy unless it is connected with sanctions so that every subject can be sure that the same rules apply to all (Habermas 1996: 107ff).

The legitimacy of the laws, then, paradoxically stems from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so without unleashing the potential threat of force when it applies equally to all and when it is in compliance with moral principles, which, under modern conditions, means that it must have been made by the people. An association is only democratic to the extent it relies upon the putative legitimate use of force to ensure compliance with its norms and only democratically made law can claim to be legitimate. Also an organization above the nation-state level equipped with mechanisms to enforce compliance – viz., military capacity to make threats credible – can rightly do so only in so far as its actions are democratically regulated. The positivisation and legal codification of human rights represents juridification and is in need of democratization. Hence, no humanitarization without representation!

In the Kantian perspective the coerciveness of the law is intrinsically linked to the ideal of equal liberties for all (Kant 1785). It is a means for compelling compliance but it cannot itself establish the required legitimacy basis for such. The authority of the law stems from the fact that it is made by the people and hence claims to be just or in the public interest, and that it is made binding on every part to the same degree and amount. The legitimacy of the laws then, paradoxically, also stems from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so without unleashing the potential threat of force, when it applies equally to all and when it is in compliance with moral principles, which, under modern conditions, means that it must have been made by the people. Hence only democratically made law can claim to be legitimate.

Correct implementation of common action norms requires concrete institutions and procedures. Proponents of a world state with far-reaching
The principle of rule of law – *das Rechtsstaat* – requires the government to act on legal norms that are general, clear, public, prospective and stable in order to safeguard against states’ infringement of individual liberties and rights. In concrete situations of norm violations often more than one justified norm may be called upon. Norms, also legal norms, are contested and require argumentation and interpretation with regard to concrete interests and values in order to be properly applied, as mentioned earlier. Individuals’ rights are limited by others’ rights and concerns of other kinds of ‘goods’, and the abstract law enforcement by a world state runs the danger of glossing over relevant distinctions and differences. There is a problem with cosmopolitan law in contrast to the existing ‘international law’ with regard to legal protection (Scheuerman 2002: 448). The cosmopolitan mission faces significant difficulties with regard to legal protection when it is not properly institutionalised. How can the rights of the citizens be protected at the post-national level?

The idea of the constitutional state is not only to protect against encroachment but also to make sure that the regulation of interests as well as the realisation of collective goals can be rendered acceptable from a normative point of view by taking stock of a whole range of norms, interests and values. But as the EU is not a cosmopolitan order that aspires to be a world organization, but rather one that subjects its actions to the constraints of a higher ranking law. What is also interesting about the EU is that it does not have a system for norm implementation of its own but is relying on national political systems - national administrations - in order to put its measures into effect. This diminishes the tremendous leeway for both legislators and courts at the supranational level. Moreover the putative democratic system of lawmaking and norm interpretation at the European level imply that the EU does not run into the well-known risks of a despotic Leviathan at the world level. It does not grant the citizens unmediated membership in a world organization but rather respect the allegiance to particular communities – the nation states – and represent a constraint upon brute state power and excessive nationalism.

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20 There is no uncontested blueprint of the design for a cosmopolitan order as the argument over the proposal of David Held and others testifies to. See Held 1995, and further e.g. Habermas 1998, 1999, 2001; Eriksen and Weigård 2003 (240ff).
Conclusion
A true republic is based on the legal protection of basic rights. In fact legal developments over the last century have been remarkable and one of their main thrusts has been to protect human rights. Rights entrenchment has been outstanding worldwide. Almost nobody can any longer be treated as a stranger devoid of rights. These rights are no longer only present in international declarations and proclamations. Increasingly they are entrenched in power wielding systems of action and in the actual policies pursued. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized.

Even though naked power is tamed by law, and legal orders are orders of peace and the position of human rights is strengthened internationally this is a development that is not without difficulties. Human rights transcend the rights of the citizens of a state, because they apply to all human beings. But with their expansion within international law they have gained an authority that limits the state’s self-legislation. Further, the problem of arbitrariness in the enforcement of norms in the international order is not resolved. For a true republic to be realised it must be possible for citizens to appeal to bodies above the nation state when their rights are threatened. This is so because a particular state can fail to respect human rights as well as other states’ legitimate interests. Human rights are ensured by non-democratic bodies such as courts and tribunals or, what is more often the case, enforced by the US and its allies. Only with a cosmopolitan order – democracy at the supranational world level – can this opposition finally find its solution. The constitutionalisation of the Charter of Fundamental Rights is an important step in the institutionalisation of a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures. Hence, the parameters of power politics have already changed in Europe.
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Chapter 3

Non-territorial Boundaries of Citizenship
The Functions of Self-rule and Self-protection

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Introduction
Since 11 September 2001, we have witnessed a striking resurgence of American patriotism and loyalty-talk, not the least of which are the anti-terrorist Patriot Act passed by the US Congress shortly after the attacks of that date and the rhetoric surrounding the creation and activities of the Department of Homeland Security. The omnipresent American flags that sprang up across the country in the wake of 11 September have faded and frayed, but a strong ethos of national loyalty continues to pervade public language.

For political theorists, these trends in popular political discourses of citizenship have unfolded against the background of a substantial body of recent work arguing that meaningful citizenship and stable constitutional order must be grounded in a shared moral identity among citizens. The boundaries of political membership, some liberal theorists argue, should be circumscribed by citizens’ shared allegiance to core moral principles of freedom, equality, and toleration. Rather than relying on a passive hope that citizens will embrace these principles, liberal democracies should actively endeavor to inculcate such commitments through processes of democratic education. While the urge to accommodate cultural and religious diversity within liberal democracies expresses a healthy concern for egalitarian
citizenship in pluralistic societies, it should not be permitted to displace efforts to guide individuals’ commitments toward the values that make democratic community possible.

I am skeptical of arguments that we can articulate the moral boundaries of citizenship in terms of shared identity or allegiances. Ideas of citizenship as loyalty, allegiance, patriotism and commitment have their roots in much older rites and conceptions of trustworthiness (such as feudal oath-taking). While I cannot develop these historical connections here, they help us to envisage the possibility that any notion of citizenship as identity – as deeply constitutive of the individual’s sense of self – will lead to implicit or explicit standards of loyalty as the precondition of full membership. And wherever loyalty becomes the standard, there is a natural tendency to be suspicious of those whose outward forms and inward habits of mind are different from those of commonly recognized paragons of citizenship. Despite these theorists’ efforts to accommodate diversity within their accounts of citizenship, the exclusivist logic of citizenship-as-shared-identity makes it an unsatisfactory conceptualization of citizenship in an age of increasing pluralism.

A further reason to question the model of citizenship-as-identity lies in its tight historical connection to the emergence of the modern nation-state. It is now a commonplace that the modern nation-state, and the conception of national sovereignty that accompanies it, are under growing pressure from the cluster of phenomena we call ‘globalization’. This ongoing transformation in the foundation of political order offers us an opportunity to reconsider the meaning of citizenship, particularly in view of the fact that the sites and targets of political involvement are so rapidly changing (witness the demonstrations by transnational labour, environmental, and human rights groups in Seattle, Genoa, Prague, and Quebec City, and the unprecedented coordination of the international demonstrations against the war on Iraq on 15 February 2003). These changes lead us to ask new questions about the various ways in which meaningful citizenship is (or is not) contingent upon boundaries of various sorts. Following recent scholarship on globalization and transnationalism, it is safe to say that most of our current understandings of citizenship are based on the historic convergence of boundaries of citizenship (territorial, cultural/national/linguistic, institutional, and moral) that are now pulling apart (Held 1995; Habermas 2001; Benhabib 2001; Cameron and Stein 2000). The heightened salience of the concept of ‘multicultural society’ in the last decade or so is, perhaps, largely traceable to these changes.

What theoretical account of the boundaries of political membership might be adequate to respond to these shortcomings of the model of citizenship-as-
identity? In what follows, I would suggest that we should move toward a model of citizenship as membership in a community of shared fate. Here, the idea is not that membership entails a shared identity with any particular content, but comes by virtue of being entangled with others in such a way that one’s future is tied to theirs. For most of us, membership in such a web of relationships has resulted from a multiplicity of causes, and is chosen in some regards and not in others. Certainly, the conditions in which we find ourselves have many historical roots that are obviously not objects of our choice (though, as Burke taught us, we have some choice about how to interpret our history and its implications for our future). When coupled with a rudimentary conception of democratic legitimacy, that we should be able to justify our actions to those who are affected by them, the notion of a community of shared fate can yield a pragmatic conception of the boundaries of membership that is freed from the pernicious tendencies that are inherent to notions of citizenship as identity.

As I hope will become clearer in the arguments that follow, a particular advantage of the idea of citizenship as shared fate in an era of globalization is that it can, at least conceptually, be freed from the assumptions of territorially-bounded membership that other accounts of the boundaries of community implicitly or explicitly presuppose. Yet in working through the meaning of citizenship in an era of globalization, we would be foolish to dispense with the rich conceptions of citizenship we have inherited from the democratic tradition. Our received understandings of citizenship are thickly grounded in assumptions about territorially delimited forms of political community, whether that of the city-state or of the nation-state. How can we draw from republican and liberal traditions of citizenship theory in our efforts to reconceive citizenship in post-national or non-territorial forms?

One strategy, which I explore in a regrettably preliminary fashion – but which is, I think, supported by recent work on new understandings of citizenship within the emerging institutions and practices of the European Union – is to recast traditional understandings of citizenship in functional or pragmatic terms. Once the core functions of citizenship are specified, we can begin to investigate at a formal or conceptual level what kinds of boundaries are necessary to sustain them. It may well turn out to be the case that some of the functions of citizenship are indeed dependent upon territorial boundaries of one sort or another, while others may be sustainable by boundaries of other kinds, particularly jurisdictional and institutional ones. More specifically, I suggest that we can derive two broad functional accounts of citizenship from the classical and modern traditions, respectively: the function of self-rule, and the function of self-protection. In the concluding section of this paper, I
attempt to disaggregate these functions and to explore what sorts of boundaries each depends upon.

The boundaries of membership I: citizenship as identity

Much of contemporary democratic theory begins from the supposition that meaningful democratic citizenship requires that citizens share a subjective sense of membership in a single political community. This sense of shared membership, theorists argue, constitutes a distinctive identity, that is, it partially constitutes individuals’ understandings of who they are.¹ Political membership is internalised as an affective bond to the political community and its other members. Joseph Carens calls this the psychological dimension of citizenship: ‘[One] way to belong to a political community is to feel that one belongs, to be connected to it through one’s sense of emotional attachment, identification, and loyalty’ (Carens 2000: 166, emphasis added).² As Benedict Anderson famously expressed this idea in his study of nationalism, individuals internalise a political identity by seeing themselves as members in an ‘imagined community,’ a community comprised of individuals with whom they never have any face-to-face contact (Anderson 1983: 15). In modern democratic societies, it is this imagined – not the city within its walls, whose citizens know one another – that constitutes the ‘self’ of political self-rule, and the ‘people’ of popular sovereignty.

But not just any collection of human beings is eligible for the status of a democratic people; there must be some substance that binds them together in order that individuals should have a reason to identify with this political community rather than any of the other communities in the world. Recent work on nationalism has yielded two candidates for this binding substance: culture or values. These options correspond to the distinction between ethnic nationalism, in which the political community is defined by a shared language, history, and culture, and civic nationalism, in which the political community is defined by a shared commitment to core principles of democratic legitimacy.

Liberal democrats have joined other theorists of democracy in affirming that

¹ ‘Citizenship is not just a certain status, defined by a set of rights and responsibilities. It is also an identity, an expression of one’s membership in a political community.’ (Kymlicka 1995 [1994]: 301).
² Carens goes on to emphasize, contra many conventional understandings of citizenship, that this psychological dimension of citizenship need not go hand-in-hand with the legal rights of citizenship: one can have a subjective sense of membership without the legal rights, and one can have the legal rights without the felt sense of membership.
democratic citizenship rests on some shared substantive identity among citizens, but have argued that a commitment to certain core liberal principles - equality, freedom, toleration, and constitutionalism - is substance enough to sustain stable democratic community. So long as the great majority of the population affirms these principles as morally authoritative, at least with regard to political relations among individuals, we have met a necessary (though perhaps not sufficient) condition of popular self-government, a coherent ‘people’. Whether one wishes to call this ‘civic nationalism’, ‘constitutional patriotism’ (Habermas 1995 [1992]), or simply ‘civic community’, the crux of this view is that by grounding political community in a shared commitment to core principles liberal democracy can overcome the dark side of ethnic nationalism, in particular its tendency to exclude people outside the ethnus from full political membership, whether or not they live within state boundaries.

Nonetheless, critics of the distinction between ethnic and civic nationalism have argued persuasively that liberal theory relies covertly upon the nationalist strategy in its account of political community and democratic citizenship. It must do so, they argue, because liberalism itself offers no principle by which to define the demos, to establish which affirmers of core liberal principles owe the peculiar obligations of liberal democratic citizenship to each other. Yet liberal democracy does distinguish the rights and obligations of citizenship from the thinner class of rights and obligations that attach to humanity as such. Liberal democracy needs the boundaries that define a demos, but cannot provide them from within its own concepts and principles. Voluntary consent would be the obvious liberal principle for inclusion, but consent by itself does not do the necessary work, for even liberal democratic states must be established in a particular territory, with particular borders, with the inevitable consequence that some of their members will arrive in their jurisdictions by birth and not by choice (see Bauböck 1994, esp. Ch. 2). Liberal democracies that are fully civic in the sense that they are free of the taint of any ethnic basis of citizenship nonetheless confer legal citizenship on the basis of birth (Tamir 1995a: 124).

But citizenship by birth is not the only continuity between liberalism and nationalism, as Yael Tamir argues persuasively in her book, Liberal Nationalism. It will not suffice, for liberal democracy, that individuals merely

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For a discussion of these concepts, see Beiner 1999 (pp. 7-14).

And a good thing, too, Bernard Yack tells us: ‘Birthright citizenship can have the effect of moderating our concern about our neighbors’ commitments to shared principles, thereby promoting greater inclusion and toleration.’ (Yack 1999 [1996]: 118 n31). I think he has hit this nail squarely on the head.
affirm the validity of core liberal principles. In addition, it is important that they feel an *affective attachment* to those principles, to the citizens who share them, and to the regime that embodies them. In short, it is important that they have some *sense of loyalty* to the principles, to fellow citizens, and to the constitutional order that connects them. Why does liberalism require more of citizens than that they affirm the valid authority of basic legal and constitutional norms? Why does it require, further, that they *internalise* these norms as part of their subjective sense of self, that is, as part of their identities? And why does it require a sense of attachment to the particular others who share political society with them?

Two broad liberal ends seem to depend upon an affective attachment to the regime and to co-citizens. The first is distributive justice. Tamir argues that the liberal conception of distributive justice

is only meaningful in states that do not see themselves as voluntary associations but as ongoing and relatively closed communities whose members share a common fate. Within such communities, members develop mutual attachments that supply the moral justifications required for assuming mutual obligations.... The ‘other’ with whom we share the fruits and burdens of co-operation must be identifiable and familiar.

(Tamir 1995a: 117-18)

She continues: ‘Communal solidarity creates a feeling, or an illusion, of closeness and shared fate, which is a precondition of distributive justice. It endows particularistic relations with moral power, supporting the claim that ‘charity begins at home’. Moreover, the morality of community can serve as grounds for justifying the allocation of resources to the well-being of future generations, and to the study and preservation of the communal past. Consequently, the community-like nature of the nation-state is particularly well-suited, and perhaps even necessary, to the notion of the liberal welfare state’ (Tamir 1995a: 121).

Eamonn Callan similarly views citizens’ emotional attachment to each other and to the political community - what he calls ‘liberal patriotism’ - as a necessary condition of liberal justice.

So far as citizens come to think of justice as integral to a particular political community they care about, in which their own fulfilment and that of their fellow citizens are entwined in a common fate, then the sacrifices and compromises that justice requires cannot be sheer
loss in the pursuit of one’s own good.

(Callan 1997: 96)

Walter Feinberg is even more forthright in stating a connection between nationalism and social welfare provision:

The source of national identity is often connected ... to the belief that a people share a common origin in terms of historical experience, culture, or language. It is also connected to a web of mutual aid that extends back in time and creates future obligations and expectations.

(Feinberg 1998:119)

The second liberal end that appears to depend upon a strong attachment to the regime is political stability. This connection has been made most clearly and consistently by John Rawls in his explication of the idea of an overlapping consensus, particularly in his historical account of how an overlapping consensus on a political conception of justice comes into being. If we take a snapshot view of Rawls’s idea of an overlapping consensus, the issue of citizens’ emotional stance toward principles of justice and political institutions does not seem to arise. That is, the overlapping consensus consists in individuals’ substantive moral agreement on core ideas and principles that provide a sufficient basis for a political conception of justice. This moral agreement, Rawls argues, lends stability to the regime grounded in the political conception of justice, because individuals conscientiously affirm its core principles. In contrast to a ‘mere modus vivendi’ (Rawls 1996: 147), in which individuals agree to be governed by certain rules and institutions because it serves their self-interest, a political order that has the support of an overlapping consensus need not fear that individuals will defect from its scheme of social co-operation the moment the balance of power shifts (Rawls 1996: 147-8). To put it slightly differently, the stability of a regime based on an overlapping consensus arises from the fact that its basic principles constitute a part of individuals’ moral identity. To abandon those principles would be an act of self-betrayal, a compromise of personal integrity much more costly than the sacrifice of marginal gains to material self-interest. Stephen Macedo expresses this idea especially forcefully:

[T]he civic health of liberal democracies depends not simply on a clear division of spheres, but on a deeper convergence of public and private values: a convergence of individual consciences and the public good powerful enough to ensure the political supremacy of public values and institutions against competing imperatives.

(Macedo 2000: 33)
Eamonn Callan and Stephen Macedo - both of whom acknowledge their indebtedness to and sympathy with Rawls’s view - state liberal democracies’ reliance on their members’ strong attachment to the political community much more overtly than does Rawls himself. Callan notes both the distributive and the stability-based reasons for this reliance:

[T]he justice of the society [Rawls] envisages depends partly on people not being strongly disposed to leave whenever they would benefit more from the distributive principles that apply elsewhere... And the stability of the society depends in part on ethnic or other subgroups being disinclined to pursue secession.

(Callan 1997: 92)

Although the liberal project begins from the presupposition of religious and moral pluralism, there is a limit to its capacity to absorb all forms of diversity. When pluralism is partly constituted by religious or other groups that disavow an attachment to the liberal regime and its core principles, it threatens the stability of just liberal institutions. Macedo’s recent work makes this point very strongly:

[D]iversity needs to be kept in its place.... Diversity is sometimes invoked as a way of taking liberal democratic principles more seriously, but at other times the invocation of diversity and multicultural ideals undermines the very possibility of a public morality.

(Macedo 2000: 3, emphasis added)

‘Talk of diversity’, Macedo argues, ‘often proceeds without taking adequate account of the degree of moral convergence it takes to sustain a constitutional order that is liberal, democratic, and characterized by widespread bonds of civic friendship and co-operation’ (ibid. 1–2).

According to this view of democratic stability, the proliferation of some forms of diversity in liberal democratic societies is likely to have grave consequences. ‘A liberal democratic polity cannot endure without citizens willing to support its fundamental institutions and principles’ (ibid. 164, emphasis added). It therefore ‘behooves us to try to understand what must be done from a political standpoint to keep Sydney from becoming Sarajevo, or Boston from becoming Beirut’ (ibid. 25). These worries about threats of diversity - and of being too generous in accommodating difference within public policy - are two-fold. On the one hand, they express a concern that an
overindulgent attitude toward non-liberal minorities will threaten liberal values directly, perhaps by violating the interests in freedom or equality of individuals within the groups, perhaps by diminishing other citizens' confidence in the legitimacy and sufficiency of liberal principles to ground a just political order. On the other hand, there is a danger in exception-making itself, whether or not the group in question is actually opposed to core liberal principles. This latter concern is the worry about 'balkanisation' or governability, that once groups develop a sense of entitlement to exceptions or exemptions or special accommodations, they 'open a floodgate of complaints and requests for exemptions' that quickly overwhelm the capacity of political officials and agencies (ibid. 191).

The difficulty, according to Macedo and Callan, is that liberal democracies do not necessarily or automatically generate only acceptable forms of social diversity. With somewhat different emphasis, they both criticize Rawls for presupposing that just liberal institutions will tend to produce citizens who feel the requisite attachments to liberal principles and to the political community. '[L]iberal citizens do not come into existence naturally,' Macedo (1995: 226) tells us. Yet having a critical mass of citizens with appropriate moral commitments and affective attachments is too important to leave to chance. Repeating an enduring theme in the history of political philosophy, theorists such as Macedo, Callan, and Walter Feinberg argue that a just regime must not merely adapt itself to its citizens, but must consciously mould citizens who are capable of living within it. The project of democratic education in pluralist societies must include 'the task of creating citizens who share a sufficiently cohesive political identity,' Callan (1997: 222) argues. As Macedo (2000: 164) puts it, '[o]ur constitutional order must shape citizens, and not only establish political institutions'.

What sort of identity should a program of civic education inculcate in citizens? Although defenders of citizenship as identity acknowledge that individuals are bearers of multiple and sometimes conflicting identities — through their roles within families, through their work lives and choice of career, through their cultural memberships, through their religious commitments - they tend to argue that political identity depends on attachment to a particular political community, and to only one such community. Civic education, then, has the task of inculcating individuals' loyalty and attachment to one and only one national political community. As Walter Feinberg puts it:

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1 See also Barry 2001, pp. 38-9 and 40-50.
2 See also Callan 1997, p. 92.
What children pick up when they take on a national identity is the idea that nationhood involves collective inclusion and exclusion in a past, present, and future stream of activities, sufferings, and anticipations.... Through the nation individuals are brought together as a people and as such ... they stand in distinction from others who are brought together as a different people.

(Feinberg 1998: 47-8, emphasis in original)

Moreover, the other attachments that compete for individual loyalty must not be so strong that they conflict with political loyalty. In effect, this means that whatever other sources of identity shape individual action, in cases of conflict it is their political identity that must prevail. Shared citizenship thus requires ‘a commitment to a common authority that can override local interests, local decisions, and local ways of knowing’ (Feinberg 1998: 49, emphasis added). Macedo argues: ‘A liberal polity does not rest on diversity, but on shared political commitments weighty enough to override competing values’ (Macedo 2000: 146, emphasis added). One of the functions of education is to encourage individuals to ‘assimilate in non-oppressive ways and toward justifiable values’ (ibid. 146). Such education must go far beyond merely teaching children about their rights and obligations as citizens. In a stable liberal polity, ‘liberal institutions and practices shape all of our deepest moral commitments in such a way as to make them supportive of liberalism’ (ibid. 164, emphasis added). As I discussed above, the idea of citizenship-as-identity rests on the supposition that political identity shapes and constitutes the individual conscience itself.

We have seen that the stability that liberal regimes enjoy as a result of individuals’ moral and emotional identification has the same form as political stability in other types of regime. Any regime can find resources for stability in its subjects’ identification with its ideological principles and their affective attachment to the regime and its populace. However, the content of the moral identity these liberals seek to inculcate is distinctive to liberalism. In particular, they agree that a robust liberal democratic citizenship depends on individuals’ affirmation of basic principles of equality, freedom, and toleration. Whether this moral identity is relatively thick, involving a commitment to the ideal of individual autonomy and an acceptance of what Rawls calls the ‘burdens of judgment,’ (Rawls 1996: 54-8) or relatively thin, requiring only a general belief in principles of individual equality and political

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1 Cf. Callan: ‘Induction into the role of citizen and the growth of affective attachment to fellow citizens are essentially tied to the particularity of the polity within which moral learning occurs: it is this scheme of just social cooperation to which the individual becomes attached, these fellow citizens with whom bonds of trust and affection take root.’ (Callan 1997: 93, emphasis in original).
liberty, is a matter of some disagreement among theorists.

Related to this substantive conception of individual identity is the liberal account of the developed *skills, capacities, and virtues* on which a healthy liberal democracy depends. Especially important is the developed capacity for critical reflection on matters of public concern: to fulfil the protective function of democratic self-government, individuals must be able to judge whether or not public officials are acting justly and in the public interest. And to participate in the work of democratic self-rule, they need to be able to engage with other citizens in an ongoing reasoned deliberation about matters that affect them. This capacity must include an ability to formulate and articulate arguments through the use of reasons that other citizens can recognise and accept, as well as a capacity for engaged listening to other citizens. Associated virtues include civility, a respectful demeanour toward other citizens even when one disagrees with them. All of these interrelated capacities and virtues are among the important aims of democratic education in a liberal society (Gutmann 1987).

On this view of liberal citizenship, then, creating the conditions in which citizen identity can flourish is a crucial part of the project of nation-building. At the same time, these theorists recognise that the project of building national identity has historically had a dark side. Not only has there been a strong tendency, in liberal democracies as in other regimes, to read the identity of dominant social groups into the content of citizen identity. Beyond this, the project of nation-building in the US and elsewhere has been based on the conscious and intentional marginalization of women and ethnic minorities. As Rogers Smith has powerfully demonstrated in the American case, ‘for over 80 per cent of US history, American laws declared most people in the world legally ineligible to become full US citizens solely because of their race, original nationality, or gender’ (Smith 1997: 15). This exclusion was no oversight or accident; it was directly tied to the project of constructing a stable political order through the promotion of particular understandings of national identity. Similar stories can be told about Canada (Walker 1997). Exclusion and marginalization have not been the only costs of constructing national identities; policies of forcible assimilation for indigenous peoples have devastated their communities and are clearly tied to contemporary phenomena of anomie, poverty, ill health, and extremely high suicide rates in many of those communities.

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*It remains a contested issue whether it is possible to defend an education that develops the skills and capacities of democratic citizenship without also insisting that it should shape individual identity. As I shall argue below, I think it important to try to develop such a view of democratic education.*
Given these historic costs of projects aimed at constructing citizen identity, liberal theorists who wish to defend an identity-building civic education are at pains to distinguish their agendas from those of the past. Tamir argues that while it is impossible to construct a liberal state that is culturally neutral, it is imperative for the legitimacy of liberal regimes that they respect the rights of self-determination of national or cultural minorities within their boundaries. (Tamir 1995a: 72-7). A program of democratic education within a liberal state should include an education for national-cultural identity (particular to each cultural community), an education for democratic participation, and an education for a respect for cultural diversity (Tamir 1995b). Macedo also argues that civic education is fully compatible with respect for those forms of social, cultural, and religious diversity that are consonant with liberal democracy. Callan and Feinberg pay particular attention to the requirements of a democratic education that is not oppressive to cultural and religious minorities (Callan 1997; Feinberg 1998). Despite the differences among them, all of these theorists, then, believe that inculcating citizen identity through democratic education is fully compatible with respect for diversity and a commitment to equality within a multicultural society.

I am less confident than these theorists that an educational project of inculcating citizen identity is easy to reconcile with the egalitarian treatment of citizens from cultural and religious minorities. Nor am I persuaded that this educational project is the most promising route to robust democratic citizenship in diverse societies, particularly in an age of globalization, when the nation-state and the conception of popular sovereignty which it enabled bear a diminishing resemblance to the nexus of political relationships in which individuals find themselves.

Let me begin by explaining why I believe that a conception of citizenship as identity stands in tension with an inclusive and egalitarian approach to minority citizens. We saw above that various theorists have linked the project of inculcating citizen identity to the idea of loyalty to the political community, its basic principles of justice, and its other members. A loyal citizenry sustains political stability by being willing to make sacrifices of narrow self-interest in difficult times, even when exit from the community might yield more benefits to the individual than staying within it. The virtue of loyalty does not necessarily entail amoral patriotism, the attitude of ‘my country, right or wrong’. It may, indeed, emphasise the contribution to legitimacy and to long-term stability of ‘loyal opposition,’ in which individuals criticize the

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For Callan 1997, see especially pp. 189-95 and Ch. 8 in general; for Feinberg 1998, see especially Ch. 8.
regime for failing to live up to its own principles or to the highest standard of the public good. These were precisely the terms in which many articulated the goals of abolitionism, the Black Civil Rights movement in the US and the women’s suffrage movement.

I do not dispute, then, the idea that a loyal citizenry can contribute to political stability in ways that are fully consonant with democratic equality. My concern, rather, is with the valorization of citizen loyalty as a virtue that we should attempt to inculcate through the use of state institutions, and as a measure of the worth or standing of citizens in a democratic society. The dark side of the claim that we have good reason to trust fellow citizens who affirm their commitment to liberal principles and constitutional order is the implication that we have good reason to distrust individuals who refuse to affirm this commitment. The confidence we feel in the stability of our political order when most citizens have internalized a sense of political loyalty has its mirror image in the fear of disorder that we feel when we observe other citizens who disavow a sense of loyalty or whose beliefs contradict core liberal values.

The articulation of a substantive content of a healthy citizen identity - an identification at the level of individual conscience with core liberal values, an affirmation of the value of tolerance toward those whose ways of life are different from our own, and a commitment to reasonableness as the standard of political deliberation — tends to slide very easily into an argument that individuals who do not display this identity are unhealthy as citizens and are unworthy of political trust.

Anxieties about political stability, and related suspicion of groups that do not converge on mainstream values and ways of life, are nothing new in the politics of liberal democracies. It is no surprise that such anxieties might lead us to seek assurances from those who do not conform to the standards of healthy citizenship. As the late Judith Shklar (1993: 185) emphasised, Americans have been particularly enamoured of extracting loyalty oaths from 

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10 Thus, although the Amish ‘pose no threat to the health of the wider liberal society’ because of their insularity and small size, Protestant fundamentalists do pose such a threat because ‘[t]hey are far more numerous and powerful, and they are actively engaged in political activity’ (Macedo 2000: 160). On this view, individuals or groups whose beliefs earn the label ‘illiberal’ or ‘unreasonable’ should not have equal standing to be heard or respected within liberal democratic politics. ‘[S]ome groups have been pushed to the margins of society for good reason, and the last thing we want is a politics of indiscriminate inclusion’ (ibid. 24). Further, the substantive standards of good citizenship may lead us to probe into individuals’ consciences to ascertain whether ‘liberal institutions and practices shape all of [their] deepest moral commitments’ (ibid. 164, emphasis added).
suspect citizens, irrational though this practice is: the distrust that motivates
the requirement of an oath is not likely to be assuaged by its utterance.11
Although few if any contemporary liberals would endorse loyalty oaths as a
permissible way of according standing to citizens whose commitments are
suspect, the project of citizenship-as-identity sometimes comes quite close to
that. As Stephen Macedo notes approvingly, American Catholics seeking
judgeships or elective office, suspected of greater loyalty to their church than
to American constitutional principles, ‘have effectively “been forced to
proclaim the practical meaninglessness” of their religious convictions as a
condition of being allowed to serve’. ‘Such rituals are bound to be educative,
and ... express our commitment to ensuring that political power will be
exercised on the basis of reasons that we can share, for purposes that we can
hold and justify in common, notwithstanding our religious differences’
unperturbed by the fact that such assurances of secular purposes are politically
necessary for Catholics, but not for Protestants. From where I stand, however,
it seems a clear double standard to presume that one citizen’s religious
identity casts her political loyalty into doubt, whereas another’s religious
commitments are fully supportive of liberal democratic principles. That this is
a moral double standard - and so a violation of the principle of equality -
seems particularly clear in the American context, where nineteenth century
Catholics were stigmatized as incapable of democratic citizenship (a legacy
Macedo fully acknowledges) (ibid. 59-73).

The liberal tendency to view Catholics with suspicion arises from a logical
inference from Catholic doctrine to assumptions about what Catholics will do
in practice. The doctrine of papal infallibility, combined with the Pope’s
status as earthly head of the Church and the supremacy of religious over all
other obligations, lead logically to the conclusion that Catholic individuals
will follow the dictates of their religion rather than the dictates of political
obligation when the two happen to conflict. A similar process of reasoning
characterises liberal assessments of Islam as a theocratic religion, and feminist
assessments of all three major monotheistic religions as fundamentally
antithetical to gender equality (Okin 1999: 13-14). Similarly, many liberals
characterize fundamentalist Protestant sects, some of which reject ideals of
critical self-reflection and individual autonomy, as essentially ‘unreasonable’
because their doctrines are incompatible with the exchange of mutually
acceptable reasons as the condition of political legitimacy (cf. Rawls 1999b:
178). In each of these cases, religious confessors’ capacities for genuine
democratic citizenship and for political loyalty are called into question
because the content of their consciences is consonant with the content that

11 See also Smith 1997, pp. 92-3 and 274-7.
healthy citizenship requires. Although individual members of these faiths are seldom questioned directly about their conscientious religious commitments and the relationship thereof to political membership, such questioning (which is obviously odious from a liberal point of view) is not seen as necessary because we can deduce their commitments from religious doctrine.

Moreover, even if they are not actively hostile to principles of individual equality, individual freedom, and toleration, groups that have experienced a history of marginalization may have good reasons to be reluctant actively to affirm those principles. All the basic principles of constitutional regimes contain an element of indeterminacy, and if that indeterminacy has historically been exploited to give the principles a content that is biased against certain groups, those groups have good reason to be wary of expressing allegiance to the principles themselves. For many groups, though, the reluctance to praise key virtues and principles of democratic citizenship arises from a critical assessment of the consequences they have had for themselves or others. Since the principles of individual equality and individual autonomy have historically been used to deny cultural minorities’ recognition or accommodation within the law, these minorities may have very reasonable reservations about these principles. If groups identify critical thinking with moral relativism, and moral relativism with a weak capacity to resist pleasures that are damaging to well being, they might have reason to oppose critical thinking. If groups identify the celebration of individual autonomy with atomism and the rejection of the duties to family and community, they have some reason for refusing to celebrate autonomy. Given that critical thinking and individual autonomy are, in any event, regulative ideals that are at best imperfectly realised in our societies, and imperfectly served by institutions of public education, to deny groups an equal place in political discourse because they fail to affirm these principles strikes me as closefisted.

Once our assessment of a religious or cultural community’s expressed commitments (or of their unwillingness to express a commitment to liberal principles) yields the judgement that it is illiberal or unreasonable, we are clearly relieved of any strong obligation to accommodate or even to tolerate them. Although liberal theorists tend to disavow the use of force toward illiberal groups, and prefer gentler means of bringing them around (cf. Callan 1997: 44), they argue that we should be prepared to do what is necessary to protect the stability of the regime. As Macedo (2000: 228) puts it, ‘Fastening our bayonets should be a last resort.... Our politics might well come down to holy war with some people, but we don’t know in advance with how many or exactly whom’.
So far, most of what I have written in characterising the liberal view of citizenship as identity would not be taken by these theorists as critique. Macedo argues that although it’s perfectly true that liberalism marginalizes some groups, they are by and large the groups that should be marginalized because their commitments are incompatible with legitimate and democratic political order. But once we have labelled a particular group’s doctrines, claims and arguments as unreasonable or illiberal, there is a common tendency to attach these labels to the group in general and to all of its members. The danger here is that we may prejudge a group’s claim to recognition or accommodation and unjustly deny that recognition because we have wrongly generalized from one argument to another, and from doctrine to practice.

Selective attention to ‘illiberal’ or ‘unreasonable’ doctrines or arguments is not the only possible source of faulty generalizations about religious or cultural groups and a consequent inclination to view them as justly marginalized in political discourse. In addition, the structure of inference from doctrine to identity to probable practice is itself flawed. First, it is highly unlikely that individual identity is ever constituted completely by religious commitments, especially in a pluralistic society. Even in relatively closed communities, individuals occupy different roles in different moments, and so learn to use different structures of reasoning about what kind of action is appropriate in each of the different social contexts they occupy. There is no reason to suppose, then, that a person who affirms a fundamentalist doctrine in her religious life is constitutionally incapable of making appropriate arguments in political discourse. Of course, they may do so, but I see no reason why we should suppose from the outset that they cannot do otherwise. Further, Nancy Rosenblum’s plea for psychological realism about illiberal associations is especially apropos here: there is very frequently a gap between a group’s express purpose and its actual demeanour, and between its doctrine and its actual effect on individual members (see Rosenblum 1998: 104-8). The concept of citizenship as identity supposes that unless commitments to critical reason, equality, freedom, and toleration are deeply inscribed into the individual’s soul, the capacities for democratic citizenship are unlikely to develop. As an empirical matter, however, there are good reasons to question this supposition.

There are costs, then, to the project of citizenship as identity, in particular the risk that by labelling groups or individuals as illiberal or unreasonable we

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12 Macedo sometimes seems to rely on such a supposition. See, e.g., Macedo 1995, p. 478: ‘Totalistic faiths (such as [Mozert parent] Vicki Frost’s belief in the Christian Bible as ‘the whole truth’) will be especially resistant to thinking about politics (or anything else) from a perspective that in any way “brackets” the truth of their particular religious views.’
might unnecessarily or unjustly marginalize them as citizens. Defenders of this project might argue that the price is worth paying if inculcating citizen identity yields the promised fruits: a loyal citizenry, ready to make sacrifices for fellow citizens, and stable democracy.

From an empirical standpoint, however, the connection between an educational project of civic identity and national loyalty, on the one hand, and the ends of distributive justice and political stability, on the other, are highly dubious. Even advocates of civic education have acknowledged that we cannot have utter confidence that an education for critical reason, toleration, and a commitment to freedom and equality will actually produce these virtues in individuals (Callan 1997: Ch. 8; Macedo 2000: 254).\(^\text{13}\) Moreover, the historical evidence does not support a claim that a strong national identity generates a willingness to support redistribution. As Bhikhu Parekh points out, under Margaret Thatcher the British populace\(^\text{14}\) was at its most nationalistic in decades, but this did not stem that government’s radical cutbacks to social welfare (Parekh 1999: 314). Citizens of the United States have a very strong sense of national identity compared with citizens of other advanced industrial societies, but also the weakest programs of redistribution.

I am particularly sceptical of the claim that moral agreement and shared identity are the preconditions of stable democracy. What are the empirical measures of the instability, which such pluralism supposedly generates? Where is the evidence of ‘balkanisation’ and ‘ungovernability’ as a consequence of moral and cultural pluralism?\(^\text{15}\) It is common to claim that granting group-based requests for recognition and accommodation produces unmanageable strains on government officials. Yet nowhere have I seen evidence that links the two phenomena. Interestingly, this argument was made in the Mozert case, but as Judge Boggs noted in his concurrence, there had in fact been some accommodation of the parents’ requests prior to the litigation, with no suggestion that the accommodation had produced a proliferation of similar claims from other religious communities (Mozert 1987: 1074). Similarly, the claim that civil discord results from moral pluralism or group accommodation is never accompanied with systematic empirical evidence. To the contrary, as Macedo acknowledges, it is more likely that moderate accommodations will serve liberal purposes by avoiding the sense of alienation that can lead religious or cultural minorities to withdraw from participation in public

\(^{13}\) Cf. also Gutmann 1995: 106-7, who cites a study to the contrary.

\(^{14}\) Or at least the English populace. Justin Bates has pointed out to me that both Scottish and Welsh nationalisms, defined in opposition to English identity, were also at a peak in this period, and that Thatcher’s electoral support came almost entirely from within England.

\(^{15}\) I have criticized ‘balkanization’ and ‘ungovernability’ arguments at greater length in Williams 1998, pp. 7-8 and 213-14.
institutions and discussions. Although I do not wish to argue in favour of indiscriminate accommodation for religious and cultural groups, and agree with liberals that policies of accommodation should maintain a steady concern for individual equality and autonomy, I think it likely that the ends of toleration and civil co-operation are better served by an openness to accommodation than by the conscious marginalization of the ‘unreasonable’ and ‘illiberal’.

The project of a civic education aimed at citizenship as identity seeks a security for liberal democracy in the content of the individual soul. I have suggested above that this is a security that we do not need, and that it is dangerous to seek. I tend to agree with Judith Shklar in her declaration that ‘When the state demands loyalty it is looking for trouble, for legislated patriotism is no patriotism at all. Loyalty is either spontaneous or it is thought control, and it is very bad news’ (Shklar 1998: 381). It is in any event a security we can never have, since in pluralistic societies (and even in relatively homogeneous ones) human beings simply will have multiple and sometimes divided loyalties. ‘All selves are self-divided’, Michael Walzer (1994: 85) tells us, between multiple roles, multiple identities, and multiple ideals or principles. The effort to claim ‘all of our deepest moral commitments’ on behalf of the political community (Macedo 2000: 164, emphasis added) - or on behalf of any other community or cause - is destined for failure. There is always the chance that, in cases of profound conflict, other human beings will disappoint our hopes and expectations about which loyalty they should prefer.

The boundaries of membership II: citizenship as shared fate

The core of the idea of citizenship as shared fate is that we find ourselves in webs of relationship with other human beings that profoundly shape our lives, whether or not we consciously chose or voluntarily assent to be enmeshed in these webs. What connects us in a community of shared fate is that our actions have an impact on other identifiable human beings, and other human beings’ actions have an impact on us. The idea of a community of shared fate is thus quite similar to John Dewey’s idea of a ‘public’, though I would emphasise the multiplicity of possible publics in which we are situated, and the variable degree to which such publics have or could have sufficiently firm

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\(^{16}\) For further discussion of these points, see Williams 2001; Carens and Williams 1998.

\(^{17}\) ‘The public consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for’ (Dewey 1927: 15-16).
institutional boundaries to sustain the two functions of self-rule and self-protection.

A community of shared fate is not an ethical community as such. Its members are not bound to each other by shared values or moral commitments, but by relations of interdependence, which may or may not be positively valued by its members. Our futures are bound to each other, whether we like it or not. There is no plausible alternative to living-together. In this way, a community of shared fate is a descriptive rather than a normative category. White slave owners and Black slaves formed a community of shared fate. The future of one was inextricably tied to the future of the other. Black and white South Africans formed a community of shared fate before constitutional reform as much as they do afterward. In North America, Native peoples’ fate was tied to that of non-Natives the moment European explorers landed on their shores. We have been thrown together by the circumstances of history, often without choosing to be thrown together.

But communities of shared fate may be more or less legitimate. Indeed, the basic account of legitimacy proffered by most contemporary democratic theorists suggests a conceptual connection between the idea of a community of shared fate and the idea of legitimacy: legitimacy consists in the ability to justify actions to those who are affected by them according to reasons they can accept.

We can use Rawls’s language to distinguish better from worse

18 In some ways, then, my aspirations for shared citizenship are more minimalist than Carens’s, for whom ties of ‘regrettable necessity’ are something we should wish to move beyond. Although I agree that sharing citizenship is easier and more inspiring when it involves a more positive psychological stance than ‘regrettable necessity’, I believe that achieving a sense of shared membership that was perceived as legitimate, even if a regrettable necessity, would be a remarkable moral accomplishment. For the time being, I would be happy to set my sights there.

19 In this sense membership a community of shared fate is ethically similar to membership in a territorially bounded society, as Rainer Bauböck describes it: ‘Membership in a territorially bounded society is a question of fact much more than of will. We cannot choose the place where we are born and raised when we are young. Our membership in a wider society results from being immersed into a culture and a dense network of social interactions’ (Bauböck 1994: 172). The difference between Bauböck’s conception and my own is simply one of level of abstraction: I perceive territorially bounded societies as a subset of the general category of communities of shared fate, and am interested to see whether other species within that genus may permit the exercise of the citizen agencies of self-rule and self-protection. I do not disagree with Bauböck’s view that territorially bounded societies are now and will likely remain for some time the most important sites of citizenship, but I wish to explore the possibility that we can imagine other communities of shared fate as sites of citizenship.

20 Contemporary theorists including Habermas 1991; Rawls 1996 (xlvi, 137); Scanlon 1982, 1998: 4-5, 148-9; Gutmann and Thompson 1996: Ch. 2; and Cohen 1989 all agree on this fundamental notion of legitimacy as grounded in reciprocal justification.
communities of shared fate: for Rawls, a well-ordered society is one in which individuals ‘agree to share one another’s fate’ (Rawls 1971: 102; emphasis added). They acknowledge their interdependence, and choose to live with it rather than fighting against it. But the claim to legitimacy doesn’t rest on mere acquiescence; it rests on the ability to justify the structure of interdependence and co-operation to those who are enmeshed in it. Since communities of shared fate entail relations of reciprocal interdependence and interconnection, the standard of legitimacy also entails a requirement of reciprocal justification.

The idea of citizenship as shared fate is implicit in many recent accounts of citizenship in multicultural societies, including some of the accounts I have criticized above for tying citizenship too strongly to an ideal of national identity. Like national identity, a conception of citizenship as shared fate requires that individuals be able to imagine themselves in a network of relationship with other human beings, some of whom they may never meet face-to-face. But in contrast to national identity, there is nothing in the idea of shared fate to require that it is a shared cultural identity or heritage that links human beings in bonds of interdependence and mutual accountability. Although shared cultural identity may be one source of a subjective sense of shared fate, it is not the only source. Institutional linkages, particularly those that have hitherto secured the functions of democratic self-rule and self-protection, are another important source of shared fate. Whether or not I see myself as culturally connected to Newfoundlanders, it remains the case that the institutions of representative government that link my political representation to theirs in the Canadian Parliament also link my future to theirs. This is not irreversibly the case, but since these institutions are one of the strongest forms of political accountability we have going, I would do well to see my fate as tied to them until some equally or more effective institutional alternative is in place. Material linkages are also important sources of shared fate, whether in the form of economic interdependence, environmental impact, or natural resource access and use.

In conceiving of citizenship as shared fate, there is no reason in principle to privilege one set of linkages over others. But it is true that to be active and

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21 Max Pensky uses the language of shared fate in a similar way to conceptualize cosmopolitan democracy: '[G]lobal ethical substance [would not] be adequately described as a nationally unbounded Habermasian constitutional patriotism, in which each nation would critically rework its own ethical substance and national history to put some flesh on the bare bones of moral universalism. Cosmopolitan solidarity would intend something a bit different, and a bit stranger: a consciousness of the shared fate of global risks, of course, and of shared potentials and dangers in the decades to come as globalization processes continue to undermine older forms of identity and generate new potentials and dangers' (Pensky 2000: 77, emphasis added).
effective citizens - to exercise the agency to reshape those connections through shared political judgement and action - requires one to understand oneself as situated within networks that have some connection to one’s lived experience. These networks of interdependence have a history, and we judge their legitimacy or illegitimacy well only by understanding how they have come to take the shape they have, and what possibilities we may imagine for the future. So the idea of shared fate does rest on powers of imagination, but not on an imagined identity as such. Nonetheless, historical imagination, clearly, is an important part of a capacity for citizenship within a community of shared fate. We can see from this that the creation of subjective consciousness of a community of shared fate is itself a political achievement, for it involves choosing among different histories that may privilege some structures of interconnection or interdependence and suppress others. As Burke told us, we have a ‘choice of inheritance’ (Burke 1871 [1790]: 275).

The idea that sharing citizenship means seeing our own narratives as entwined with those of others, and so sharing a narrative of some sort with those others, has been gaining currency in recent political theory. Jeremy Webber, for example, has emphasised the importance of conceiving the bonds of social unity in Canada in terms of an ongoing ‘Canadian conversation’ which structures ongoing debates about principles, political players, and issues. The conversation itself has a history that is contested, and by participating in it individuals contribute to shaping its future (Webber 1994: Ch. 9; cf. Kymlicka 1998: 173-7). But sharing membership in one community of shared fate by participating in its narrative is by no means an exclusive proposition. Every community is constituted by a multiplicity of narratives that intersect at some points and not at others. This holds for local communities and cultures as for political community at the level of the constitutional state. As James Tully has argued in his excellent book, Strange Multiplicity, contemporary constitutionalism is marked by its dialogic and pluralistic character: ‘There is not one national narrative that gives the partnership its unity, but a diversity of criss-crossing and contested narratives through which citizens participate in and identify with their association. Constitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements’ (Tully 1995: 183-4).

This suggests that having a sense of ourselves as members of a community of fate entails telling ourselves (true) stories about how we came to be connected to particular other human beings, and believing that we are responsible for constructing that connection in a manner that is justifiable to them. Telling those stories truthfully and conscientiously, in a manner that acknowledges others’ perspectives on past and future, requires effort and intentionality. So
too does recognising the danger that important narratives may have been overlooked or distorted in the construction of the collective narrative.

Although I have tried to distance the idea of citizenship as shared fate from the idea of citizenship as identity, there clearly is some connection between the former and identity broadly understood. To act as part of a community of shared fate the individual must see herself as situated within, and to a certain extent bound by, networks of relationship with others. If we define individual identity as having a coherent sense of self, then citizenship-as-shared-fate does constitute an element of individual identity because it is part of how individuals see themselves as political agents. But this is a much thinner sense of identity than is often suggested by those who use the language of identity in defining citizenship, and particularly among those who tend to elide the concepts of identity, nationality, and loyalty. As we saw above, these discussions ascribe a particular substantive content of citizen identity in terms of a commitment to certain principles or an affective attachment to the imagined community. In contrast, there is nothing in the idea of shared fate that requires a positive affect toward others with whom one is connected, no requirement of allegiance and no possibility of betrayal, no particular principles to which one must be deeply committed so long as one observes the practice of reciprocity. All of these forms of giving substantive content to citizen identity set it up as a standard against which we can then judge the identities of actual others. And this, as I have argued, is a dangerous and limiting move. It is dangerous because it leads us to look first to the content of others’ identity, judge it against the substantive standard we have devised, and then exclude them from a claim to shared citizenship when we find them wanting. It is limiting insofar as it connects identity to membership in this community - the nation - and shuts down our capacity to understand citizenship in terms that withstand the transformations that the nation-state is currently undergoing. To have a conception of citizenship that can persist through and beyond the current period of globalization, we need to be much more open to the possibility that communities of shared fate other than the nation-state might sometimes, and very appropriately, come to occupy a greater part of citizen energies than the nation-state itself.

22 This point tells against the notion that secularism provides an adequate standard of neutrality for public discourse in liberal democracies; instead we should aim at the exchange of mutually comprehensible arguments, whether those arguments are secular or religious in their foundations. Veit Bader makes this point in his powerful critique of secularist versions of neutralist liberalism: ‘Instead of trying to limit the content of public reason by keeping all contested comprehensive conceptions and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to others, fair-mindedness, and readiness to accept reasonable accommodations or alterations in one’s own view’ (Bader 1999: 614).
What are the advantages of conceiving citizenship as membership in a community of shared fate? First, it does not presuppose that any particular community is the privileged or exclusive site of citizenship. This restraint is an advantage because of the phenomena of multiple and overlapping memberships that has always characterized even putatively homogeneous nation-states but which is an increasingly irresistible phenomenon in the age of globalization. The functions of self-rule and self-protection may be served within the institutions of local government, within cultural communities (as in Aboriginal self-government), at the national level, or through participation in regional or transnational movements and organisations. Indeed, there is nothing, in principle, to prevent an individual participating in the activities of self-rule and self-protection at all of these levels, though presumably it would require a person of extraordinary energy and imagination to do so. Certainly the capacity to exercise meaningful citizenship is constrained by the institutional capacities of the relevant communities. And there may well be good arguments for limiting the number of memberships of a certain kind any particular individual may hold because of the need for some kinds of communities (e.g., communities within which redistribution is a goal) to depend upon individuals’ commitment to long-term participation. Thus, although I agree with Walter Feinberg when he argues that the nation-state may well continue to be the most relevant site of citizenship for most people for the foreseeable future (Feinberg 1998: 29), the idea of citizenship as shared fate enables us to imagine other important sites of collective self-rule and self-protection – and to consider how to strengthen their legitimacy-conferring institutional features – as well.

Second, although the idea of citizenship as shared fate implicitly affirms a specific set of citizen virtues (on which more below), it does not require that we inquire into the content of an individual’s identity or the commitments of her conscience to know whether or not she is capable of good citizenship. Good citizenship is something we know from individuals’ acts rather than from their beliefs.23 Citizenship as shared fate requires of individuals that they develop a capacity to see themselves as participants in a project of cooperation that includes others who are different and distant from them, and to participate in a manner consistent with the ethical norms that sustain legitimacy, including norms of egalitarian reciprocity and respect for

23 In this I very strongly agree with Rainer Bauböck when he writes, “The capacity to be a citizen of a liberal democracy must in principle be ascribed to any person who has not given strong evidence of the contrary in speech or deeds…. What is expressed in voluntary and optional naturalization is not more and not less than an individual decision to become a citizen of this particular democratic state but not a decision to convert to democracy” (Bauböck 1994: 92, emphasis added).
individual freedom.

Third, the idea of citizenship as shared fate does not presuppose that all individuals' or groups' understandings of their place in a community of shared fate need be the same as all others'. The fact that we are all players in the same story does not require that we give it the same interpretation, nor that we see it as the only or most important political story in which we are involved. Although the idea of a community of shared fate does require, as suggested above, that individuals identify with the community in some way, it does not require that they identify in the same way.²⁴

Like any conception of citizenship, the idea of citizenship as shared fate implicitly affirms a certain set of virtues of the citizen. Some of these are common to other accounts of citizenship, particularly insofar as they are connected to the core functions of self-rule and self-protection (discussed further below). Participating in self-rule requires a capacity for shared deliberation with others, which includes a capacity for reason giving and judgement. As many political liberals emphasise, the capacity for participating in political deliberation requires skills of critical reason. Although these theorists may be right that it is likely that developed skills of critical reason will subject not only matters of public concern, but also matters of private conscience, to critical reflection (cf. Gutmann 1995), I think we should be cautious about making overly strong assumptions about this connection. In particular, I think it is important to avoid the inductive logic described earlier in this essay: that because a group or individual declines to affirm the principle of critical self-reflection as a good in religious life, we need not assume that this demonstrates an incapacity to exercise powers of critical reflection and shared deliberation on matters of politics. People often display remarkable capacities for compartmentalizing their moral lives, and I see no reason why this should not be the case with regard to the objects of critical reflection. Again, then, citizenship as shared fate would encourage us to focus on

²⁴ Anthony Appiah makes a similar point: '[T]he institutions of democracy – the election, the public debate, the protection of minority rights – have different meanings to different subcultures… [T]here is no reason to require that we all value them in the same way, for the same reasons. All that is required is that everybody is willing to “play the game”’ (Appiah 1996: 86-7). See also Veit Bader’s trenchant critique of the ‘concentric circles’ model of individuals’ moral attachment to family, locale, state, and humanity that is implicit in many accounts of civic education. His argument elucidates the dangers attached to the supposition that we can articulate a proper priority of attachments, ‘as if there is just one throw of the pebble, and the obligations are strongest the closest by, getting weaker and weaker the farther away from this center’ (Bader 1999: 391). Yet even cosmopolitans like Martha Nussbaum, who reject the moral priority of close attachments, retain the concentric circles model, and in doing so overlook the ways in which the ‘multilayered ties, relations, identities, and commitments’ of ‘multicultural, global society’ disrupt its neat ordering (Bader 1999: 392).
citizens’ performance in public deliberation rather than on the content of their religious or other moral beliefs.

The function of self-protection also requires certain virtues. In particular, it requires that individuals have a clear knowledge of their rights and a disposition to insist upon the observance of those rights. It also requires a disposition to resist the abuse of others’ rights - to avoid what Judith Shklar (1990) called ‘passive injustice’. This latter disposition is closely related to the virtue of tolerance, as it entails that we acknowledge an obligation to respect others’ rights even when we disapprove of the way in which they use those rights. Finally, self-protection requires some level of awareness of and participation in institutions that secure political accountability: a familiarity with public affairs, a habit of voting, and the like.

In addition to the virtues associated with self-rule and self-protection - which I believe must be common to any contemporary conception of democratic citizenship - there are also certain virtues, which are distinctively tied to the idea of membership in a community of shared fate. One of these is a capacity to see oneself as connected in a network of mutual interdependence and mutual impact with other human beings, some of whom have very different social experiences from our own, whether those differences are traceable to ‘race’, culture, religion, class, gender identity, sexual identity, economic role, region, etc. Another is an inclination to take some responsibility for the legitimacy of the relationships and for securing the institutional and social conditions in which they can meet at least the basic standards of legitimacy. That is, a good citizen will possess a sense of political agency and the responsibility for exercising it when relationships fail to meet standards of legitimacy. A third virtue, perhaps less crucial than these two, would be a capacity to see oneself as situated within several networks of human interdependence, and to be able to make judgements and choices among them as to when to invest one’s energies of citizen participation in one network, and when to shift to a different network.

The boundaries of self-rule and self-protection

It is noteworthy that the current wave of interest in inculcating shared national identity as a project of civic education should arrive just at the moment when the nation-state to which such identity would attach is itself on the wane. The cluster of phenomena that we call ‘globalization’ pulls

\[25\] For a more general list of democratic virtues, see, e.g., Bader 1997: 787. Carlos Alberto Torres (1998: 255-8) enumerates virtues that are especially relevant for multicultural civic education.

\[26\] For a similar argument, see Parekh 1999, p. 311.
apart those spheres of human activity whose boundaries have coincided with
the boundaries of the nation-state (Cameron and Stein 2000). The increasing
dynamism of population flows means that the boundaries of political and
cultural identity are not exclusive and singular (not that they ever were - see
Benhabib 2001). There is a steady rise in the number of individuals who hold
dual citizenship, or who have strong bonds membership in more than one
country (what sociologists call ‘transmigrants’ or ‘transnationals’), or who
maintain strong cultural networks across several countries (‘diasporic’
communities, such as ethnic Chinese) (Wong 1999). Even in quieter times,
when the project of nation building advanced at the cost of suppressing social
and cultural diversity, the demand for an exclusive or supreme loyalty to the
nation was unreasonable. In present circumstances, the implications for
citizenship of pluralism and the multiple bonds of loyalty - some of which
have inescapably political dimensions - are irrepresible. The boundaries of
attachment never coincided perfectly with those of the nation-state, and it
seems highly unlikely that even a strong program of civic education could
bring that about in an era of globalization. A conception of citizenship that
fails to come to grips with this will offer little guidance in our fast-changing
world.

The changing boundaries of citizenship call for a conception of citizenship
that is adaptable to new circumstances without abandoning the legacy of the
democratic tradition. How can we conceptualise a meaningful citizenship that
is not so closely tied to the weakening boundaries of territorially defined
nation-states? I believe this to be one of the most important challenges for
political theory in the coming years, and certainly do not presume to offer a
definitive answer to it. However, it seems likely that a successful response will
require that we abstract away from the historical institutions and practices of
citizenship and focus instead on a pragmatic or functional account of
citizenship. What is citizenship good for? What are the most important
functions it serves in the life of the individual and in collective life?

When we gaze at the Western tradition of democratic citizenship, two broad
functions stand out as crucial, and likely to remain so even if the contexts and
institutions of citizenship change dramatically. One of these is the legacy of
classical political thought; the other is the achievement of the era of
Enlightenment and the age of democratic revolutions. The first is what I will
call the function of self-rule; the second I will call the function of self-protection.

Beginning with Aristotle, citizenship has been understood as an integral part

Despite differences in our conceptualizations of citizenship, my approach here is similar to
that of Carens 2000, insofar as both proceed by disaggregating the concept of citizenship.

of the project of human freedom. To fulfill the human potential for freedom, we must learn to govern ourselves both as individuals and as collectivities. The role of the citizen consists above all in participating with other citizens in collective self-rule by reasoning and speaking or deliberating together over what they, collectively, ought to do. Thus being a citizen means being able to recognise and affirm, through the exercise of one’s own judgement, that the rules under which one lives issue from good judgements about what is just and what is beneficial to the community as a whole. Citizenship serves the function of collective self-rule, then, by giving individuals the means for exercising agency over the circumstances that profoundly shape their lives, an agency they can meaningfully possess only if they exercise it in concert with others.

Let me turn now to the second function of citizenship, what I am calling the function of self-protection. The rule of law and modern constitutional government are two of its central pillars; citizenship entails being recognized as a bearer of rights that others are obliged to acknowledge and respect. The security of rights depends on active citizenship, and entails a form of self-protection, for several reasons. First, governments can only be trusted to protect and enforce rights when they are accountable to those who live under them; the security of rights depends upon the active vigilance and regular participation of citizens. Thus a key instrument of citizenship as self-protection is participation in the regular election of decision-making officials. The institutions of political representation, and the lines of accountability they establish between governors and governed, are critically important. Second, the content of the rights that should be protected is itself worked out through citizens’ participation in the definition of and the contestation over the legal and practical meaning of rights. In this way, the functions of self-rule and of self-protection intersect through the distinctive forms of constitutional politics that give substantive content and legal force to the broader concept of rights.

Whatever the future holds for the boundaries of politics, it seems clear to me that the prospects of democracy - and of political legitimacy - will depend upon practices of democratic citizenship that meet these two broad functions of self-rule and self-protection. Both functions of citizenship do depend in important ways on the existence of boundaries of different kinds - moral, economic, institutional, procedural, administrative, jurisdictional - though they need not correspond precisely to the boundaries that have historically

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28 Cf. the ‘protective goal’ of representative government as discussed in Thompson 1976, p. 9 and passim.

29 This is what Habermas 1996 describes as the co-originality of public and private autonomy.
been instituted in the nation-state. What follows is a (woefully incomplete) formal/analytic investigation of the kinds of boundaries that are necessary to sustain these functions of citizenship.

**Boundaries of self-rule**

*Moral boundaries*
Taking our cue from Aristotle, it is reasonable to begin from the supposition that political communities are intrinsically moral communities whose members are bound to seek shared judgments concerning ‘the just and the advantageous’. Within the morally minimalist account of community that arises from the idea of shared fate and the condition of legitimation, we can recast the boundaries of political community in terms of the question: Who can be tasked with the moral obligation of mutual justification? (The answer: those whose actions affect others owe justification to those others.) Thicker understandings of moral community entail more substantial domains of shared judgment about the just and the good. These can be understood in terms of religion-, language-, or culture-based communities; social movements defined by a shared commitment to the emancipation of dominated groups (e.g., women, racial or ethnic minorities, indigenous peoples, sexual minorities, labor), or to the protection of the environment; etc.

**Boundaries of participation and obligation**
Who is entitled to recognition as a member of a self-governing community? Who has standing to participate in binding collective decisions? The function of self-rule requires the identification of a sufficiently discrete ‘self’ that it is possible to identify who is in and who is outside of the set of members, and upon whom collective decisions are legitimately binding. Key difficulties arise *(inter alia)* when (1) the set of participants in collective decisions is not co-extensive with the set of individuals who are bound by those decisions; and (2) there is no simple and dichotomous distinction between members and non-members (e.g., the claim to political participation of long-standing denizens who are not formal citizens under law, or of transmigrants who reside in one territory for part of the year and in another for the remainder; contestation over mixed-ancestry individuals’ claims to be band members for purposes of participating in indigenous self-government structures).

**Boundaries securing non-domination by outsiders**
Aristotle (and Machiavelli and Rousseau after him) emphasized the central importance for self-rule of the *self-sufficiency* of the political community, whose significance lies mainly in the freedom of its members to chart its own course without having to worry about the arbitrary interference of outsiders in its affairs (see esp. Pettit 1999). In the republican tradition, self-sufficiency
Non-territorial Boundaries of Citizenship takes two principal forms: economic and security.

**Economic self-sufficiency**
Exercising collective self-rule requires some degree of economic autonomy such that the community is not so dependent upon resources beyond its control that its decisions can be dictated by those who control external resources. This is the core of the democratic critique of the ‘race to the bottom’ generated by economic globalization: the dependence on mobile capital investment depletes communities’ ability to raise the taxes necessary to fund the projects they understand as most beneficial to their members. It also diminishes their capacity to institute protections for their own members (workers’ rights, environmental protections) that constitute disincentives for investment. The creation of a common market whose boundaries more or less coincide with the boundaries of political participation seems to be a precondition of the economic self-sufficiency that sustains self-rule.

**Self-sufficiency in security provision**
Self-rule also requires that the political community be shielded from domination through the exercise of force upon its members by non-members. Thus it seems to depend either upon the absence of threats of external violence or upon the existence of a ‘security community’ (see Adler and Barnett 1998) whose boundaries more or less coincide with the boundaries of political community.

**Boundaries of self-protection**

**Rights**
The idea of the individual as a bearer of rights (both against other individuals and against collective actors, including states) lies at the heart of the modern idea of citizenship as self-protection: the purpose of political society is to secure the rights of its members. Despite the universalistic language in which they are often expressed, however, rights also have boundaries:

**The subject of rights**
For every specifiable right there is a corresponding definition of the population who can justly claim to bear it, ranging from the most inclusive (humanity) to the less inclusive (the citizens of a territorially defined polity; the members of a voluntary association; the shareholders of a corporation).

**The domain of rights**
We can distinguish among different types of rights by specifying the kinds of goods they secure to their bearers. T. H. Marshall’s famous taxonomy of rights – civil, political, and social rights (to which we may now add cultural
rights as a fourth generation or type) – articulates the kinds of rights that are necessary to secure equal membership in a political community (Marshall 1965). Although Marshall’s argument focused on the historical emergence of these different types of rights in terms of an increasing robustness of citizenship within the territorially-defined modern democratic state, we need not adhere to his assumption that the state is the only locus of such rights or that they are necessarily or appropriately bundled together in the manner he describes. The claim to civil, social rights and some cultural rights historically precedes political rights in many European contexts of immigration in recent decades (Soysal 1994).

**Social rights**

I will not dwell here on the ways in which current rights regimes are, at the level of practice, unsettling the Marshallian assumption that the most relevant subject of rights for each of the prominent domains (civil, political, social, and cultural) is the legal citizen of a territorially-defined state. Other scholars have done that work much more meticulously than I could venture to replicate here (see esp. Bauböck 1994; Soysal 1994; Benhabib 2001). However, it is worth mentioning one formal feature of the boundaries necessary to secure the protection of social rights. Such rights presuppose a system of social and economic cooperation that generates wealth that can, in turn, be redistributed to participants to provide for their needs. By doing so, redistribution can sustain (or reproduce) ongoing cooperation over time. This must be a more or less closed system in two respects. First, the wealth generated through cooperation cannot be transferred outside the system beyond a certain limit without jeopardizing the system’s capacity to reproduce itself. Second, the system cannot, beyond a certain limit, contain valid claimants to social rights who are not also contributors to the social production of wealth. In other words, social rights depend upon boundaries that limit the outward flow of wealth from the system of cooperation that produces it and limit the inward flow of non-productive claimants. Both kinds of limits, of course, are strained by the phenomena of economic globalization and global migration: the political systems that control the redistribution of wealth no longer share boundaries with the economic systems that produce wealth. *Pace* the above discussion of citizenship-as-shared-identity and its proponents claims about redistribution, this trend strikes me as a much greater threat to distributive justice than the absence of shared national identity among citizens.

**Jurisdictions**

Citizenship as self-protection requires institutions capable of interpreting and enforcing rights claims, and citizen access to those institutions. That is, it requires both *juridical powers* and *police powers*. The rise of transnational and
international rights tribunals (including the recently established International Criminal Court), and the rising phenomenon of national court recognition of international human rights instruments, attest to the fact that the boundaries of juridical institutions need not coincide with those of territorial states. At the same time, it is also evident that the development of police powers whose jurisdictions coincide with those of juridical institutions limits the latter’s effectiveness in securing rights at the level of practice. At the same time, arguments for multilateral humanitarian intervention aimed at preventing human rights abuses have been gaining ground since the Bosnian and Rwandan genocides. Recent debates over universal jurisdiction in international law (inspired in part by Spanish judge Juan Guzman’s indictment of Pinochet) also suggest that the boundaries of both juridical and police powers need not coincide with the boundaries defining the subject of rights in order to have some effective force (here the universal human rights claims of individuals residing in Chile were upheld in a national court outside Chile).

Multiple, overlapping and shared jurisdictions
The existence of multiple jurisdictions covering the same subjects of rights, and of competing rights domains grounded in different jurisdictions, is nothing new even within domestic law. The coexistence of territorially-based jurisdictions with issue-based jurisdictions (e.g., of municipal governments and state or federal environmental protection agencies) is but one example of such overlapping jurisdictions. Frequently we tend to think that multiple jurisdictions do more to undermine than to secure the egalitarian protection of rights, as they enable venue-shopping for those who have the resources to sustain legal challenges in more than one jurisdiction. However, it is also possible to conceive of overlapping or shared jurisdictions as an opportunity for enhancing rights protection on an egalitarian basis, as Ayelet Shachar’s (2001) work on the regulation of marriage and family law by states and religious communities has argued.

Accountability
Citizenship as self-protection requires mechanisms that hold political decision-makers accountable to those whom their decisions affect. Among the key requirements of accountability are the publicity of decisions and the reasons that support them and the reflexivity of binding and authoritative decisions, their openness to contestation, appeal, and grievance.

Representation
Among the key procedural and institutional devices for accountability are structures of representation, through which members of a political
community participate in a mediated fashion in the decisions that affect them by selecting representatives to speak on their behalf. To meet the standard of accountability, institutions of representation must meet a number of distinct requirements, including:

Authorization
Whether through elections or through some alternative selection procedure for representatives, members must authorize representatives to act on their behalf.

Constituency definition
A system of representation depends for its legitimacy upon the claim that it has defined the principle for aggregating members’ views and interests in a manner that reflects the social groupings that are most relevant for purposes of collective decision (Williams 1998: Ch. 1). The principle of inclusiveness is a key feature of the justifiability of a given scheme of representation. Inclusiveness itself depends upon the mobilization of relevant constituencies claiming a voice in decision-making processes.

Conclusion
In the context of globalization, with the emergence of multiple decision-making institutions across and above the nation-state, it is important to consider the place of NGOs as potential agents of representation. Increasingly, NGOs are being incorporated into the consultative processes of decision making bodies as quasi-representative agents of relevant constituencies. There is much to be said for this practice in contexts where the institutional mechanisms for direct grassroots involvement in democratically authorized representation are lacking, for it does bring voices to the table that might otherwise be overlooked. At the same time, it is important to acknowledge that NGOs are generally self-appointed advocates for their putative constituencies, and frequently lack even internal mechanisms of accountability that could render them more credible as authorized agents of constituent groups. It is also the case that the constituencies represented by NGOs, while the most effectively mobilized for participation in decision making, are not necessarily the constituencies most affected by particular decisions or the institutions that make them. While NGO participation in supranational bodies is a good stopgap measure for those bodies’ accountability, it has not yet been institutionalized in a way that can secure the full requirements of accountability.

The foregoing is admittedly a very preliminary attempt to conceptualize the
kinds of boundaries that sustain the citizenship functions of self-rule and self-protection. Behind this effort lies the hope that teasing out the structure of and relationships among these different kinds of boundaries might assist us in gaining more critical purchase on the prospects of democratic citizenship in an era of globalization. Nothing in what I have written should be taken to recommend an abandonment of already-existing structures of citizenship, whether at the local level or at the level of the territorial state. To the contrary, it seems obvious to me that the prospects of citizenship depend crucially on attempts to increase the robustness of citizenship as self-rule and citizenship as self-protection within existing frameworks of membership. Even if the exclusive authority of nation states is in decline, the constitutional devices and the institutions of representation that have evolved within state boundaries are the best means humans have yet devised to secure the two defining functions of citizenship: the power of collective self-rule according to shared judgments about a common good, and the protection against abuses of power both by the state and by other social actors. For all the failings of constitutional democracy within state boundaries – for all the inequalities of political power and the poverty of political participation – it remains a considerable human achievement.
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Chapter 4
The Constitutional Idea of a ‘European Union of Citizens and States’

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Introduction
As the European Union (EU) is in the process of drafting a Constitution for itself, the question about the nature of the Union as a political system is inevitably raised. Often this debate has focussed on the opposition between a confederal and a federal political system; the process of European cooperation has originated as a confederal construction, a league of states, but over time it has acquired ever more features that make it resemble a federal state.

Talking about the European Union as an emerging federal system, however seductive, is prone to raise a range of misunderstandings. For one, the European Union emerges on top of the European state system as it was fully fledged out in the nineteenth and twentieth centuries rather than as part of that historical process of nation-state building. The process of European integration marks a new historical stage and there is little reason to think that

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under the present conditions of globalization this process will follow the same rules that applied two centuries ago.

What is more, the record of federal states in terms of providing stable political solutions is not without problems. In notable cases (US, Germany) the balance between the federal centre and the individual states seems for a long time to have decisively shifted against the former. Indeed these examples probably account for much of the political sensitivities attached to the concept of the EU as a federal state. Other cases where we have seen developments in the other, decentralized direction (Belgium, Canada) have generally been associated with political crises and threats to political stability.

These considerations have led many to emphasize the need to think of the EU as a political system *sui generis* (Schmitter 1996; MacCormick 1999) or as a ‘post-national’ (Curtin 1997; Habermas 1996), or even a ‘post-modern’ (Ruggie 1993; Cooper 2003), political system. Notably, all these conceptions underline what the EU *is not* or what kind of system it has surpassed. They make much less clear what the Union *is*, what features define it and how it operates.

More instructive in this regard are the legal analyses that have come to view of the European order as a ‘pluralist’ one in which a supranational order, rather than superimposing itself upon the existing national orders, has emerged alongside them. Thus we find in Europe ‘a plurality of institutional normative orders’, where ‘each of which is acknowledged valid (…) while none asserts or acknowledges constitutional superiority over the other’ (MacCormick 1999: 104; cf. Walker 2002). In this vein, Joseph Weiler celebrates the European Union as resolving ‘a particularly vicious circle: achieving a veritably high level of material integration comparable only to that found in fully fledged federations, while maintaining at the same time – and in contrast with the experience of all such federations – powerful, some would argue strengthened, Member States’ (Weiler 2001). In fact, Weiler (2001, 2002) does express some concern that the proposals for a formal EU Constitution might come to quench the pluralistic nature of the EU order by replacing it with a strict hierarchy of norms usurping the autonomy of the member states.

Somewhat implicitly but noteworthy nonetheless, the draft EU Constitution prepared by the European Convention does harbour a distinct concept of the EU. Already in its very first article concerning ‘Establishment of the Union’, the draft Treaty establishing a Constitution for Europe invokes the concept of a ‘Union of citizens and states’.
Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it.

(European Convention 2003a)

While the concept of a Union of citizens and states remains short of being fully spelled out, it figured prominently in the explanation of the original draft of the article:

This Article establishes the Union and describes its fundamental characteristics. In response to requests made at the plenary [of the European Convention], the wording proposed is designed to adequately express the dual dimension of a Union of States and of peoples of Europe in terms appropriate to a Constitutional Treaty.

(European Convention 2003b: 11)

Thus, by invoking the will of the citizens and the states of the EU, it is made clear at the very start of the Constitutional Treaty for the EU that the Union is founded on a dual legitimacy.

This article examines whether and to what extent this view of the European Union as a Union of citizens and states is validated by the Constitutional Treaty drafted by the Convention. A second question addressed is whether this dual-concept of the European Union is a stable one or if eventually one or the other side is bound to have the upper-hand. As a prelude to the exploration of the relationships between the Union, the states and the citizens within Europe, I first want to revisit some philosophical insights into the relationship between democratic order and citizens’ autonomy.

**The ‘co-originarity’ of democratic order and citizens’ autonomy**

Any political system is defined by the way it reconciles the maintenance of political order with the autonomy of the subjects. Thomas Hobbes’s *Leviathan* can be taken as marking one extreme way of solving this challenge as it gives absolute precedence to the maintenance of order and reduces the liberty of

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the subjects to nothing more than ‘those things, which in regulating their actions, the sovereign hath praetermited’ (Hobbes 1651: Ch. 21). On the opposite end, one can think of the libertarian regime that is completely premised on the exercise of individual’s natural and inalienable rights and that invalidates any further claim to impose a certain political order (cf. Locke 1690; Nozick 1974).

This paradox of the foundations of democratic order and the question of which of the two sides – the general order or claims to individual autonomy – can claim precedence when they come into conflict has been at the heart of the whole tradition of political theory. Recent years have seen various notable contributions to thinking about the paradox of democratic order. In particular, I would want to single out the theory of the democratic state under the rule of law that has been developed by Jürgen Habermas (1992: Ch. 3; 1996). The distinctive claim made by Habermas is that he rejects any claim of ontological primacy of either ‘natural’ individual rights (Locke) or the power of state (Hobbes). Instead he submits that in a democratic order the two are mutually constitutive: autonomous citizens are only created through the state, just as state power can only operate democratically if it emerges in tandem with citizens’ autonomy. In Habermas’ words, citizens’ autonomy and democratic state power stand to besides each other in a relationship of ‘co-originality’.

Habermas further suggests that the relationship between citizens’ autonomy and the maintenance of order is facilitated by the recognition of citizens’ rights. To effectively fulfil its role within the democratic order, this system of rights is again double-sided as it includes at the same time negative rights that serve to demarcate citizens’ privacy as well as positive rights that guarantee their access to public decision-making processes:¹

- Negative rights that delineate a certain private sphere from the state’s incursions, eventually including even the possibility to leave the realm of the state (exit)
- Political participation rights in the widest sense that ensure citizens the

¹This list is a slight variation on Habermas’ list (1992: 155-7):  
- Basic rights that secure the greatest possible amount of equal subjective liberties  
- Basic rights that follow from the status of member of a voluntary association of legal subjects  
- Basic rights that follow from the claim to rights and the legal protection  
- Basic rights to equal opportunities to participate in processes of opinion-building in which citizens exercise their political autonomy and by which they create legitimate law  
- Basic rights to the guarantees of the means of life which, to the extent that their assurance is socially, technically and ecologically possible, are necessary to guarantee equal opportunities in the exercise of the previous categories of basic rights.
opportunities to participate in opinion-formation and decision-making processes
- opportunities to decide over the political regime
- means to avail themselves of the resources necessary for effective participation
- access to justice to challenge decisions that thwart them in their basic rights.

Thus there is a further form of co-originality by which individuals under the democratic state are at the same time turned into legal subjects and politically autonomous citizens. As two sides of the same coin, rights ensure the private and public autonomy of citizens in the democratic state under the rule of law.

This analysis has obvious relevance for the European Union as in the slipstream of the development of the political system we have also seen a slow but steady development of citizens’ rights of both the private and the public kind. This can indeed be seen as a manifestation of the co-development of a political order and a new, European citizenship status. The next section reconstructs this process and identifies the various elements in the new Constitutional Treaty that reinforce the status of individuals in the European order as EU citizens.

As is also suggested by the concept of a Union of citizens and states, there is another, parallel relationship between the Union and the member states. Often this latter relationship is portrayed as involving a shift of power from one level to another. Drawing on Habermas’ theory of co-originality, we might, however, re-think the relationship between the Union and the member states as one of mutual (re-)constitutionalisation. Rather than developing at the expense of the member states’ primordial powers, the development of the EU order may be seen as attributing to the member states a new political status within a new, supranational political order. In fact, as the draft EU Constitution makes clearer than ever before, member states and the Union have come to stand together in a kind of reciprocal relationship in which the prerogatives of the member states are guaranteed both by way of severing certain, negative rights and competences from the Union’s sphere of influence as well as by ensuring a range of powers in the decision-making process of the Union. In section 3 below, an attempt is made to provide a full reconstruction of this reciprocal relationship.

The ascent of the EU citizen
The story of the ascent of the EU citizen has often been told, in different ways (e.g. O’Leary 1996; Weiler 1999: Ch. 2). Its point of departure can be
traced to the famous dictum of the European Court of Justice in 1963 in *van Gend en Loos*: ‘The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals’ (case 26/62 [1963] ECR, 1). While conceding that the EEC is an object of international law, the Court distinguishes it from ‘normal’ international treaties by asserting that it constitutes a new legal order that has taken over some of the sovereignty of its member states. This distinct nature is then adduced to justify the Court’s doctrine of ‘direct effect’ whereby legal subjects are given the opportunity to invoke European law irrespective of the mediating role of their state. The doctrine of ‘direct effect’ – in combination with the doctrine of primacy that the ECJ was to spell out one year later in Costa (Case 6/64 [1964] ECR, 594) – gave a distinct twist to the relationship between the European Communities and their member states (Weiler 1999: Ch. 2), even if the doctrine was only occasionally tested given the very restrictive conditions for private parties to access the ECJ.

Moreover, from very early on it was recognized that the European order provided the people living under it with a certain set of rights. For a start, there were the four freedoms that were put at the heart of the economic cooperation: free movement of persons, goods, services and capital. What is more, having established the doctrines of primacy and direct effect, the ECJ step by step came to recognize that the European legal order would require a modicum of fundamental rights protection. Even though such rights were not explicitly provided for in the treaties, the Court assumed there to be an understanding common to the constitutional traditions of the member states that would warrant protection within the confines of the European legal order (Weiler 1999: Ch. 3).

Notably, however, during the first decades of European cooperation, the citizens of the member states figured mostly as legal subjects of the European legal order, not as active and autonomous EU citizens. An important breakthrough, complementing the status of legal subjects with a political capacity, was the introduction of direct elections to the European Parliament in 1979. Through successive treaty revisions (Maastricht 1992, Amsterdam 1997 and Nice 2000), the powers of the European Parliament have been steadily expanded, both in terms of intensity (from consultation to full co-decision) as well as in terms of scope, involving ever more EU policy areas. Gradually, the European Parliament, directly representing the EU citizens, has really become a power of its own, completing the central EU institutional
As the 1992 Treaty of European Union was negotiated in Maastricht, citizens’ political rights in the Union and the four liberties that had been put at the heart of the economic integration project were put together under the overall label of ‘citizenship of the Union’. This move might have been taken as little more than a public relations stunt in which the rhetoric far outmatched the concrete implications. But still, once established, EU citizenship will not go away and it can easily be invoked to add force to claims of EU citizens before the European Union. The Maastricht Treaty further increased the powers of EU citizens by establishing the institution of an EU Ombudsman to receive and consider complaints from citizens and legal entities concerning instances of maladministration by the EU institutions.

The next notable step was the EU Charter of Rights that was initiated under the German EU Presidency in 1999 and drafted by a Convention in the course of 2000. In general terms, the drafting of the Charter served to recognize the far-reaching impact of the EU order and the importance of it relying on a sense of legitimacy among the peoples of the Union. More specifically, the drafting of the Charter was motivated by the fact that, as the European Union was prevented from acceding to the European Convention of Human Rights (Opinion 2/94 [1996] ECR, p. I-01759), EU citizens were left without any human rights instrument to protect them against intrusions by the (supranational) EU institutions. As it turned out, the EU Charter is a very comprehensive Bill of Rights, more far-ranging and up-to-date than its counterparts at the national level, as is for instance illustrated by the inclusion of references to eugenic practices and reproductive cloning under the right to the integrity of the person. In December 2000, the European Council in Nice ‘solemnly proclaimed’ the Charter. The heads of government refrained, however, from incorporating the Charter into the treaties, leaving its legal status for further consideration.¹

All these achievements are consolidated and further developed in the draft EU Constitution prepared by the European Convention (2003a). Typically, the principle of primacy – which so far mostly existed in the jurisprudence of the ECJ and the work of legal scholars – is for the first time enshrined in the European founding texts (Art. I-10.1). Early on in the Constitution, the

¹ Note, however, that this has not prevented various EU legal actors (advocates-general, the Court of First Instance) from invoking the Charter in legal procedures (Lenaerts and de Smijter 2001; Menéndez 2002).
fundamental freedoms as well as a non-discrimination clause are laid down (Art. I-4), closely followed by provisions on fundamental rights (Art. I-7) and citizenship of the Union (Art. I-8). The Convention furthermore resolved the status of the EU Charter of Fundamental Rights. Article I-7 of the draft Constitution provides that ‘The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights’. The complete Charter is integrated as Part II of the four-part draft Constitution. Thus the rights contained in the Charter will be legally enforceable for EU citizens. This advance is secured, however, with a number of restrictions. Above all, it is made very clear that the Charter does in no way apply beyond the competences and the law of the Union (Art. II-51). Furthermore, the scope of Charter rights is directly linked to the relevant policy provisions and the conditions and limits defined therein and those rights that are defined as principles will be judicially recognizable if, and to the extent that, the Union adopts relevant legislative and executive acts (Art. II-52). In all this it is important to point out that access of individuals and private parties to the ECJ remains restricted to those cases in which they can demonstrate a ‘direct and individual concern’, to which the Convention has made the small addition of those cases in which persons are directly affected by a regulatory act that does not require implementing measures (Art. III-270).

The draft Constitution also continues the process of extending the powers of the European Parliament. The EP gains much from the co-decision procedure becoming the standard EU legislative procedure. The Parliament thus emerges as a full and equal co-legislator alongside the Council. Still some important Union competences remain excluded from its remit, like the common foreign and security policy, macro-economic policy and the implementation of the common agriculture policy. Parliament’s role as a budgetary authority is also strengthened as the draft Constitution gets rid of the distinction between non-compulsory expenditures (over which the EP did have authority) and compulsory expenditures (over which it did not have authority). Furthermore, the draft Constitution affirms that the European Parliament ‘shall elect the President of the European Commission’ (Art. I-19.1). Nevertheless, looking at the details in Art. I-26, it turns out that this election is predicated on the nomination of a single candidate by the European Council. Still in practice the European Parliament may well be able to put its mark on the procedure as it can reject the candidate of the European Council and force it to propose a new one. For the first time, the draft Constitution also explicitly provides that the Commission as a college is responsible to the European Parliament (Art. I-25.5).
The draft Constitution elaborates on the political capacities of EU citizens by emphatically affirming their fundamental equality (Art. I-44) and by asserting that the democratic life of the Union is founded on the principles of representative democracy (Art. I-45) and participatory democracy (Art. I-46). As a consequence, besides their active and passive voting rights for the European Parliament, the draft Constitution ensures EU citizens opportunities for political participation through European political parties and representative associations and civil society. Provisions are inserted ensuring that the Union institutions will operate as openly as possible (Art. I-47) and that actions will be preceded by wide-ranging consultation of the relevant societal actors (Art. I-46), giving particular attention to the roles of social partners (Art. I-49) and of churches and non-confessional organizations (Art. I-51.3). Furthermore, a completely new political right is introduced by the insertion of a legal basis for a citizens’ initiative, whereby no less than a million European citizens coming from a significant number of member states can invite the European Commission to prepare a legislative proposal on a specific issue (Art. I-46.3).

In the end, the draft Constitution marks a fundamentally new moment in that for the first time it also acknowledges EU citizens as authors of the Treaty, thus importing the democratic ideal of popular sovereignty. Thus far, all European Treaties were authored by the ‘High Contracting Parties’, i.e. the heads of state of the member states, as is generally the case with international treaties. EU citizens only figured as the subject of the treaties, as is well-illustrated by the preamble of the Treaty of the European Community in which the High Contracting Parties express themselves as ‘determined to lay the foundations of an ever closer union among the peoples of Europe’. The Treaty on European Union (Art. 1 TEU) followed up on this by declaring that it ‘marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’.

As indicated in the introduction above, Article 1 of the draft Constitutional Treaty deletes the reference to the High Contracting Parties and presents the establishment of the Union as a self-referential performativ action (‘this Constitution establishes the European Union’) that is premised on the ‘will of the citizens and States of Europe to build a common future’. Admittedly this Constitution as well as future amendments will need to be passed by the member states and to the extent that they do involve their citizens in this ratification process (if at all), it is only as national citizens. Still, in the light of the ascent of EU citizenship in other EU domains, the reference to the citizens in the article on the Establishment of the Union cannot be simply
cast aside as a piece of rhetoric. Notably, the draft Constitution does for the first time recognize some formal role for the supranational institutions of the European Parliament and the Commission in the preparation of the Treaty amendments. It gives them the right to initiate a revision procedure by submitting amendment proposals on an equal footing with the member states (Art. IV-7.1). Further, they are guaranteed a presence in a Convention that in the future is supposed to be the main forum for examining possible treaty amendments (Art. IV-7.2). For sure, these provisions fall far short from full democratic engagement of EU citizens (as EU citizens) in the revision process, but they do signal the first manifestations of a different logic of EU constitution-making besides that of the logic of states (cf. Fossum and Menéndez 2005).

The constitutionalisation of reciprocity between the Union and the member states

At times, the Union, in particular its supranational institutions make the member states look like sorcerer’s apprentices (cf. Curtin 2001): having conceived the Union, the states have lost control over it and, worse, have even become its servants. For sure, the Union originates in a contract under international law that has been the object of agreement of all member states and that also can only be changed with the agreement of them all. Multilateral international cooperation requires the governments to compromise their interests at times, but they are all still basically in the same position and if one state feels pushed too far than it always retains a veto. In practice, however, the EU is clearly not the exclusive domain of the states any more. Supranational institutions such as the Commission, the European Parliament and the European Court of Justice have come to play roles of their own that at times can exert considerable leverage over the interests of the member states. What is more, as was demonstrated in the former section, there is a wide range of ways in which citizens are by now engaged in EU affairs without necessarily having to go through their national institutions.

One particular source of concern for the member states is the perception that there is an uncontrollable logic of ‘a creeping expansion of the competence of the Union’ encroaching upon the competences of member states and regional authorities (European Council 2001; Pollack 2000; Craig 2003: 6). One manifestation of this expansion is the fact that throughout the various European treaty revisions, new competences have been added with few, if any, ever being scrapped. What is more, the logic of this process is reinforced by the mission-oriented set-up of the Union in which its competences are derived from the objectives attributed to it – an orientation that is reinforced
by certain treaty provisions (ECT Arts. 95, 308) and also, at times, by the jurisprudence of the ECJ. The feeling that the EU competences are not under sufficient control is reinforced by the nature of the treaty texts in which they have been specified. The various treaties and their complex structure reflect the complex historical trajectory of the integration process. Moreover, the language by which the competences are defined is often rather opaque and betrays many compromises that have been needed to reconcile the various member states.

In fact, at the present stage of European integration, there are many aspects in which the states can no longer claim to be fully in control. The Union has achieved a certain autonomy as a political system. It is, however, too rash to suggest that the tables have simply turned and that the Union, being the higher, more-encompassing political level, can now impose its will on the member states. The sovereignty of the member states has not been simply appropriated by the Union. Instead we have witnessed the development of a reciprocal relationship in which member states negotiate their engagement in the Union through the guarantee of certain substantive warrants and political powers. Harking back to Habermas’ co-originality thesis, we might say that the process of constituting the European Union involves at the same time a process of redefining the political status of the member states.

Notably, the draft Constitution, rather than marking a further weakening of the position of the member states, on many accounts clarifies, elaborates and enshrines states’ prerogatives. Typically, among the very first articles of the draft Constitution, a new one (Art. I-5) has been inserted addressing the relations between the Union and the member states. First of all, this article provides that the Union will respect the national identity of the member states as well as their distinctive politico-constitutional organizations. The second paragraph then enshrines the commitment of loyal cooperation, both among the member states themselves, as well as of the member states towards the Union. Thus, while putting the member states’ guarantees first, this article reflects a strong sense of reciprocity between the Union and the member states.

While, as we saw, the will of the citizens is now invoked in establishing the Union, it is matched by a reinforcement of the position of the member states. Most notably, after having established the Union by an invocation of the will of the citizens and states, the first paragraph of the Constitutional Treaty underlines no less than three times that the Union’s objectives, as well as the choice of policies that warrant coordination or joint administration, are to be defined by the member states. This approach is fully spelled out by the
principle of conferral as it is defined in paragraph I-9.2: ‘the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States’. For a long time, European lawyers have already been working on the assumption of the doctrine of ‘attributed competences’, which suggests that the Union can only act within the realm of the powers explicitly attributed to it (Craig 2003: 6). Still, the constitutional inclusion of the principal of conferral and its reinforced wording serve to strengthen its importance and the commitment to its surveillance (cf. Dougan 2003: 765).

With the aim of guaranteeing that the EU only acts within the realm of powers attributed to it, calls for a strict catalogue of its competences (Kompetenz-katalog), which had been circulating over the last decade (cf. Pernice 2001). The European Convention was remarkably swift in rejecting this proposal, as a majority considered that such a catalogue would impose too much rigidity upon the process of European integration and ‘be detrimental to the requisite flexibility to adapt to new realities’ (European Convention 2002: 6).

While abstaining from a strict catalogue, the European Convention did seek to clarify the EU’s competences. For one thing, it proposed a complete overhaul of the existing treaty structure, merging the European Community with the European Union and bringing the different policy provisions together in a logical order (Part III of the draft Constitution). Furthermore, the Convention proposed to introduce different categories of competences, with each category representing a distinct division of powers between the EU level and the member states: exclusive competences, shared competences and areas for supporting action. Exclusive competences involve the areas that fall fully under the authority of the Union. In areas of supporting action, on the other hand, member states retain their political primacy. In these areas the Union cannot act by laws that entail the harmonization of member states policies but only through actions that serve to support, coordinate or supplement the actions of member states. Beyond the three categories of competences, the Convention has separated out the coordination of economic and employment policies and the common foreign and security

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5 At present Article 5 ECT states: ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.’
policy as two specific competences *sui generis*. The exclusive competences and the areas for supporting action are listed exhaustively. The biggest category is the category of shared competences in which all other competences conferred to the Union automatically fall. The scope of shared competences is determined only by the precise legal bases provided in Part III of the Constitutional Treaty on the policies of the Union.

While the approach chosen lacks the strictness attributed to a catalogue of competences, its overall presentation within the re-organized structure of the draft Constitution reinforces the idea of a reciprocal arrangement between the Union and the member states. One might compare the way the draft Constitution deals with the competences issue with the way states generally deal with individual rights. Bills of rights chart out a negative sphere from which the state is prevented from threading in pursuing the public good. Conversely, the Union’s competences vis-à-vis the member states are positively enumerated by the draft Constitution where Part III figures as a kind of ‘bill of competences’, with the strict provision that ‘competences not conferred upon the Union in the Constitution remain with the Member States’ (Art. I-9.2). Nevertheless, just as individual rights do not constitute absolute limits but rather guidelines that always remain subject to interpretation, the definition of the Union’s competences is above all indicative, warranting close observation but not precluding a certain flexibility in its use. In this respect, when it comes to adjudicating the boundaries, one needs to appreciate the importance of underlying notions such as individual autonomy and the equal worth of the person in the case of rights, and the Union’s values (Art. I-2) and objectives (Art. I-3) in the case of the European Union.

Even where the Union is assigned competence, it is bound to respect member states prerogatives through the principles of subsidiarity and proportionality. These two principles figure in the same article of the draft Constitution as the principle of conferral. The principle of subsidiarity provides that (except for areas in which it has been given the ‘exclusive competence’) ‘the Union shall act only if an insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States either at central level or at regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level’ (Art. I-9.3). In turn, the principle of proportionality provides that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution’ (Art. I-9.4).
Ever since these principles were incorporated in the Treaty of Maastricht, there have been doubts whether they served more than a symbolic role, especially since any mechanisms to control their compliance have been absent (cf. de Búrca 1999). Indeed the observance of subsidiarity and proportionality tends to come under pressure in the EU decision-making process given the strong position of supranational institutions (Commission, EP and the ECJ) and the fact that more detailed legislation often turns out to be the easiest way to reconcile the different preferences of member states. In drafting the EU Constitution, the European Convention has proposed some concrete political mechanisms to reinforce compliance with subsidiarity and proportionality. Underlining that the policing of subsidiarity and proportionality is in the end a political rather than a judicial task, the Convention has put the responsibility on the Commission to demonstrate that the principles are complied with and has attributed rights to the parliaments of the member states to challenge any presumed violation of the principles. Together these measures aim at ensuring that the observance of subsidiarity and proportionality will become a much more integral part of the EU decision-making process.

Yet state prerogatives are not only defended by way of substantive guarantees. Member states also enjoy major political powers at all levels of the Union’s legislative process. First of all, acting through the European Council, member states define the general political guidelines for the Union. Then, all Union legislation (except for some particular intra-institutional arrangements) needs the approval of the Council of Ministers, in which all member states are represented. As cooperation has intensified and the number of members has expanded, states have ceded their veto rights on most pieces of legislation. Still, in order to be adopted, legislation generally requires a qualified majority in the Council and in practice there is a general reluctance to impose legislation against the vehement opposition of one or more member states. Finally, even at the level of administrative acts, member states have secured their close involvement through the establishment of committees that monitor the administrative process.

The main ground for the states still being able to claim to be the ‘Masters of the Treaties’ is that, beyond the fact that they were the authors of the initial treaties, any amendment to the treaties can only be adopted with the consent of each and every member state. Furthermore, such agreement will also have to pass through the respective ratification procedures of the member states.°

° The addition of paragraph IV-7.4 providing that the European Council will have to consider the situation if two years after a revision agreement, its entry into force is prevented by the failure of one or more member states to ratify it formally does not remove this requirement.
Thus the member states still act as gatekeepers for the Union’s powers and each state enjoys a veto power on any change of these. Indeed, from a formal standpoint, the fact that treaty amendments still require a double unanimity may be taken as definite proof of the EU remaining an international treaty organization.

On closer inspection, however, the unanimity test turns out to be less of an absolute criterion and more a matter of degree. Notably, for a long time, lighter revision procedures have been provided to amend some of the basic rules of the EU’s foundation, particularly the flexibility clauses (ECT Art. 95, 308; DCT Art. I-17, cf. Art. I-24.4) allowing the member states to add new competences to the Union that it requires to meet its objectives. At the same time the criterion that national constitutional systems are revised by some kind of majority formula while international treaties are characterized by revision by unanimity alone does not hold in practice. On the one hand, national constitutional systems often impose particularly onerous demands on constitutional revision, at times even involving unanimity (‘equal suffrage in the US Senate’, US Constitution Article V). On the other hand, there are also international institutions that do not require unanimity to revise their founding texts (cf. Art. 108 of the UN Charter; Art. 36 ILO Constitution).

The issue of treaty amendment also touches upon the much-vexed issue of the *Kompetenz-Kompetenz*, the question who is the final arbitrator in conflicts over the limits of the EU’s competences. Obviously, as masters of the treaties, the member states have the power to settle any dispute by revising the basic Treaty texts. When it comes to the judicial arbitration of individual disputes touching upon EU competences, the situation is less clear (Weiler 1999: Ch. 9; Kumm 1999). In principle, one can expect the ECJ to be the primary institution to guard the legality of Union acts (cf. Art. III-270). Yet, in particular cases, especially when Union acts touch upon essentials of national constitutions, the highest national courts may play an autonomous role. In those cases the nature of the EU order as an order of shared sovereignty is exposed, and rather than there being a single judicial site ‘deciding the exception’ (an ‘EU Constitutional Council’, see Weiler 2002; 1999: Ch. 10), the most appropriate way to deal with such a situation may well be through a constitutional conversation between the various judicial and political institutions involved (cf. Weiler 1999: 322).

A final important clarification in the draft Constitution concerning the relationship between the Union and the member states is the inclusion of a

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7 Cf. the German Bundesverfassungsgericht BverfG 89, 155 (Maastricht); House of Lords.
withdrawal clause (Art. I-59). Such a clause is extremely rare among political systems as these are generally premised on a commitment towards mutual cooperation. The most notable exception is Canada where, under pressure of the province of Quebec, procedures have been defined by which a province could secede from the Canadian federation (cf. Fossum’s contribution to this volume). Up till now, it was unclear whether and how a member state could leave the Union. There was the withdrawal of the Danish county of Greenland from the European Communities in 1985, but this was arranged in a legal void, and as it only concerned an (overseas) part of a member state, it could not automatically be taken as a precedent for the possible withdrawal of a whole member state.

The EU Constitutional Treaty leaves it to the European Council to specify, upon notification by a state that it wishes to withdraw from the Union, the procedures for negotiating the agreement to that effect. After the terms of the withdrawal have been defined, they need the approval of a qualified majority of the (remaining) member states in the Council as well as of the European Parliament. Yet it should be recognized that the Constitutional Treaty strengthens the position of any state interested in withdrawing by providing that this state is freed from its obligations under Union law if it turns out to be impossible to reach an agreement within two years after its initial notification.

In some interpretations the new withdrawal clause only codifies the most appropriate principles. One can argue, however, that the formal recognition of this possibility will affect the relationship of member states with the Union and with each other. On the one hand, an individual member state may be tempted to invoke the possibility of withdrawal as a threat in negotiations. On the other hand, it may also be used by the majority of member states to put the others before the choice of accepting a common position or resigning themselves to withdrawal. Such a strategy would in particular be conceivable when it comes to renegotiating the terms of the Constitution.

**The balance between citizens’ and states’ prerogatives**

What we find, then, is that the draft Constitutional Treaty contains both clear elements of citizens’ rights as well as provisions that preserve distinct state prerogatives. The fact is that these two rationales figure side by side in the draft Constitution and are fundamentally irreducible to each other. Thus there is much to be said for the concept of a Union of citizens and states to be a valid concept in the light of the content of the draft Constitution.
Comparing the powers of citizens within the EU structure with that of states, it turns out that in many respects the states still enjoy the upper hand. Most noteworthy, the political role of the member states in the Union’s decision-making process is far more developed than that of the citizens or their directly elected representatives in the European Parliament. Over time, the powers of parliamentary institutions directly representing the citizens have been catching up with those of the states, a process that may be brought to its conclusion by the establishment of the standard legislative procedure in which the Council and the European Parliament enjoy equal powers. Nevertheless, the main exceptions to the standard procedure involve limitations of Parliament’s powers. At the same time, while some modest openings have been forged, member states very much guard their powers over revisions of the Union’s treaty foundations.

Yet, while the prerogatives of the states may be more complete, it is clear that the powers of EU citizens are on the ascent and that this process is only likely to roll forward. Thus, while the concept of a European Union of citizens and states may in many respects be adequate, it is definite not a stable concept. Shifts are bound to continue, as they have continued over the last decades.

One simple way to think of the shifts would be to suggest that there is a strict correspondence, a zero-sum game, between the ascent of the Union of citizens and the demise of the Union of states. Such a view is however difficult to sustain in the light of actual developments, in particular the retrenchment of states’ prerogatives that can be identified in the draft Constitution. Typically, in many respects the states have allowed the recognition of EU citizens alongside the prerogatives they enjoy as states. A good example are the powers of the Council, which rather than being transferred to the European Parliament, persist side by side with it. In many respects we find that the Union of states and the Union of citizens are embodied in separate institutional provisions. Considering the further evolution of the European Union as a Union of citizens and states, we can first look at the further evolution of the institutions of the Union as a Union of citizens and the Union as a Union of states independently of each other. To a large extent these institutions can exist side by side. Then, of course, there are also cases where the two rationales interfere with each other and then there is a need to reconcile or articulate them with each other.

With regard to the building up of a European Union of citizens, three spheres may be pointed out where the ascent of the EU citizen is likely to continue: access to the Court and to EU rights, extension of the imprint of
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the EP on the EU political process and new claims on the political process. Up till now, conditions for citizens to seek redress in the sphere of the Community competences in the single market before the EU courts have been rather restricted. Over recent years, however, pressure has been growing (Lenaerts, 1998; cf. Unión de Pequeños Agricultores v. Council, Case C-50/00 P [2002] ECR I-06677) as the Convention has also acknowledged by putting forward a small but important proposal on access to the Courts for citizens and other private parties (Art. III-270). The formal incorporation of the Charter of Rights in the EU Constitution is bound to give a major additional boost to citizens’ abilities and interest in accessing the ECJ.

At the same time, we can expect the political presence of the European Parliament to expand further. Of particular importance will be whether the Parliament will be able to extend its influence beyond the legislative realm and to establish itself as a critical interlocutor of executive power in the Union, as it is at present dispersed between the Commission, the Council institutions and the member states. Important present concerns in the EU are not so much addressed through legislation but rather through executive action. For the EP the key in this may well lie in its ability to take control over appointment and dismissal of EU political figureheads, first among which is the President of the Commission.

Then, the political union of citizens also manifests itself through the direct involvement of civil society groups and experts (bypassing the national level) in the EU decision-making process. This process has a considerable history. Business groups already played a major role in the 1992 single market project and the number of civil society representations in Brussels has markedly increased ever since. In particular the Commission has taken a keen interest in involving societal groups to tap their knowledge and seek their constructive collaboration. In its 2001 White paper on European Governance, the Commission sought to set out a more systematic approach to these consultation processes. And while the Convention has largely overshadowed the follow-up to the Commission’s initial proposals, we find some of the underlying ideas reflected in the draft Constitution’s provisions on the Union’s democratic life and societal consultation. If fully followed through, these provisions may well lead to a much wider-ranging direct involvement of societal groups in the Union’s decision-making process. This of course applies also to the proposal for an EU citizens’ initiative.

At the same time, the process of redefining the state’s prerogatives vis-à-vis the Union is bound to continue and while the position of the states is definitely marked by a certain defensiveness, it is far from sure that they are
bound to lose powers. Indeed, further expansions of the EU’s range of competences and, more importantly, EU actions in areas where it has so far failed to develop its powers effectively (justice and home affairs, foreign policy), are bound to provoke reactions of retrenchments and boundary quarrels. In this light the categorization of competences proposed by the Convention may well be only the first step in a longer process of competence clarification (which need not inevitably lead to a competence catalogue).

Besides these boundary quarrels, one could well envisage claims being raised to more affirmative approaches to states’ prerogatives. The respect expressed in Article I-5.1 of the draft Constitution for national identity, political and constitutional structures and essential state functions can well be developed further. Beyond safeguarding these prerogatives, one could also envisage claims for positive actions when it comes to ensuring cultural diversity in an ever more integrated Union. The supranational language regime is an important case in point, but more generally there is the question how the diversity of European cultures can be preserved from being swamped by a Euro-Anglo hegemony. Leaving nation-states free to develop their own policies may not suffice and require being complemented by supranational interventions of one kind or another.

There will also be some areas where the dynamics of the Union of citizens and the Union of states will come to interfere with each other and where tensions may arise. Maybe most clearly, and highlighted by the present enlargement, such tensions arise when it comes to the division of power in the Union’s political institutions: the Council, the Parliament and the Commission. Crucially these institutions were historically assigned fundamentally different roles with fundamentally different powers. In many respects, the Council was, and still is, the pivotal institution when it comes to political decision-making. The role of the Parliament was originally little more than that of a sounding-board, and only in recent years has it acquired equal powers to the Council in the legislative process. The role of the Commission is emphatically a-political in important respects when it comes to its role as honest broker and guardian of the treaties.

Given this historical background, the institutions have never been simply functionally opposed to each other, with the Council representing the states, the Parliament representing the citizens and the Commission serving the general EU weal. Rather within each institution power is shared by way of a compromise-formula that mediates between equality of states and equality of citizens. Seats in the Parliament and votes in the Council are divided on the basis of what is called ‘digressive proportionality’. In the College of
Commissioners the big countries have up till now had two commissioners, while all other states only had one.

It is no coincidence that in the negotiations on the Treaty of Nice and on the draft Constitution, these issues concerning the division of power have been the most difficult ones to settle. While in the Commission the arrangement now seems to converge on one commissioner for each member state, in the Council and in the Parliament the tendency has been for the equality of citizens dimension to gain more prominence over the equality of states dimension. Interestingly the Convention proposed a so-called ‘double-majority formula’ (50 per cent of the states representing 60 per cent of the citizens) for decision-making in the Council. Closer analysis shows, however, that in effect the latter part of the formula is of much greater importance than the former part (Baldwin and Widgren 2003; Machover and Felsenthal 2004).

The simple solution of the Council being based on the principle of one vote per state and the Parliament being based on the principle of one vote per citizen is still far off, especially as long as the Council, much more than a mere legislative senate, also exercises a wide range of additional, executive functions. Yet a stable alternative solution seems also far out of sight.

Another area were the ascent of the EU citizen may well come into conflict with the prerogatives of the state concerns access to justice and the judicial Kompetenz-Kompetenz (Kumm 1999). As in the future private parties are likely to come more often before the ECJ, the Court will be challenged to decide over questions that national courts may well claim to be in their domain. The eventual Kompetenz-Kompetenz lies in the question of what court is to decide over issues concerning the delineation of the EU and the national judicial domains. Particularly hard cases may arise were member state acts will appear to conflict (not with EU law, because then the solution is clear given the principle of primacy) with fundamental principles of EU law, like the basic rights embodied in the EU Charter of Rights. Thus there is the risk that with greater access to the ECJ, citizens may try to further their interests by playing the ECJ off against their national authorities.

A final area in which tensions between the union of states and the union of citizens are likely to come to the fore concerns the, until now, exclusive prerogative of the states as masters of the treaties. Especially after enlargement to 25 member states, there are good reasons to doubt whether the requirement of double unanimity (agreement and ratification) for treaty revisions can be sustained. Given that the process of integration still appears far from concluded, further revisions would seem inevitable and it would
appear difficult to justify that one country’s inability to ratify an agreed-upon change could keep the whole Union hostage, as threatened to happen for instance when the Irish electorate rejected the Treaty of Nice in the 2001 referendum. Moreover, despite all formal courtesies, size does matter here as well: it makes a difference whether the ratification problems occur in Ireland and Malta or in France and the UK.

It seems inevitable that sooner or later it will have to become possible to revise the treaties with just somewhat less than all member states (twice) giving their formal approval. Quite likely the vetoing minority will then be defined in terms of both number of states and the share of the population they represent, e.g. it could be provided that treaty amendments will enter into force once ratified by 90 per cent of the member states representing 90 per cent of the EU population. Such a change might be accompanied by giving the European Parliament a formal role in approving the treaty amendments.

Conclusion

The constitutionalization of the European Union is a two-way process on two sides. It involves and affects not only the Union itself but also the political status of the member states and the status of EU citizens. A systematic examination of the European Convention’s draft Constitution for the EU validates the concept of a ‘Union of citizens and states’. The draft Constitution contains clear manifestations of both aspects which are irreducible to each other and in many respects can co-exist side by side.

By adopting the concept of a Union of citizens and states and elaborating it as a reciprocal relationship at two, complementary levels, the European Convention has risen to the challenge of drafting a formal Constitution that preserves the constitutional pluralism that is distinctive of the EU as a constitutional structure (Weiler 2002: 567 ff.). At the same time, it is a misrepresentation to claim that ‘on a number of crucial power issues, the Draft [EU Constitution] shifts the emphasis to the member states and reduces the ambitions of and for the Union’ (Klabbers and Leino 2003). While recognizing the reinforcement of the states’ prerogatives, such a reading remains caught in a simple zero-sum logic between state and citizens’ claims in the Union. Rather, as Kalypso Nicolaïdis puts it:

After half a century of existence, the European Union has established itself as a new kind of political community, one that rests on the persistent plurality of its component peoples, its demoi. It is more than a particularly strong version of a confederation of sovereign
states, in that its peoples are politically connected directly and not only through the bargains of their leaders. And yet, to the extent that these peoples are organized in states, these states should continue to be at the core of the European construct. (Nicolaïdis 2003: 5)

Still, at the present stage of the European integration process, the concept of the European Union is far from stable; there is little reason to assume that the draft Constitution establishes its political finality. The recognition of the EU citizen is likely to penetrate ever further into spheres where for the moment it still falls short. While with the incorporation of the EU Charter of Fundamental Rights, citizens find their negative rights in the Union guaranteed, there remains much to be gained in terms of access and engagement in the decision-making processes. States on the other hand have been able to maintain a rather complete set of political powers at all levels of the Union’s decision-making process. Here future effort is likely to focus on the sharpening and elaboration of guarantees of their substantial prerogatives. Although there are areas where the two ideas come into conflict, such conflicts are unlikely to be resolved by the replacement of one principle (the union of states) by the other (the union of citizens). Rather we are likely to see new articulations that seek to combine the two rationales or at least allow them to co-exist.

Ultimately, adopting a truly cosmopolitan perspective to EU cooperation, one might insist on the normative superiority of the union of citizens over that of the union of states. For sure, the EU nation-states are social constructions that lack the ontological status that can be claimed for individual citizens. Also from a normative perspective, individual citizens emerge as ‘ends in and of themselves’ while states do not. Still, the concept of the nation-state has become a historical fact that has come to define the European continent as we encounter it. All understanding of politics in Europe today is premised on the existence of the state as the foremost political form of organization. This applies in particular to the European Union, which both practically and conceptually is premised on the pre-existence of the member states. 8

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8 The ultimate enlightenment philosopher Immanuel Kant (1795) has justified the persistence of the nation-state as a philosophical necessity since he considered that its dissolution in a supranational or global polity would leave a political vacuum that would soon issue in civil war. For Kant the nation-state fulfills certain political functions that cannot simply be taken over by a supranational polity. Also the existence of a plurality of states prevents power from being too much concentrated at a single political centre that would then be in danger of being abused.
Eventually, however, the future dynamic of the Union is not a philosophical matter. Nor is it determined by the institutional provisions of the EU Constitution that have been the main focus of this article. In the end, it is the actual use and perception of these provisions that are decisive. It is easy to overestimate the interest and readiness of citizens to actually employ the opportunities that the new draft Constitution provides for them. There are no guarantees that these are actually fully appreciated and used by the citizens and translate into a sense of identification. In fact, many indicators suggest that the actual engagement of the EU citizens with the EU consistently lags behind the institutional evolution. Most notable are of course the low turn-out figures at elections for the European Parliament, which with an average in 1999 of just below 50 per cent, remain significantly behind those of national elections. Results of the Euro-barometer surveys (2004: 24) indicating that 57 per cent of the inhabitants of the member states do feel ‘European’ give some hope. Still, this share is much lower than the national identity that almost all Europeans experience. And for the great majority of those who sense both identities, the national identity still takes precedence. Notably, the Convention and its draft Constitution have not led to a massive upsurge of engagement either, even though a relatively stable majority of about 60 per cent of the EU-15 population welcomes the idea of an EU Constitution (ibid. 88).

These figures confirm the view that in terms of political allegiance and identity, the level of the nation-state does remain an important horizon that European integration cannot simply brush over. Even if in some distant future, national identity might possibly become politically irrelevant in Europe, at this moment we still face the challenge of accommodating this fact within the emerging supranational political system. For as long as this is the case, the European Union is bound to remain a Union of citizens and states.
References


Chapter 5
Constitutional Amendment Initiatives in Canada: From Patriation to the Meech Lake and Charlottetown Accords

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Introduction
The Meech Lake and Charlottetown Accords cannot be understood without some knowledge of the events surrounding the patriation of the Canadian Constitution, just as the patriation of the Constitution must be seen in the context of what preceded it.

After a brief survey of Canada’s constitutional roots, this paper will examine the forces that led to the patriation of the Constitution, the processes followed by the political actors in coming to an agreement, the main elements of the resulting Constitution Act, 1982 and the opportunities and difficulties that followed its coming into force. The paper will then turn to a consideration of the Meech Lake Accord, which was devoted almost

1 This paper was prepared for a presentation at a series of four seminars organized by the Nordic Association for Canadian Studies on 'Popular Sovereignty and Democracy in Multi-National and Poly-Ethnic Entities Constitutional Processes in Canada and the EU Compared', 17-22 April 2004: University of Århus, 17 April 2004; University of Oslo, 19 April 2004; University of Gothenburg, 20 April 2004; and University of Copenhagen, 22 April 2004.

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exclusively to issues of concern to the province of Quebec, and will explain the way agreement was reached and some of the reasons for the eventual failure of the Accord.

The Charlottetown Accord, which came little more than two years after the death of the Meech Lake Accord, attempted to cover a broader set of issues than did the former Accord. Its focus was on issues that were of concern to Canada as a whole. That initiative ended in failure as well. The processes surrounding the Charlottetown Accord differed radically from those leading to the Meech Lake Accord, and these will be examined in the paper. Finally Canada’s prospects for future amendments will be touched upon briefly.

Background

Canada was created in 1867 by means of a British statute, entitled the British North America Act, now called the Constitution Act, 1867.\(^2\) That Act brought together three British colonies, the united province of Canada (now Ontario and Quebec), Nova Scotia and New Brunswick into a new Canadian federation. Other provinces were added, and Canada expanded until it now comprises ten provinces and three territories touching the Atlantic, Pacific and Arctic Oceans. The last province to join was Newfoundland in 1949 and the most recent territory to be created was Nunavut in 1999.

This United Kingdom statute established the federal institutions of governance for Canada and divided the governing powers between the federal and provincial legislatures. It established a number of other rules and founding principles and carried forward in the first recital of its preamble the understanding that Canada has ‘a constitution similar in principle to that of the United Kingdom’, thereby establishing a number of other unwritten rules and founding principles that had developed over the centuries in the United Kingdom. The Constitution of Canada also allows for the development over time of conventions that shape the way powers and duties are exercised in Canada.

Canada is a constitutional monarchy sharing Queen Elizabeth with the United Kingdom and other Commonwealth countries. The Queen’s powers and duties in relation to Canada are almost always carried out by the Governor General of Canada, who is appointed by the Queen on the recommendation of the Prime Minister of Canada. The Queen acts in relation to Canada only on the recommendation of her Canadian ministers, as

\(^2\) Constitution Act, 1867, 30 and 31 Victoria, c. 3 (UK), reprinted in R.S.C. 1985, App. II, No. 5.
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does the Governor General. The provincial governments have a similar relationship with the Queen\(^3\) and are independent in that regard from the federal government, notwithstanding the fact that the lieutenant governors, who are appointed for each province, are appointed by the Governor General on the recommendation of the federal government.

Canada was the first of the former British colonies to achieve an independent status but, because of its founding statute in 1867 did not establish procedures for major amendments to the Constitution to be made in Canada, that task remained with the United Kingdom Parliament\(^4\), as it turned out, until 1982.

It was not for want of trying that Canada was unable to devise an amending procedure for itself. Important advances were made with the *Statute of Westminster, 1931*.\(^5\) That Act removed the rule that United Kingdom statutes had supremacy over dominion\(^6\) laws (section 2) and provided that no United Kingdom Act would apply in the future to a dominion unless the Act expressly declared that the dominion had requested and consented to the enactment (section 4). However, it was necessary to ensure (in section 7) that the United Kingdom Parliament continued to have the capacity to amend or repeal the *British North America Act, 1867* since Canadians were unable to agree upon a wholly Canadian amending procedure.

This failure to agree persisted for another half century, despite many, many attempts made at numerous federal-provincial constitutional conferences. The matter was not resolved until late in 1981 when the federal government and nine of the ten provinces agreed to a package of constitutional amendments that included a comprehensive set of amending procedures. The package of amendments was submitted for approval to the United Kingdom Parliament one final time. The Constitution of Canada was patriated\(^7\) on 17 April 1982.

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\(^1\) In 1892, the Judicial Committee of the Privy Council found that the Crown is divisible as between the federal government and the provinces and that the Lieutenant Governor of a province is the direct representative of the Queen, not of the federal government. See *Liquidators of the Maritime Bank v. Receiver General of New Brunswick*, [1892] A.C. 437.

\(^2\) This was not the case for the other colonies that became independent somewhat later. See, for example, the *Commonwealth of Australia Constitution Act*, 63 and 64 Victoria, c. 12 (UK), enacted in 1900.


\(^4\) The term ’dominion’ at that time was used to refer to the more independent of the British colonies. It has now fallen out of use.

\(^5\) In the years leading up to the *Constitution Act, 1982*, Canadians started to speak of a ’repatriation’ of the Constitution. That term suggests that the Constitution had somehow once been in Canada and then removed to the United Kingdom. This was not the case. Therefore, the better term is ’patriation’. 

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by the signing by Queen Elizabeth on Parliament Hill in Ottawa of the proclamation bringing into force in Canada the Constitution Act, 1982.

The Constitution Act, 1982 is a schedule to the British act called the Canada Act, 1982. While the 1867 and 1982 Acts are the most important written instruments that form part of Canada’s Constitution, they are by no means the only ones. The Schedule to the Constitution Act, 1982 identifies thirty acts and orders that are included in the Constitution of Canada, and this list is not necessarily exhaustive.

The constitution act, 1982

Forces for change

The Constitution Act, 1982 includes more than just amending procedures. Part I includes the Canadian Charter of Rights and Freedoms, which itself includes important protections relating to Canada’s two official languages; Parts II and IV add recognitions in relation to the Aboriginal Peoples of Canada; and Part III makes commitments in relation to equalization payments for certain provinces and the reduction of regional disparities among Canadians. Only when one reaches Part V of that Act does one find the amending procedures.

Pierre Elliot Trudeau, the Prime Minister at the time of the patriation of the Constitution in 1982, came upon the political scene in Canada in the mid 1960’s. The 60’s were an interesting and exciting time in Canada, and Trudeau seemed to fit the mood of the times. Canada was celebrating its centennial year in 1967 and pride in Canadian citizenship was high. That was the year of Expo ’67 in Montreal. It was becoming increasingly anomalous that Canadians were not masters of their own Constitution.

At the same time Quebec nationalism was on the rise and some groups of militants were beginning to emerge. The October crisis in 1970 was a serious shock to Canadians. For most Canadians the kidnapping of a British diplomat, the kidnapping and murder of a Quebec cabinet minister and the invocation of the War Measures Act seemed totally alien. Another shock occurred in November 1976, when the Parti Québécois, a party committed at the time to taking Quebec out of confederation as we know it and proposing a new sovereignty-association arrangement, was voted into power under its popular leader, Premier René Lévesque.

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8 Schedule B to the Canada Act, 1982 (UK), 1982, c. 11.
Language issues had already taken on a new prominence, and the enhancement of minority language rights continued to be viewed as a way to make Quebec more comfortable within Canada. A Royal Commission on Bilingualism and Biculturalism had made strong recommendations in 1963 to take measures towards the equality of both official languages and to provide language protections. Trudeau, himself perfectly bilingual, had a vision of a Canada in which both French and English could flourish across the whole country.

Human rights in general became a preoccupation in the 1960’s in Canada, as elsewhere. The Parliament of Canada had enacted a Canadian Bill of Rights\(^\text{10}\) in 1960 under Prime Minister John Diefenbaker but, as an ordinary statute, it was not having as strong an impact in the courts as had been hoped for. Prime Minister Trudeau, who was very much an advocate of individual rights in the traditional liberal mould, became a strong advocate of an entrenched Bill of Rights, and this objective remained constant from the late 60’s through to the achievement of the Constitutional package that became the Constitution Act, 1982.

There were several lengthy periods of intense federal-provincial negotiations between 1967 and 1980, but all ultimately ended in failure. The frustration of Prime Minister Trudeau was evident. In 1978, the federal government published a white paper entitled A Time for Action putting forward a plan for the federal government, as a first step, to go ahead with constitutional renewal in areas of federal jurisdiction where agreement would not be necessary with the provinces. This too failed, when the Supreme Court found that the federal government’s Bill C-60 had overstepped its jurisdiction when it attempted to replace the Senate with a new institution called the House of the Federation.\(^\text{11}\)

After a brief period out of power in 1979, Prime Minister Trudeau returned in February, 1980 and was faced with the first of two referendums held in Quebec on the matter of Quebec’s independence. That referendum took place on 20 May 1980 and resulted in a vote of 59.6 per cent in favour of Canada and against embarking on a process that would lead to sovereignty-association, despite the popularity of the Quebec leader, René Lévesque. Late in the process, Trudeau weighed in with his contrary image of a strong Canada and promised to press ahead with constitutional change. That same


year, the Government of Canada embarked on one final attempt to patriate
the Constitution on Trudeau’s terms.

Reaching agreement

Trudeau, despairing of ever getting agreement with the provinces, boldly
proposed to go over the heads of the provincial politicians to the people of
Canada with a ‘people’s package’ that included a charter of rights, and a new
amending formula proposal that included the possibility of a referendum
should unanimous agreement on the formula not be reached among the
governments. Trudeau proposed to take this package directly to the United
Kingdom Parliament without involving the provinces at all. The package was
sent to a Joint Parliamentary Committee of the Senate and House of
Commons and the deliberations were televised for all to see. A number of
amendments were made at the Joint Committee to strengthen the protections
under the proposed Charter.

The issue of the legitimacy of the unilateral attempt at constitutional
amendment found its way to the Supreme Court, as had the Senate
Reference before it, in what we refer to as the Patriation Reference. This
time the Court found that the federal government did indeed have the legal
authority to take the package to the United Kingdom Parliament on its own,
but the Court went on to say that to do so would be unconstitutional in the
conventional sense. Constitutional convention dictated ‘that a substantial
degree of provincial consent is required’. The Court declined to set a
specific formula, but left it to the political actors to determine the degree of
provincial consent required. It was this ruling that led the federal government
back to the federal-provincial bargaining table yet again. While it was not
legally necessary to get provincial agreement, without that agreement the
amendment would lie under a cloud of illegitimacy.

The scope of the ‘substantial degree’ of provincial support was further tested
in what became known as the Quebec Veto Reference (1982) as a result of the
Government of Quebec’s claim that its consent was necessary for the
‘substantial degree’ of consent. Quebec based its claim on the fact that it was
the only province whose population was primarily French-speaking and on
the fact that it included at the time over 25 per cent of the population of
Canada. The Supreme Court of Canada found against the Quebec position,
thus removing any suggestion that the patriation of the Constitution, which

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12 Ibid.
15 Re: Objection to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793.
had by the time of the judgment already been completed, was not in any way tainted, either legally or conventionally.

The First Ministers' Conference that took place from 3 to 5 November 1981 was one of high drama. By the end of it, nine premiers and the Prime Minister had signed on to the package proposed by the Prime Minister, but some significant changes had taken place. The Premier of Quebec left in anger without signing. This was to colour federal-provincial relations for the next two decades. The characterization of the events of the night of 4 November 1981 remains to this day a matter of deep disagreement. However, the package that was agreed to on 5 November, with some minor adjustments that were made over the next few weeks by agreements reached through a series of telephone consultations, is the package that went forward to the United Kingdom for enactment and became the Constitution Act, 1982.

The constitutional changes that were achieved were far-reaching and profound. It is striking that there were significant changes made at the last minute to three important elements of the package. While the changes were in one sense surprising, one must not lose sight of the fact that negotiations were very fluid, there was no guarantee that a deal would be struck and most of the progress was inevitably made away from the formal bargaining table. The last minute changes to the federal proposal were the result secret negotiations that took place during the afternoon or evening of 4 November between the Attorney General of Saskatchewan, the Attorney General of Ontario and the Minister of Justice of Canada in what came to be known informally as ‘the kitchen accord’. The negotiations related to the amending formula, the Charter and aboriginal rights.

The amending formula

The Constitution Act, 1982 was the final realization of many attempts, beginning as early as 1927, to establish a procedure that would allow all amendments to Canada’s constitution to be made in Canada. The federal amending-formula proposal that had been tabled at the November, 1981 conference was based on one called the ‘Victoria formula’, which had achieved federal-provincial consensus in 1971 only to be lost due to a change of heart of the Quebec government after their delegation had returned home. That formula required a regionally based approval that took into account population size. The two largest provinces, Ontario and Quebec, would have had a veto. The 1981 proposal added the possibility of amendments being authorized by a successful referendum initiated at the federal level where sufficient provincial support was not forthcoming. The federal proposal also allowed for an interim period of two years when other proposals for an
amending formula could be put forward and voted on by referendum as an alternative to the one proposed by the federal government. During this interim period, a unanimity procedure for amendment would apply.

In the spring of 1981, about six months earlier, the Premiers of eight provinces, all but Ontario and New Brunswick, who came to be known as the Gang of Eight, had agreed to a different general amending formula. Their formula was based on the equality of the provinces with the general amending formula requiring the approval of the Senate, the House of Commons and the legislative assemblies of seven provinces. Some recognition of population was reflected in the requirement that the seven approving provinces must include 50 per cent of the Canadian population. This formula also included a power for provinces to opt out of any amendment where provincial powers, rights or privileges were to be affected. Where the amendment related to education or other cultural matters, compensation was to be paid by the Government of Canada to any province that had opted out of the amendment. This proposal was critical to Quebec’s support since it effectively gave them their veto insofar as an amendment might affect Quebec.

It was this Gang of Eight proposal that resurfaced as part of the ‘kitchen accord’. This was a great surprise to the federal officials involved in the conference, since we had understood from the beginning that this formula was simply not negotiable. For this reason, as drafter of the federal proposals, I had paid no attention to this formula. Unaware of the ‘kitchen accord’, I spent most of the night of 4 November 1981 adjusting the federal amending-formula proposal to reflect an agreement that I was told had been struck between Premier Lévesque of Quebec and Prime Minister Trudeau. I have no way of knowing how accurate this information was.

The Premier of Quebec had apparently abandoned the Gang of Eight and was now contemplating the federal proposal with some adjustments. Not all of the adjustments were straightforward – there were complexities added to the referendum provisions – so it took until dawn for my English version and the French version to be completed. However, the draft was ready for

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16 There were a total of five procedures, including a unanimity procedure for certain amendment considered to be central to the federation, a bilateral or multilateral procedure for amendments that related to one or more but not all provinces, and separate unilateral procedures for the provincial and federal governments for amendments of internal concern only.

17 See ss. 38 (3) and s. 40 of the Constitution Act 1982.
consideration by federal officials at an 8:00 meeting on the morning of 5 November. It was there that I learned about the ‘kitchen accord’.

On the morning of 5 November 1981 the Premiers of all the provinces except Quebec and the Prime Minister of Canada signed the agreement reached overnight in the ‘kitchen accord’. All that remained to be done was the drafting of the final package and its approval that afternoon by the Minister of Justice and Attorney Generals of the provinces. Needless to say, the drafter was rather tired, but running on adrenalin. The final draft was discussed and finally approved in the late afternoon without a representative from Quebec. Premier Lévesque had left with his delegation that morning.

There are many views on whether what happened should have happened and whether Quebec was deliberately excluded from the agreement. Some argue that a Quebec government dedicated to breaking from Canada would never have signed on to an agreement to patriate the Constitution. I do not know where the truth lies, but I cannot point to a specific part of the final deal that was the deal-breaker for Quebec. The reaction seems to flow from the fact that a deal was fashioned without the participation of the Quebec representatives. That deal was subsequently sold to the remaining provincial representatives, but was not accepted by Quebec.

The Canadian charter of rights and freedoms
By the time of that final federal-provincial conference, the details in the Charter were quite firmly established. The controversy centered mostly on whether to have a Charter at all. Prime Minister Trudeau was adamant that the patriation package must include the Charter, which itself must include language protections. We had thought he was also adamant that we should not accept the amending formula proposed by the Gang of Eight, but he ultimately compromised on that. There was a substantial compromise to be made in relation to the Charter as well. Section 33\(^\text{18}\) was added to the Charter, to allow most of the rights and freedoms guaranteed by the Charter to be overridden by Parliament and the provincial legislatures. The override would have to be renewed every five years. From all reports, this was a very bitter compromise for the Prime Minister. He would be pleased to know, no doubt, that the Federal Parliament has not to date made use of section 33.

\(^{18}\) Ss. 33(1) of the Charter reads as follows: ‘Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 of this Charter.’
It is significant that the Prime Minister managed to except from the override all the new provisions included in the Charter that relate to language rights, those relating to the status and use of the two official languages of Canada and those relating to the minority language educational rights of citizens of Canada. These were very important provisions for the Prime Minister.

Another change to the package was made at the last minute to provide special relief for Quebec alone from the full force of the minority language educational rights provision in the Charter. Subsection 23 (1) of the Charter establishes the right of parents whose mother tongue is the minority English or French language of a province or who themselves received their primary school instruction in the minority English or French language of the province in which they reside to have their children receive primary and secondary instruction in that minority language. The right based on mother tongue will not apply in Quebec until such time as the legislative assembly of Quebec issues a proclamation bringing it into force in Quebec. This exception was not enough to convince the Quebec government to support the patriation package. The exception still stands in Quebec.

In the years that immediately followed the patriation of the Constitution, the federal government embarked upon two initiatives to implement the new Charter. An omnibus bill was undertaken to amend all the provisions in federal legislation that would offend the new Charter. Determining what amendments might be necessary was no easy task in the absence of any guidance from the courts. This was particularly true in relation to the equality provisions found in section 15 of the Charter. In recognition of the need for a delay, the Charter itself provided for a three-year period before section 15 came into force.

The second initiative was a complete revision of the federal Official Languages Act to take into account the expanded status of French and English as official languages under the Constitution. The Bill was introduced into Parliament on 25 June 1987 and proclaimed in force on 15 September 1988. The preparation and consideration of that Bill took place during the same period as the Meech Lake Accord was being considered, and the Accord had some effect on the language in the Bill.

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19 Ss. 16-22 of the Charter.
20 S. 23 of the Charter.
21 See s. 59 of the Constitution Act, 1982.
Despite the widespread concern about changing the balance of power between Parliament and the courts, an issue that still stirs much controversy, individual Canadians very quickly took ownership of the Charter. It has become a symbol of pride and a source of identification for Canadians. It has become the unifying force that it was hoped it would become.

Rights of the aboriginal peoples of Canada
The third major change to the federal proposal that came out of the November 5 agreement was the deletion of the provision that affirmed the aboriginal and treaty rights of the Aboriginal peoples of Canada. It would appear that that provision was deleted from the final deal due to concern of a number of the provinces over the uncertainty as to what content that provision would be given. It had been included in the federal proposal as a result of active pressure from the Aboriginal communities in Canada both at home and in the United Kingdom. This provision was reinserted into the package of amendments in the weeks that followed the agreement as a result of media pressure and the series of telephone consultations that followed the agreement. It became section 35 of the Constitution Act, 1982.\(^\text{24}\)

The concern on the part of some of the provincial leaders was not irrational. This provision has been given a broad and progressive interpretation by the courts, probably due to a lack of speed on the part of governments to deal with the real problems of Aboriginal communities.

The Constitution Act, 1982 provided for an additional constitutional conference to deal with aboriginal matters within a year after it came into force and, at that mandated conference held in 1983, two more conferences were constitutionally mandated. An additional conference was held, so there were a series of four First Ministers’ conferences between 1983 and 1987 that were devoted exclusively to aboriginal interests. The first of these conferences resulted in amendments to Part II of the Constitution Act, 1982. These amendments added two important clarifications – that new land claims agreements would qualify as treaty rights and that aboriginal and treaty rights

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\(^{24}\) S. 35 of the Constitution Act, 1982 was amended in 1984 to add ss. (3) and (4) and now reads in its entirety as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, ‘aboriginal peoples of Canada’ included the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreement or may be so acquired.

(4) Notwithstanding any other provision of this Act the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
were guaranteed equally to male and female persons. They also added a constitutional commitment to hold a conference where representatives of the Aboriginal peoples of Canada were invited to participate before any amendment is made to a provision in the Constitution that relates to the Aboriginal peoples of Canada.

It is interesting to note that these amendments proclaimed in force in 1984 were made under the general amending formula and received the support of the federal government and the governments of all the provinces except Quebec. This has been the only amendment achieved under the 7/50 formula since patriation.

After patriation

The years in the mid-80’s that followed the patriation of the Constitution were years of consolidation under Canada’s new legal rules. Federal and provincial laws were amended to comply with the Canadian Charter of Rights and Freedoms. There was increasing focus on minority rights in general and minority language issues in particular.

There were a number of attempts at constitutional change. Among them were proposals initiated by several provinces to add protections for property rights to the Charter. These provinces had not been successful in having them included in the patriation package and had no more success after patriation.

Draft constitutional amendments were developed to regularize the failure of Manitoba to comply with its obligation under section 23 of the Manitoba Act, 1870 to enact its legislation in French as well as English. Bilateral negotiations took place between the Government of Manitoba and the Government of Canada, but they gave way ultimately to a solution imposed by the Supreme Court of Canada. The Court found all the legislation of Manitoba to be invalid since it had only been enacted in English, but allowed a period of time for the French versions to be drafted.

Early in 1985, constitutional proposals were developed by the Government of Canada to limit the Senate veto on legislation as a result of an impasse in the Senate on a borrowing authority Bill. It appeared for a while that the requisite seven provinces would support this amendment, but the Senate finally passed the legislation, the current crisis was avoided and the support for the amendments ebbed quickly as provincial governments changed.

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Finally, the years between 1983 and 1987 were taken up with the series of Aboriginal constitutional conferences that had been mandated by the constitutional amendments in 1982 and 1984. These were intensive multilateral conferences, involving at one time or another, officials, ministers, or first ministers. In the end, although at times it appeared that there would be agreement, no further agreements were reached in relation to the Aboriginal peoples of Canada after 1984.

While all this constitutional activity was going on, Quebec was staying on the sidelines. The Government of Quebec refused to recognize the validity of the constitutional amendments that had taken place in 1982. Neither ministers from Quebec nor the Premier of Quebec attended federal-provincial meetings that related to constitutional change. This boycott did not usually extend to the Quebec government officials, but the officials from Quebec lacked a clear mandate so were hampered in their participation.

As further evidence of their estrangement, the Government of Quebec enacted legislation\(^\text{27}\) assented to on 23 June 1982, shortly after patriation, that systematically applied the section 33 override to all their legislation. This blanket override was upheld in the courts. It remained in force for the five years authorized by section 33, but was not renewed when the five years ran out.

At the political level, there were a number of important changes to the landscape during this period. Prime Minister Trudeau resigned in 1984 and was replaced as Prime Minister and leader of the Liberal party by John Turner who was sworn in as Prime Minister in June of that year. An election was called that summer and a Conservative Prime Minister, Brian Mulroney, was sworn in as Prime Minister in September, 1984. In December, 1985, the Parti Québécois was replaced in Quebec by the Liberal Government of Robert Bourassa after almost ten years in government. There were changes of government, as well, in a number of the other provinces. The landscape was ripe for new initiatives.

The Meech Lake Accord
An agreement reached
The agreement to a new package of constitutional amendments at Meech Lake on 30 April 1987 came as something as a surprise to Canadians. In fact, the participants themselves, the Prime Minister of Canada and the premiers of

\(^{27}\) *An Act respecting the Constitution Act, 1982, R.S.Q. c. L-4.2.*
the provinces, were not necessarily expecting so quick an agreement themselves. It was in stark contrast to the failure to get an agreement on an aboriginal package of amendments just a month or two earlier.

There had, however, been a great deal of preparation for the Meech Lake agreement that had been going on quietly and without fanfare for some time. The foundation was laid in May 1986 at a symposium at Mont-Gabriel, Quebec, where the Quebec Minister of Intergovernmental Affairs confirmed Quebec’s five conditions\(^{28}\) for acceptance of the patriation package of 1982. The Government of Quebec was asking for five changes to the Constitution that would have symbolic meaning but that it felt would have minimal impact on the Constitution for those outside Quebec. The changes would relate to a recognition of Quebec’s distinctiveness, immigration, the Supreme Court of Canada, the federal spending power and the amending formula. This list was in sharp contrast to the much longer list of demands that had been coming from Quebec in recent years.\(^{29}\)

The provincial premiers agreed, in August 1986 at a meeting in Edmonton, to give their first priority to the issues identified by Quebec and to set aside their other priorities until Quebec’s demands had been addressed. Prime Minister Mulroney had written to them earlier in the summer to request that they consider this approach. What was known as the ‘Quebec Round’ was effectively launched. Through the fall of 1986 and the winter of 1987 a series of bilateral meetings took place secretly, between Quebec representatives and representatives of the other provinces, with a reporting back by Quebec to their federal counterparts. During this period, federal officials began to work on secret drafts with their Quebec counterparts. As a rule, no paper was exchanged. The Government of Quebec was reaching out to the rest of Canada, but was very sensitive to what they would consider to be yet another humiliation if they were to fail to achieve their modest set of conditions.

In this way, when all the governments met at Meech Lake on 30 April 1987 the five conditions of Quebec had been well canvassed. There had been only one meeting of officials before the First Ministers’ meeting held early in March. Drafts had been prepared to reflect each of Quebec’s five conditions. The package included the following elements:

\(^{28}\) These five conditions were in fact the same as had been set out in June 1985 in a Quebec Liberal Party position paper, entitled *Maîtriser l’avenir*, before that party came into power.

\(^{29}\) For example, the Parti Québécois proposed 22 conditions in its *Projet d’entente constitutionnelle* in May 1985 that was more typical of recent demands from Quebec.
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- recognition of Quebec’s distinct society;
- constitutional protection for agreements between the Government of Canada and individual provinces that would give provinces a greater role in immigration;
- entrenchment in the Constitution of the requirement that three of the nine Supreme Court judges should be from Quebec, and provision for provincial input into the appointment of judges;
- limitation of the federal spending power;
- a veto for Quebec, expanded to include all provinces, on a wider range of constitutional amendments, and compensation in any case (not restricted education and culture) where a province opts out of a transfer of legislative powers to Parliament.

The agreement reached at Meech Lake also included several additional elements that did not flow from Quebec’s demands.

Senate reform was a high priority for the Western provinces. In recognition that this was intended to be the ‘Quebec Round’, detailed proposals were not developed, but an interim arrangement was included in the package by which, whenever there was a vacancy in the Senate, the government of the province to which the vacancy related could submit a list of candidates from which the Government of Canada would have to make the Senate appointment. This procedure was to apply until a comprehensive Senate amendment was made. Provision was also made for annual First Ministers’ conferences on the Constitution. The agendas of those conferences were required to include Senate reform and fisheries roles and responsibilities.

The last of the components of the package to be agreed upon was the distinct society clause. The agreement only became possible when the distinct society provision was directly balanced, in the same subsection, against the recognition of the existence of English-speaking and French-speaking Canadians throughout Canada as a fundamental characteristic of Canada.

The only part of the Meech Lake Communiqué issued that night that contained actual draft language was the distinct society/duality clause. It had been carefully constructed and there was a desire not to lose the consensus on this clause. It was to be the most sensitive part of the package through the three years of discussions that followed. The other parts of the Communiqué were issued in more general language, even though in most cases the First Ministers had been looking at more detailed drafts.

\textsuperscript{36} The procedure was followed for three years, until the death of the Meech Lake Accord.
The Meech Lake Communiqué of 30 April 1987, was approved unanimously by the Prime Minister and the premiers of all the provinces, including Quebec, and was met with great enthusiasm and the hope that this might be the end of our Constitutional difficulties. That mood held through the technical discussions held over the next month or two at the officials’ level as the final draft was refined. At the final First Ministers’ meeting held to endorse the draft and make final changes, there were some tense moments and the discussions went on through most of the night of 2 and 3 June. However, at the end of the discussions, the First Ministers were able to give the package a second unanimous endorsement on 3 June 1987, this time with the final legal text.

An agreement lost
Initially, the Meech Lake Accord was met with a level of public euphoria. This was evidenced, for example, by the headline in one newspaper the day after the Accord was signed that qualified the Accord as ‘Un véritable tour de force’.

Quebec was the first to table the necessary resolution in its National Assembly and the resolution was adopted on 23 June 1987. That initiated the three-year period within which the resolutions of seven provinces would have to be adopted under the general amending procedure. The Meech Lake Accord included some amendments that called for this general procedure and others that required unanimous approval. The draft amendments were part of one interrelated package, so it was concluded that both the three-year limitation and the need for unanimity would apply simultaneously.

A Joint Parliamentary Committee was set up quickly after the resolution was adopted in Quebec, and the House of Commons followed with little delay in adopting the resolution in the fall of 1987. The legislative assemblies of eight provinces had passed their resolutions by the summer of 1988, all but Manitoba and New Brunswick.

However, by then opposition to the Accord had begun to gather strength. People complained that the deal had been cooked up behind closed doors by a group of men in suits. There was a general dislike and mistrust of what was referred to as ‘executive federalism’. The Charter had given Canadians a sense of empowerment and they were resisting secret deals. The federal

32 By then, the House of Commons had adopted the resolution for a second time to compensate for the fact that the Senate had failed to adopt the resolution. S. 47 of the Constitution Act, 1982 allows for amendments without Senate approval if the Senate fails to authorize the amendment within one hundred and eighty days after the House adopts its first resolution.
Constitutional Amendment Initiatives in Canada

government took the position, in the Parliamentary hearings on the resolution, that no changes should be made to the draft unless an ‘egregious error’ was found in the text. This added to the suspicions of the general public.

Probably the most significant factor in the ultimate demise of the Meech Lake Accord was the very fact that there were three years within which to complete all the provincial and federal resolutions. This allowed enough time for forces of dissent to gain strength and too long a period to maintain a sustained effort to push the agreement to completion. There were diversions during this period. For example, during the same period the *Canada-United States Free Trade Agreement* was being negotiated, and the Canadian legislation completed, involving its own series of federal-provincial negotiations and negotiations with the Americans.

In three provinces, changes in government had a direct impact on the fortunes of the Meech Lake proposals. The Newfoundland government of Clyde Wells actually revoked the assent given by the previous Newfoundland government. Frank McKenna came in as Premier of New Brunswick opposing the amendment, and, although he ultimately became one of the strongest supporters of the amendment, was for a significant period a strong force against it. The new Liberal government in Manitoba was less than enthusiastic about the package and became embroiled in lengthy hearings.

The distinct society provision was the focus of much of the dissent. Many objected to giving Quebec a special status, preferring the idea of the equality of the provinces. They were deaf to the arguments of the Government of Canada that pointed to the many other examples in the Constitution where provinces were not treated equally.

Many argued that the Government of Quebec would be able to evade the provisions of the *Charter* using the distinct society clause. Women’s groups and other minority groups became vocal. Similar concerns had been raised during the period between the Meech Lake Communiqué on 30 April 1987 and the final legal text on 3 June, and a section had been added at that time to address them. Section 16 of the final legal text provided that the distinct society/duality clause did not affect either section 27 of the *Charter*, relating

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34 S. 27 of the Charter reads as follows: 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
to multiculturalism, or the several provisions of the Constitution that relate to the Aboriginal peoples of Canada.

Women’s groups attacked the Meech Lake Accord with particular vigour. These groups had been successful in the brief period after the patriation package was agreed to in 1981, and before it was approved by Parliament, in forcing the removal of the override power in section 33 of the *Charter* in relation to section 28, a section that guaranteed rights equally to both sexes. During the Meech Lake Accord approval process, these women’s groups expressed concerns that the Government of Quebec could override rights of women using the distinct society clause. They went so far as to suggest that laws could be enacted using the distinct society provision that would require women to have a certain number of children so as to increase the population of Quebec. This suggestion was not well received by women’s groups in Quebec.

Aboriginal groups and territorial representatives complained that their concerns had been ignored. The apparent quick resolution of the Quebec issues must have been particularly upsetting to Aboriginal groups after the numerous, but ultimately unsuccessful, meetings to address aboriginal issues.

Undoubtedly the most important and persuasive foe of the Meech Lake Accord was former Prime Minister Trudeau. He still retained much of his original charisma. Trudeau had been the driving force behind the acceptance of a *Charter* and argued against diluting its effect in any way. He argued equally forcefully against a special status for Quebec. The arguments that Quebec was already ‘distinct’ and that the Constitution already contained unique provisions for Quebec carried no weight with Trudeau. His intervention in the debate had a profound effect.

The single event most damaging to the success of the Meech Lake Accord, however, was probably the invocation in December 1988 by Quebec’s Premier Bourassa of the notwithstanding clause (section 33 of the *Charter*) to override a recent Supreme Court judgment. The Supreme Court had just found that amendments to Quebec’s language legislation that banned English from commercial signs were unconstitutional under the *Charter* as offending

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35 It is not clear to me that section 28 adds a great deal to the *Charter* in any event. It adds to the general protection against discrimination under s. 15 of the *Charter*. It had been included in the Charter before patriation as a result of pressure from the women’s groups. S. 28 reads as follows: 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

freedom of expression guarantees. The Supreme Court in its judgment supported Quebec’s objective of establishing measures to protect the French language in Quebec. In fact, in assessing whether the limits on freedom of expression were reasonable under section 1 of the Charter, the Supreme Court took note of Quebec’s unique linguistic situation in a predominantly English-speaking North America, thus recognizing in our jurisprudence Quebec’s distinctiveness as the only French-speaking jurisdiction in North America.37 However, the Court found that the Quebec National Assembly had gone too far in passing legislation that banned English from public signs altogether, suggesting instead that some solution like a predominance of the French language on signs would be acceptable under the Charter.

The timing of Premier Bourassa’s announcement could not have been worse. Premier Filman, Premier of Manitoba, had just tabled the Meech Lake resolution for a vote. Premier Filman hastily withdrew the resolution the next day in anger, suggesting that such an extreme restriction of English minority language rights in Quebec violated the spirit of the Meech Lake Accord itself.

The pace of events quickened markedly in 1990 with only six month remaining in the three-year limit. Premier McKenna had changed his position and become an active proponent of the Meech Lake Accord by then. He had become convinced that the Meech Lake Accord was important for the unity of the country. However, he continued to look for a way to accomplish some adjustments to the package. He was particularly insistent on getting a provision into the Constitution that would entrench the provisions of a New Brunswick statute38 that guaranteed equality of status to the English and French linguistic communities in New Brunswick. Beyond this, there were a number of other preoccupations he wished to address.

This was a problem because the federal government was firmly convinced that the Meech Lake amendments must not be changed. It was also important to the Quebec government that the Meech Lake proposals take precedence over any other amendments. There were secret meetings involving federal officials and ministers with Premier McKenna and members of the McKenna government, and a plan was ultimately developed whereby a companion accord would be proposed.

Both the Meech Lake resolution and the proposed companion resolution were tabled in the New Brunswick legislative assembly on 21 March 1990.

The companion resolution was tabled two days later in the House of Commons and sent for study to a committee chaired by Jean Charest, then a young Conservative Member of Parliament. The Charest Report endorsed most of the recommendations contained in the companion resolution.

On this basis, in early June, 1990, Prime Minister Mulroney called the First Ministers together one last time in Ottawa for a dinner to consider the substance of the companion accord and to convince the Premiers of the three provinces, New Brunswick, Newfoundland and Manitoba, in which the Meech Lake resolution had not yet been adopted, to see to its adoption. That dinner stretched into a meeting that lasted a week. At the end of a pressure-cooker week there was an agreement. That agreement constituted the third time the Prime Minister of Canada and the premiers of all ten provinces agreed to accept the Meech Lake Accord.

The agreement of 9 June 1990 included an undertaking that the three remaining provinces would complete their approval process for the Meech Lake Accord prior to 23 June 1990. It included a number of other undertakings as well. Senate reform would be pursued over the next five years according to a process set out in the agreement and would be given constitutional priority. A companion package of constitutional amendments would be pursued as soon as the Meech Lake amendments were proclaimed in order to make a variety of adjustments to those amendments relating to sex equality rights, the role of the territories, language issues and further Aboriginal constitutional conferences. An agenda for future constitutional discussions was set out. Finally, it was agreed that a bilateral amendment for New Brunswick in relation to English and French linguistic communities would be pursued as soon as possible after the Meech Lake amendments were proclaimed.40

However, it was not to be. With less than two weeks before the deadline date of 23 June 1990, the premiers returned home. The agreement unraveled. It became evident that Premier Filmon of Manitoba would not be able to get around procedural difficulties that made it impossible to adopt the resolution in such a short time frame. One Aboriginal member of the Manitoba legislative assembly was refusing his consent. Premier Filmon had been

40 Jean Charest, head of the Liberal Party of Quebec since December 15, 1998, became Premier of Quebec when the Liberal Party replaced the Partie Québécois government in the general election held in Quebec on 14 April 2003.

41 The New Brunswick amendment was the only element of the 9 June 1990 agreement that was achieved. It came into force in 1993 as s. 16.1 of the Charter under the Constitution Amendment, 1993 (New Brunswick).
warning of this possibility during the final negotiations. However, the Government of Canada was satisfied that the additional time required could be managed if provincial legislative assemblies re-adopted the resolution, as necessary, in order to move the three-year period forward. Unfortunately, Premier Wells of Newfoundland, seeing the agreement unravel in Manitoba, decided not to put the resolution to a vote. At that point, on 22 June 1990, the Government of Canada conceded defeat.

I have always wondered whether it was absolutely necessary to concede defeat on 22 June 1990. As drafter of the various proposals, I had poured my heart into the success of the Meech Lake Accord. I also believed that Quebec’s demands were minimal; that it was a very easy package to accept; and that it might achieve an important reconciliation between the Government of Quebec and the other governments in Canada. If it had been up to me, I would have relied on the assumption that the three year period was not a static one, waited out the necessary period to have the resolution considered, and hopefully adopted in Manitoba, and then turned the pressure onto Clyde Wells to call a vote on the resolution in Newfoundland. However, the politicians had had enough. They decided to declare an end to the drama of the ‘Quebec Round’ that had lasted more than three years.

The one bright note, perhaps, is that much of the Meech Lake Accord is observed in practice, despite the fact that it did not become part of the Constitution of Canada.

The Charlottetown Accord
The Charlottetown process stands in marked contrast to the Meech Lake process. The Meech Lake Accord appeared to come into being overnight and then three years were spent trying to convince the public that it should be accepted. The ‘Canada Round’ began quite differently. Before any proposals were considered, extensive consultation mechanisms were put into place. The Meech Lake Accord came near the beginning of discussions; the Charlottetown Accord was the culmination of discussions.  

The two Accords differ, as well, in their scope. The Meech Lake Accord was intended to address only Quebec’s issues, while the Charlottetown process deliberately aimed to address everyone’s concerns. Although the Meech Lake

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41 It was even decided in advance to hold the final meetings in Charlottetown so that the Accord could be signed in the same place as the final agreement was made that led to Confederation in 1867. Ironically, Prince Edward Island was not among the first four provinces to form Canada in that year, but waited to join Confederation until 1871.
Accord included what the Government of Quebec considered to be the critical elements for Quebec to feel comfortable in Canada, it was in many ways more important as a symbol of the acceptance of Quebec’s special place in Canada by the other parts of Canada. The Charlottetown Accord, on the other hand, attempted to deal with a broad range of concerns from all parts of Canada. The Meech Lake Accord was short and quite simple; the Charlottetown Accord was long and complex.

In the late fall of 1990, less than six months after the demise of the Meech Lake Accord, the Government of Canada embarked once again on its quest for constitutional solutions to concerns of Canadians about their place in Canada. This time, the approach was to consult broadly before coming forward with any proposals for change. The Government expanded its reach beyond provincial issues to include aboriginal and territorial issues as well as those of ‘ordinary Canadians’.

Aboriginal communities were becoming increasingly vocal about their place in Canada. The Government of Manitoba was not able to get around the procedural impediment to the passage of the Meech Lake resolution because of the refusal of Elijah Harper, an Aboriginal member of the Manitoba legislative assembly, to waive the rules. Mr. Harper was acting with the backing of the Assembly of Manitoba Chiefs. They had decided not to support the Meech Lake Accord as a protest against the lack of attention given to aboriginal issues. The image of Elijah Harper, holding a feather, and refusing to back down was carried in all the news media across the country.

Just a few weeks later, in July 1990, there was a serious stand-off between an Aboriginal community and police at Oka, Quebec over sacred land that was to be used for a golf course. The territorial governments, with strong ties to Aboriginal communities, were also pushing to be heard. One of their main concerns was the fact that changes in the amending formula proposed in the Meech Lake package would have resulted in the need for unanimous consent of all the provinces for a territory to become a province, rather than the seven provinces required under the patriation package in 1982. Before 1982, it would have been possible for a territory to become a province with the consent of the Government of Canada alone.

Western Canadians were becoming increasingly alienated. They found the federal government to be unduly preoccupied with the more populous and powerful central Canadian provinces of Ontario and Quebec to the detriment of the West. Senate reform had become a touchstone for many Westerners, with the cry for a triple-E Senate, one that was elected, equal and effective.
The Government began by establishing two separate consultative mechanisms. The first was the Citizens’ Forum on Canada’s Future, set up on 1 November 1990, to engage in dialogue with Canadians in an informal and unstructured way. The Report that was tabled on 17 June 1991 reflected a general disenchantment with politicians and political processes and recommended direct grassroots consultations.

The second was a Joint Parliamentary Committee, set up on 17 December 1990, to consult on amendment processes. The Report of the Committee, tabled on 20 June 1991, recommended a number of constitutional amendments. It recommended that the amending formula known as the Victoria formula, based on regional blocks, replace the formula that was adopted at patriation, based on the equality of the provinces. Perhaps, more significantly, it recommended a number of other measures that did not require constitutional change, several of which suggested expanded consultations with Aboriginal peoples, territorial governments and the general public. It also recommended that legislation be adopted to provide for the possibility of consultative referendums in relation to constitutional proposals.

All the provinces set up similar commissions or committees to consider constitutional issues that carried on their activities over similar periods. All had reported by early 1992. There were two reports tabled in Quebec, still under a Liberal Government, both of which called for radical changes to the powers of Quebec if it were to stay in Canada and both of which contemplated the possibility of sovereignty of Quebec. Both recommended a referendum on sovereignty in Quebec by the fall of 1992.

In the spring of 1991, what is referred to as the ‘Canada Round’ can be said to have begun. A newly constituted Cabinet Committee on Canadian Unity and Constitutional Affairs began work in earnest under the chairmanship of a new Minister of Constitutional Affairs, former Prime Minister Joe Clark. It met weekly, and held its meetings at various locations across the country in

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42 The Chairman of the Commission, Keith Spicer, put it bluntly in his oft-quoted comment, ‘...there is a fury in the land against prime minister’. The quote is at pages 6 and 7 in the forward of the Report.
43 This Committee is commonly referred to as the Beaudoin-Edwards Committee.
44 The reports by the Allaire Committee were made public on 28 January 1991, and the report by the Bélanger-Campeau Commission was concluded on 27 March 1991.
45 Joe Clark was appointed to this position on 21 April 1991. He was the Prime Minister from 4 June 1979 to 13 December 1979 when his new Conservative government was unexpectedly defeated in Parliament. It was the opportunity of this defeat that brought Prime Minister Trudeau back into power on 18 February 1980.
order to underline the intention to take the concerns of all regions of Canada into account. The work done was detailed and serious; the Cabinet Committee was accompanied by a retinue of officials who assisted in developing proposals, often in the form of detailed drafts.

The Special Joint Parliamentary Committee on a Renewed Canada was established on 21 June 1991 to consider the Government’s proposals. The Government’s proposals came out in the form of a soft-cover publication called *Shaping Canada’s Future Together* that were made publicly available. This publication covered the range of topics that were to become part of the Charlottetown Accord. It was augmented by a series of individual publications, all with matching blue covers with a red maple leaf. It was hoped that these publications would be read by the public and would give them a deeper understanding of the issues at play. The Joint Parliamentary Committee, which itself had the power to travel and hold hearings throughout Canada, was given a deadline of 28 February 1992 to report.

As one final consultation exercise before the provinces were engaged, the Government of Canada arranged for a series of five conferences, each held in a different area of Canada, each to concentrate on a different aspect of constitutional change. The five subjects covered included the distribution of powers, national institutions, the economic union, a proposed Canada clause (including the distinct society clause, duality and the *Charter*), and a final general conference. A sixth conference was added, due to pressure from the Aboriginal groups, on aboriginal issues. That conference was held after the Special Joint Committee report came out.

These conferences were highly successful so far as they went. They were attended by between 200 and 300 people made up of federal, provincial and territorial representatives, including officials and politicians, Aboriginal representatives, members of the Special Joint Committee and, most interestingly, about 50 ‘ordinary Canadians’. The conference organizers chose the ‘ordinary Canadians’ by lot with an eye to regional balance from amongst persons applying to take part in these conferences. Since their expenses were paid, no one was excluded for cost reasons. Participants broke out into smaller groups to study the issue at hand, functioning like focus groups, and then reported back to the plenary, which was televised. It was remarkable how engaged the participants became and the seriousness with which they attempted to adjust proposals so that they were acceptable to all.

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46 This committee became known as the Beaudoin-Dobbie Committee.
Unfortunately, we have not figured out a way to transpose that feeling of ownership from the participants in those conferences to the public at large.

Finally, after all these consultative exercises had taken place, the multilateral meetings of government leaders began on 12 March 1992. This time, however, there were representatives not only of the federal government and the provinces, but also of the territories and the four national Aboriginal groups. Quebec alone was not represented at the meetings, having refused to be drawn into meetings with so many different parties, and not having any special status. The meetings were held in private, but there were briefings to the press at the end of each day of meetings. A large retinue of officials supported the leaders. Meetings were held in different parts of Canada at a frenetic pace through the spring and into the summer.

The range of subjects was extensive. All the elements of importance to Quebec that were included in the Meech Lake Accord were included, but there was much, much more. The preoccupations of all the participants were addressed. The only way to manage the breadth of subjects was to create separate working groups of officials to concentrate on specific parts of the package. Four working groups were created.

The first group dealt with the Canada clause and the amending formula. The Canada clause was an important symbol of the inclusiveness of this round of Constitutional discussions. It ultimately included the distinct society clause, and the recognition of Canada’s linguistic duality, but only as two of eight fundamental characteristics that were felt to be deserving of express mention as well.

The second working group dealt with institutions, including the Senate and the Supreme Court. The Senate proposal involved equal provincial representation in an elected Senate, but removed the absolute veto from the Senate. The Supreme Court amendments were similar to those in the Meech Lake Accord.

The third working group dealt with Aboriginal peoples and their rights. The most remarkable work was, I think, done in this working group. A proposal was fleshed out for the recognition of an inherent right to Aboriginal self-government within Canada in the context of a commitment on the part of

48 The distinct society provision now reads: ‘Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition’. The descriptive clause added to the end was intended to circumscribe the potential breadth of the concept.
federal, provincial and territorial governments to negotiate the implementation of that right.

The fourth group dealt with the distribution of powers, the spending power, the economic union and a social charter. The discussions in this group were not easy to manage, particularly in relation to the distribution of powers, and the issues were complex. This was probably the weakest area of the Accord.

It was miraculous that agreement was reached on such a package. There was pressure to come to an agreement in time to ensure that the referendum that was to take place in Quebec by 26 October 1992 would be on renewed federalism, rather than on sovereignty. Premier Bourassa accepted an invitation of the Prime Minister to meet with other First Ministers on 4 August 1992, and this set the stage for the return of the Quebec delegation at the critical Constitutional Conference in Ottawa from 18 to 22 August. Tentative agreement was reached at that conference and, with only a few details remaining, the final conference was held for symbolic reasons in Charlottetown where agreement of all parties, including Premier Bourassa, was reached on 28 August 1992.

A week after agreement was reached, Quebec set its referendum question on the Charlottetown Accord, rather than on sovereignty. Prime Minister Mulroney set in motion the national referendum for the rest of Canada on the same question for the same day, 26 October 1992.

Holding a referendum on constitutional change was something new for Canadians. It is not legally required. Nor had a procedure involving a referendum for constitutional change ever been contemplated except once, in connection with the patriation package put forward by Prime Minister Trudeau, and that proposal was ultimately rejected. The two national referendums that had been held in Canada since Confederation, one on prohibition in 1898 and one on conscription in 1942, had resulted in bitter divisions in the country. There was concern, therefore, that the referendum on the Charlottetown Accord might result in similar regional splits.

The referendum vote was lost with about 55 per cent voting against the Accord across the country. The aboriginal vote on reserves was somewhat higher at 62 per cent. Fortunately, there were no major discrepancies in the voting patterns in the different regions of Canada. Only a very slightly higher

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50 Both of those referendums had been supported generally by English-speaking Canadians but opposed by French-speaking Canadians.
percentage of those living in Quebec rejected the Accord compared to other Canadians.

Despite all the efforts that had been made to include the Canadian public in the development of the amendment package, there remained a significant level of distrust on the part of the public. Furthermore, the amendments were so wide-ranging that they left plenty of scope for the voters to find something that they did not like about them. The Accord was undoubtedly rejected not because of a united reaction by Canadians, but for multiple different reasons. Certainly, the reasons for voting against the Accord in Quebec were likely quite different from those outside Quebec.

As would be expected, the failure of the Charlottetown Accord brought with it another deterioration in relations between Quebec and the rest of Canada, although it was not met with the same emotion as was the demise of the Meech Lake Accord. There was no appetite to try again for broad constitutional reform, and that feeling has persisted until the present time. On 12 September 1994, at the following election in Quebec, the Parti Québécois defeated the Liberal Government of Robert Bourassa. Part of their election platform was to hold a referendum on sovereignty if elected. That referendum was held on 30 October 1995. It was so close\(^1\) that it sent shock waves through the federal government and the rest of Canada.

The next few years in Canada were tense ones. The Government of Canada finally took direct action in the courts\(^2\) and through legislation\(^3\) to combat the threat of Quebec secession. It has recognized the possibility of secession, but has tried to communicate the difficulties and disadvantages for Quebec itself if it were to leave Canada. It is not clear how much effect these efforts have had, but, for whatever reason, the threat of secession seems to have abated for the moment. The Parti Québécois government was defeated in a Quebec election held on 14 April 2003 and the Liberal Government is once more in power in Quebec, under the leadership of former federal Conservative, Jean Charest.

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\(^1\) The vote was 49.42 per cent in favour of the ‘yes’ side and 50.28 per cent in favour of the ‘no’ side. Canadians outside Quebec, and many in Quebec, watched in horror on television as the vote projections swayed from one side to the other.


\(^3\) An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26. The Act is commonly referred to as the Clarity Act.
Conclusion

After the failure of the Charlottetown Accord and up to the present time, there have not been many voices calling for major constitutional amendments. There have been no multilateral constitutional conferences held since 1992. Canadians appear to have lost their appetite for what had earlier been called our national pastime. It may be that we have been trying too hard for constitutional change and we need a few years to determine what changes may actually be necessary or desirable.

Frequent constitutional change is not necessarily a good thing. There are those who suggest that our constitutional amending procedures are too rigid. I would argue that this is not necessarily the case. A constitution is the fundamental law of a country and adjustments to that law should not be taken lightly. Ideally, constitutional changes should have the support of a strong majority of the population and should be something for which support has developed over time. The Constitution should not be used as a political tool, without regard to the merits of the changes being proposed.

Secondly, the Canadian Constitution has shown itself to be quite flexible over the years. The courts have found ways to allow our constitutional rules to grow and develop, as necessary, to reflect new attitudes in our society and to accommodate changes brought about by modern life.

Furthermore, one need not always amend the Constitution to accommodate change. It is instructive to examine Quebec’s five objectives that were pursued unsuccessfully both in the Meech Lake Accord and the Charlottetown Accord. While none are reflected in the Constitution, they have not been ignored. Practical arrangements are in place in relation to four of Quebec’s five objectives.  

With respect to the recognition of Quebec as a distinct society, we have seen that the Supreme Court has recognized the special needs of Quebec to maintain its French-speaking character. Following up on a pledge made just before the 1995 referendum on sovereignty in Quebec, the federal

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54 The fifth objective related to compensation to a province that opted out of a national shared-cost program established by the Government of Canada in an area of exclusive provincial jurisdiction. This difficult area of the federal spending power is a constant source of complaint for the provinces. Many discussions have taken place in the years that followed the defeat of the Charlottetown Accord and certain accommodations have been made.

government tabled resolutions\textsuperscript{56} both in the House of Commons and in the Senate that recognized Quebec as a distinct society and undertook to be guided by that reality.

Immigration agreements continue to be negotiated with Quebec. Under them, Quebec is given the potential for a higher than proportionate share of the immigration for demographic reasons. Although immigration does not reach those levels for Quebec, the agreements result in proportionally higher payments being made to Quebec. The main objective for Quebec is to be able to participate in the selection of persons who will settle in Quebec so as to protect their linguistic and cultural profile. Although these agreements did not get the Constitutional protection proposed in the Meech Lake and Charlottetown Accords, an agreement still exists between the Government of Canada and the Government of Quebec.

Three of the nine judges of the Supreme Court of Canada continue to come from the Bar of Quebec. Although an amendment has not been made to Constitution, there is a good argument to be made that the requirement that is found in the federal \textit{Supreme Court Act}\textsuperscript{57} already forms part of the Constitution. Whatever the case in that regard, the rule stands, as it has for many years. No move has been made, however, to proceed with the proposal that Supreme Court judges be chosen from among names submitted by the provinces, and this would appear unlikely to happen in the near future.

With respect to the amending formula, following up on a pledge made just before the 1995 Quebec referendum on sovereignty, the Government of Canada introduced a bill, commonly known as the \textit{Quebec Veto Bill}\textsuperscript{58}, imposing upon itself the requirement of regional consent\textsuperscript{59} before a resolution can be proposed by any Minister of the Crown. This statutory requirement is superimposed on the constitutional amending formula such that the Government of Canada must apply both formulas when proposing constitutional amendments. This has the effect of giving Quebec a veto for all amendments that could affect it so long as the \textit{Quebec Veto Bill} is in force.

\textsuperscript{56} The resolution was adopted in the House of Commons on 11 December 1995 and in the Senate on 14 December 1995.


\textsuperscript{58} The proper name of the Act is \textit{An Act respecting Constitutional Amendments}, S.C. 1996, c. 1.

\textsuperscript{59} The formula in the \textit{Quebec Veto Bill} is very similar to the Victoria amending formula, which was the inspiration for the amending formula proposed by the Government of Canada in its patriation package. The proposal was changed on the night of November 4, 1981.
Senate reform was an important element of both the Meech Lake Accord and the Charlottetown Accord. It was added mainly as a result of Western Canada’s concerns that it was not adequately represented in Ottawa and that it was being ignored. No progress has been made on this issue, but it remains an irritant to many Canadians and could be revived at any time in the coming years.

Finally, one must not lose sight of the fact that there have been a number of successful constitutional initiatives in Canada since 1982. Most of these initiatives have involved the bilateral amending procedure\textsuperscript{60}, but just two years after patriation we did have a successful amendment relating to the Aboriginal peoples of Canada using the general amending formula, requiring approvals from seven provinces having at least 50 per cent of the population of Canada.

The bilateral amendment formula has been applied in relation to religious education rights in Newfoundland on three separate occasions and in Quebec, minority language communities in New Brunswick, a name change from ‘Newfoundland’ to ‘Newfoundland and Labrador’, and an amendment to remove a requirement to maintain a ferry from the mainland to Prince Edward Island to accommodate the fact that a bridge was being built from the mainland to Prince Edward Island. As well, there have been several amendments using the unilateral federal amending power for matters internal to the executive government, Senate or House of Commons.\textsuperscript{61} An important amendment made under this power related to the creation of the new territory of Nunavut.

Now that we have a less hostile government in Quebec, and now that the separatist movement seems to have abated to some extent, perhaps the time is not too far off when we can look once again at some of the other issues that might require constitutional change. Perhaps the next multilateral initiative will deal with Senate reform.

\textsuperscript{60} S. 43 of the \textit{Constitution Act, 1982} provides for an amendment to the Constitution in relation to any provision that applies to ‘one or more, but not all, provinces’ to be made when authorized by the Senate and House of Commons and ‘the legislative assembly of each province to which the amendment applies’.

\textsuperscript{61} These amendments were made by federal statute pursuant to s. 44 of the \textit{Constitution Act, 1982}. 
Chapter 6
The Canadian Experience of a Charter of Rights

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Introduction
This paper is not written by a lawyer, although the academic legal community plays the leading role in Charter analysis. There are, however, virtues in bringing a political science perspective to the Charter, for the Charter was driven by political purposes. Indeed, discussion of the constitutional protection of rights in Canada has always been conditioned by various extraneous factors. A brief historical excursion will help to explain the absence of a constitutionally entrenched rights protecting statute until recently.

A brief historical excursion
No one could credibly claim that Canada was home to rampant abuse of citizen rights in the pre-Charter era (1867–1982). There had, of course, been rights abuses by governments, and they were cited in the build-up to the Charter as justification for adding a rights-protecting instrument to Canada’s constitutional framework. By themselves, however, they would not have provided enough momentum to institute an entrenched charter.

1 This chapter has been reprinted with the kind permission of Nomos, Baden-Baden. It was originally published in the volume The Chartering of Europe: The European Charter of Fundamental Rights and its Constitutional Implications, edited by E. O. Eriksen, J. E. Fossum and A. J. Menéndez, Baden-Baden, Nomos, 2003.
The 1982 Charter was a late arrival on the Canadian constitutional scene. For the first century following Canada’s founding (1867), advocates of entrenched rights were a distinct minority. The idea of an entrenched charter or bill of rights could be, and was, portrayed as alien, as un-British and therefore un-Canadian, or phrased differently as an American idea, and therefore un-Canadian. Canada was founded in 1867 with a constitutional framework in which parliamentary responsible government and federalism, capped by constitutional monarchy, were the central institutional pillars. The confederation task was to bring together politically organised communities into a new federal nation, not to create a new nation of rights bearing individuals. In any event, rights were thought to be politically secured by the inheritance of the British political tradition. The rights that Englishmen carried around the globe were considered superior to rights whose effectiveness depended on their codification.

The fact that the separate colonies with their own governments pre-existed the move to Confederation meant that if some form of union was to take place federalism was the obvious response. The choice of federalism received additional support from the expectation that the new dominion would expand to the Pacific coast to incorporate British Columbia, and would seek to include Prince Edward Island and Newfoundland, which had resisted initial entreaties to join the new country. The combination of geography and the distinct local identities of the separate colonial communities therefore allowed no alternative to federalism. This conclusion was reinforced by the fact that the attempted creation of a single political community in the United Province of Canada, formed in 1841, and bringing together the future provinces of Ontario (then Upper Canada) and Quebec (then Lower Canada) had clearly failed, with the consequence that the breakup of the United Province into its two component parts was inevitable. For the future Ontario and Quebec, which contained the bulk of the population of the emerging new country, and had been joined in an unhappy constitutional marriage for a quarter of a century, Confederation was a deeply desired coming apart as a prerequisite to the larger coming together with other colonies in the central government of the new nation. In sum, the political facts at the time of Canada’s founding, and those that would follow the anticipated expansion of Canada to the west coast – thousands of miles away – meant that federalism, so to speak, chose itself.

British responsible government also triumphed because no competitor surfaced as a reasonable challenging alternative. The separate colonies which came together to constitute Canada already enjoyed their own British system of parliamentary government, linking the political executive to the legislature,
and were unwilling to give it up. It also followed that the new central
government which would cap the emerging federal system would almost
automatically adopt the responsible government model already in place in the
colonies.

Responsible parliamentary government in the separate colonies rested on and
nourished a strong sense of local (later provincial) identity. It was assumed
that over time the same system in the central government would contribute
to an emerging Canadian identity. For the colonists, responsible government
was a proud confirmation of their British heritage. They were not rebelling
against their British past as they worked to create a new country. They were
simply rearranging their relationship with each other, while retaining their
patriotic connection with the ‘motherland.’ While the francophone
population of Quebec was naturally less inclined to relate to Great Britain
with the same kin-inspired loyalty as were British colonists, they had
negligible counter-allegiance to France and neither sought nor found
constitutional inspiration from that country. France, in other words, was not
a ‘mother country’. Finally, separation of the Presidential executive from the
legislature in the next-door American example, which in some circumstances
might have provided a counter-model, was incapacitated for that task by the
civil war – 1861–1865 – which colonists north of the border often attributed
to faulty American constitutional arrangements. In these circumstances, the
American Bill of Rights, which was associated with those arrangements, was
not championed by the Canadian constitution-makers.

Parliamentary responsible government with its partner constitutional
monarchy were selected, among other purposes, for their nation-building
capacities. The imperial British presence in the form of constitutional
monarchy at the head of the federal and provincial governments served a
nation-building purpose by differentiating Canada from its republican
southern neighbour. It strengthened an imperial allegiance across the Atlantic
to Great Britain. This psychologically gave Canadians a split identity, one
branch of which was in Europe. This reassuringly contrasted Canada to the
United States by underlining the absence of any revolutionary rejection of
Europe in the Canadian founding. This symbolic separation from the
American neighbour was nation-building by contrast. – ‘We are not you.’ –
Responsible parliamentary government was nation-building in the more
active sense that it facilitated strong executive leadership by the central
government in the project of expansion. Finally, federalism with its sensitivity
to local conditions was nation-building by facilitating the addition of new
provinces. Given the impediments to central control of far flung territories, a
unitary state, had it been selected, would have quickly foundered under the weight of centrifugal pressures.

The constitutional system established in 1867 still exists well into its second century – thus giving Canada one of the oldest uninterrupted constitutional systems in the contemporary world. This survival reflects the obvious fact that Canadians have enjoyed a living constitution characterized by a high degree of de facto flexibility, which has compensated for the difficulty of formal constitutional change. In addition, of course, Canada has had the good fortune of geographical isolation from the wars of the 20th century, and thus has been spared both invasion and occupation. For Canadians, war happens elsewhere. The Canadian military experience has not involved physical defence of the homeland, but the sending of Canadian troops to fight or keep the peace in foreign lands.

This constitutional system, which differentiated Canada from the United States by, among other things, its conscious rejection of a Bill of Rights and by the relative absence of a revolutionary tradition, gained nourishment from the British connection. The imperial British context positively linked Canadians to a distinct British political tradition, and gave them a symbolically gratifying connection with a global imperial enterprise. A ‘Constitution similar in Principle to that of the United Kingdom’ in the words of the preamble to the British North America Act was for nearly a century seen as a source of pride, not as imitative colonial borrowing. In summary, for the better part of a century in post-Confederation Canada an adaptation of British constitutional theory and practice – federalism excepted – was comfortably applied in Canada. This nation-building without a charter might be inelegantly labelled diaspora constitutionalism, the migration of a tradition.

This old world view declined in legitimacy as the supporting assumptions which had sustained it weakened. A ‘Constitution similar in Principle to that of the United Kingdom’ lost some of its lustre as the British Empire shared the fate of other global European empires in the first two decades following WW II. The gratifying imperial red on the global map, which had given Canadians an identity far beyond the capacity of a relatively small country to sustain, shrank to a few slivers as the Empire retreated when confronted with colonial nationalism. Simultaneously, Canadian trade with the United Kingdom, which had earlier been Canada’s prime market, as well as an important source of Canadian imports, shrank to almost negligible proportions. In 1910, 50 per cent of Canadian exports went to the United Kingdom, and 37 per cent to the United States. In the same year, 26 per cent
of imports came from the United Kingdom and 59 per cent from the United States. In 1995, by contrast, merchandise exports to the United States were 80 per cent of the total, and imports from the United States were 75 per cent of imports total. By the mid-nineties, only 1.5 per cent of Canadian exports went to the United Kingdom, and 2.4 per cent of our imports came from the former ‘mother country.’ Imports from and exports to Japan in the mid nineties were, respectively, 4.5 per cent and 5 per cent, putting Japan ahead of the United Kingdom as a trading partner. Accordingly, the imperial connection came to have less and less practical significance and symbolic importance for Canadians.

In the sixties, a profound relaxation of immigration criteria in response to an anti-racist international climate fundamentally transformed the ethnic demography of the Canadian population. Between 1961 and 1971, 75 per cent of Canadian immigrants came from the United States (6 per cent) and Europe (69 per cent). Between 1981 and 1991, two decades later, 70 per cent came from Asia (48 per cent), Africa (6 per cent) and the Caribbean, South and Central America (16 per cent). The official policy of multiculturalism, adopted in 1971 in response to pressures from Ukrainian and other European background Canadians who feared being excluded by a two-nation policy that singled out French and English Canadians as founding peoples, was pulled in a multiracial direction by the dramatic increase in non-European background immigrants. This changed ethnic demography further weakened the link with the United Kingdom, reduced trust in majorities and generated potential supporters for a charter of rights.

The Canadian charter and its sources

The idea of an entrenched charter was given additional stimulation by a global rights consciousness fed by the United Nations. The Universal Declaration of Human Rights (1948) was followed by a succession of rights instruments. These were triggered by the third world majority in the United Nations General Assembly, with fresh memories of the denial of rights in the colonial era, and by the brutalities of WW II, specifically the Holocaust. Post-Holocaust, benign beliefs in the trustworthiness of governments were put on the defensive. As the idea of entrenched rights became a powerful norm, countries without them could be seen as defying the spirit of the times. Writing in 1968, the Canadian legal scholar Maxwell Cohen asserted that ‘Human rights became (...) within the past twenty years, an important piece

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3 Ibid. 67.
of ‘debating’ language (...) part of the political dialogue, part of the debating experience of peoples in all parts of the world, even those in affluent societies’ (cited in Cairns 1992: 28-9).

Even in the United Kingdom, where the principle of parliamentary sovereignty was deeply embedded in the political culture, and the common law was lauded for its capacity to protect human rights, ‘a consensus slowly emerged in the legal establishment and the civil rights community that the common law alone was no match for the expanding power of the media and the executive and could not be left to provide the necessary safeguards against abuse’. By the mid-nineties, the United Kingdom came to be seen as a laggard in protecting rights, ‘as suffering from a human rights deficit’ (Malleson 1999: 24).

The initial Canadian response, following several post-war inquiries by parliamentary committees, was the 1960 Bill of Rights. The 1960 Bill was an ordinary statute. It did not apply to the provinces which had long been considered more likely to violate rights than was the federal government. It was unaccompanied by significant public mobilization. Hence its public roots were shallow. Unsurprisingly, the judiciary did not treat the bill as an invitation to play a vanguard role in the defence of rights. By 1982, when the Charter of Rights came into effect, only one statute had been struck down for being in violation of the Bill.⁵

Nevertheless, the Bill of Rights accustomed Canadians to the idea that in normal circumstances parliamentary majorities might be limited by a body of rights beyond the reach of legislatures. Further, the 1960 Bill of Rights had, among its other objectives, a nation-building purpose, as did the later 1982 Charter. The Bill’s sponsor, Prime Minister John Diefenbaker, of German background, saw the Bill as homogenizing the Canadian identity by doing away with the concept of hyphenated Canadians. He viewed the latter as creating a hierarchy in which Canadians of British and French backgrounds were at the top of a hierarchical allocation of status. By contrast, the uniform possession of rights on a country-wide basis would, in a sense, level the citizenship playing field by wiping out invidious distinctions based on time of arrival in Canada, and on ethnic background.

Twenty-two years after the 1960 Bill of Rights, the 1982 Constitution Act gave Canadians an entrenched Charter of Rights and Fundamental Freedoms. While it is tempting to explain the Charter as a response to a history of rights violations, to do so would be wrong.

Advocates of a charter of rights for Canada did not lack ammunition from the Canadian past. Texts on the background of the Charter cite, among other examples, the WW II internment of Japanese Canadians, the ambiguous position of Indian peoples - with a few exceptions, deprived of the franchise until 1960 – the insensitivity of the Duplessis regime in Quebec (1936–39; 1944–59 – the year of Duplessis’ death), and various other incidents (Tarnopolsky 1975: 3-14; Williams 1985: 100-4). While such examples of rights abuses could be and were cited as supports for a Canadian charter no reasonable analyst could successfully argue that Canadians were groaning under a tyranny, or that in the world of actually existing political systems Canada could be ranked outside the top tier of those polities whose citizens already enjoyed the various protections that charters were designed to institute.

If the source of the Canadian Charter does not lie in a shameful Canadian past from which an escape was sought, where does it lie? A contributing factor was the diminished prestige of parliamentary regimes. The United Kingdom, with a disappearing empire, a diminished status as a world power, and reduced trade and immigration links to Canada, no longer endowed parliamentary regimes in Canada or elsewhere with vicarious prestige. Simultaneously, as already noted, parliamentary regimes whose governments were not constrained by courts and constitutional charters began to appear anachronistic when viewed from the perspective of an emergent international human rights regime. This latter phenomenon, the focus of a massively proliferating and overwhelmingly positive literature of analysis, unquestionably contributed to the adoption of the Canadian Charter. Its role, however, was facilitative rather than determining.

The triggering factors were domestic, not of rights abuses but of trends in Canadian federalism. The hegemony of the central government, given initial sanction in the original 1867 Confederation agreement, and which – after the cyclical fluctuations common in federalism – vigorously re-emerged in WW II and was sustained in the early post-war years, was in retreat by the sixties.

The strongest challenge to the leading role of the central government came from a state-centred Quebec nationalism supported by all provincial parties in Quebec since 1960. The emergence of the independence oriented Parti Québécois (PQ) in 1968 raised the stakes to such an extent that the possible breakup of Canada was openly discussed. The gravity of the situation was underlined when the PQ won power in 1976, and promised a referendum on Quebec independence during its first term in office. (The referendum, based
on a convoluted question, took place in 1980, and was lost to the federalist forces led by Prime Minister Trudeau.)

Concurrently, other provinces, especially Ontario, British Columbia and Alberta, were actively involved in a creative process that came to be called province-building. All provincial governments, with that of Quebec leading the way, were busily constructing provincial societies. Responsible parliamentary government based on increasingly competent provincial bureaucracies pursuing provincial goals was seen by the federal government as an agent of a threatening centrifugalism.

To Prime Minister Trudeau, these trends, particularly the independence strand in Quebec nationalism, had to be challenged by a reinvigorated pan-Canadian nationalism which could counter the provincialising of Canadian society. The Charter was the key instrument in the counter-attack he mounted against provincialising trends which he saw as weakening the Canadian nation, and the federal government which spoke for it.

At its deepest level, the Charter was an instrument to nationalize the psyche of the citizenry. Its goal was to keep alive and strengthen a counter-vision of Canada which would challenge and weaken provincialism, either of the threatening Quebec nationalism variety, or of the less culturally based province-building drives outside of Quebec. The Charter and the new responsibilities it gave to the Supreme Court was a major part of Trudeau’s vision to unify Canadians around a distinctly Canadian concept of citizenship. In no small part this movement was designed to defuse the nationalist sentiment in Quebec by articulating a pan-Canadian national identity and by drawing the attention of all Canadians to a ‘higher’ set of values.

(Vaughan 1999: 12)

These political, nation-building goals provided the impetus for the Charter. The protection of rights was secondary, or in different phraseology was a key instrument for the Charter’s political objectives. Minority language rights, English in Quebec, and French outside Quebec, were given constitutional recognition, particularly in the field of education. Minority French language rights were designed to strengthen the claim that the French language could flourish outside Quebec, and thus to weaken the Quebec government thesis that only in Quebec and with the sympathetic support of the Quebec government could the French language thrive. Simultaneously, the Charter’s support of the language rights of the minority English language community in

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6 See also Webber (1993: 208-9).
Quebec was to be a constant reminder that there were two historically based languages in Quebec – that Quebec was a homeland to more than francophone Quebeckers.

More generally, the protection of rights from violation by either level of government was intended to underline the idea that the rights in question were Canadian rights. This overall message was reinforced by section 23 of the Charter with its guarantee of ‘minority language educational rights’ for ‘English or French linguistic minority population(s)’ in the provinces; – by section 27 which required Charter interpretation to be ‘consistent with the preservation and enhancement of the multicultural heritage of Canadians’; – by section 28 which guaranteed Charter rights and freedoms ‘equally to male and female persons;’ – and by the equality rights of section 15, particularly by subsection 2 of section 15 which allowed affirmative action for the ‘amelioration of conditions of disadvantaged individuals or groups’. The Charter was designed to wean individual citizens from provincialism and recruit them to the Canadian cause, leading to a strengthened pan-Canadian identity based on common country-wide citizen possession of rights. A separate clause in the Charter (Section 25) protected ‘aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada’ from abrogation or derogation by the Charter.

The dramatic setting for the Charter’s introduction underlines its role as an instrument of the central government in the Quebec-Ottawa confrontation, and more generally in the federal-provincial struggle. Following the 1980 Quebec government referendum, decisively won by the federalist forces 60–40 per cent, which had asked the Quebec electorate to give the Quebec government authority to negotiate a sovereignty-association agreement with Canada, the federal government of Prime Minister Trudeau launched a major effort to amend the British North America Act. The centre piece of its proposal was a Charter of Rights, supplemented by an amending formula designed to bring the Canadian constitution home. (Amazingly, more than a century after Confederation, formal amendment of major clauses of the British North America Act, which was a British statute, could only be implemented by British legislation.)

The play of forces in the 1980–82 constitutional process which led to the Charter was remarkably revealing. While the federal government was the catalyst for the Charter, initially supported by governments of only two of the ten provinces – Ontario and New Brunswick – the Charter proposal attracted massive public support. Parliamentary government, long considered along with federalism to be the centre-pieces of Canadian constitutional identity,
was clearly on the defensive. The eight provincial governments opposed to the Charter appeared to be speaking for yesterday’s Canada. To the Charter’s public supporters a constitution which spoke the language of federalism and parliamentary government and little else appeared to address the concerns of governments and to overlook the widespread public desire for constitutional recognition offered by the Charter. Clearly, a contagious international language of rights had helped to undermine the support for a nineteenth century constitutional inheritance which rested on different constitutional principles.

The provincial government opponents of the Charter fought a delaying battle – including resort to the courts, and to lobbying efforts in London to induce the British parliament to reject any unilateral federal government request for a constitutional amendment. Ultimately however, with the very important exception of Quebec, they agreed to a revised constitutional package which included their acceptance of the Charter (slightly modified) and an amending formula originally proposed by the eight dissenting provinces (also slightly modified.) In a major concession to its provincial government opponents, the Charter contained a ‘notwithstanding’ clause (section 33), which allowed the federal parliament or a provincial legislature to declare that a legislative provision in violation of certain Charter clauses (sections 2 and 7 to 15) should nevertheless be legally valid for a renewable five year period.  

The Charter’s legacy is a profoundly transformed constitutional culture and the unfinished business of the Quebec government’s continuing opposition to the 1982 Constitution Act. For Quebec Prime Minister Rene Levesque the 1982 Constitution Act was a great betrayal of Quebec, mainly because of what he pejoratively referred to as that ‘bloody Charter’ (cited in Cairns 1992: 121).

The opposition of the PQ to the Charter was in part opposition to its language clauses which modified Quebec’s provincial language regime.  

Two additional factors contributed to the opposition. The Quebec Charter (1975) was an instrument of Quebec nation-building. The Canadian Charter was an instrument of Canadian nation-building. Given the fact that the 1980 Quebec referendum had been a Quebec government instrument to break away from Canada into some version of sovereignty-association, the Canadian Charter was a humiliating confirmation that the Quebec

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7 For a discussion, see Leeson 2000.
8 From the outset, it was clear that the Charter would conflict with Bill 101. By some readings a major purpose of the Charter’s guarantee of minority language education was to invalidate the restrictions that prevented anglophone Canadians from sending their children to English schools in Quebec’ (McRoberts 1997: 181).
government had gambled and lost badly. This was underlined by the fact that the Constitution Act 1982, including the Charter, was patriated without approval by the Quebec government or the National Assembly. Language clauses excepted, however, the Quebec opposition to the Charter was less directed to the Charter’s substance than to the above-noted context of its introduction and to its political purposes – to strengthen identification with the pan-Canadian community that the independentistes had hoped to leave.

The Canadian charter experience

Two decades later, the Charter remains very popular, supported by over 80 per cent of Canadians. It has given birth to a new social category, self-labeled as Charter-Canadians. Occasionally a distinction is made between a ‘Citizens’ constitution, focused on the Charter and a ‘Governments’ constitution focused on federalism and parliamentary government. While the preceding is an oversimplification, it nevertheless underlines the reality that the existing constitution contains internal tensions or contradictions in that citizens and governments relate positively to different parts of the revised constitutional arrangement.

The Charter has given the constitution a popular base. It speaks directly to the citizenry. It is clothed in the symbolism of popular sovereignty. In a very short period of time, it has become a very high profile popular institution in the overall constitutional order. Surveys in 1987 and 1999 reported over eighty percent of Canadians who had heard of the Charter saw it as ‘a good thing (...) for Canada’. There were strong supportive majorities in every region of the country. In the 1999 survey close to 90 per cent of Quebecers who had heard of the Charter viewed it positively. Even Bloc Québécois supporters expressed very strong support for the Charter (Fletcher and Howe 1999: 4–6). Mary Dawson, Associate Deputy Minister, Constitutional Affairs,

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1 McRoberts observes that Quebec’s opposition to the Charter ‘did not stem from the various rights enumerated in it. An analysis of public opinion in the mid-1980s found that “with respect to ideas about basic rights and freedoms” there were no significant differences between French Canadians and English Canadians’. See McRoberts 1997: 180.

2 ‘A second difficulty with the Charter of Rights and Freedoms was the pan-Canadian nationalism with which it is so intimately linked. By definition, a measure that tries to standardize rights throughout Canada as a whole, within provincial as well as federal jurisdictions, is antithetical to Quebec’s claim to distinctiveness within Canada. In defining basic rights that all Canadians should enjoy, wherever they live, it reinforces the notion of Canada as the pre-eminent national community’ See ibid. 181.

3 Vaughan refers to ‘the enthusiastic popular acceptance of the Charter (...) there can be no question that Canadians have embraced the Charter. Clearly, the Charter has provided Canadians with an indigenous point of national coalescence’ (Vaughan 1999: 13). Sigurdson asserts that ‘Canadians, it would seem, have not only become used to life after the Charter, but recognize the Charter as a valuable and authoritative symbol of this country’s commitment to freedom, equality and human dignity’ (Sigurdson 1993: 113). According to Mary Dawson, the 1982 Constitution Act changes to the BNA Act ‘have (...) unleashed a dynamic of their own and have changed the way Canadians understand themselves as individuals’ (Dawson 2001: 6).
Department of Justice in Ottawa. notes the ‘remarkable (...) extent to which [the Charter] (...) has become a symbol of pride and a source of identification for Canadians, thus becoming a unifying force as had been hoped’ (Dawson 2001: 2).

There is widespread agreement that Canadians have experienced a Charter revolution. The Charter has given birth to a vigorous rights-oriented discourse and a dramatic increase in the propensity to litigate (Hein 2000: 17). Particular clauses have their own clientele. Ethnocultural minorities see their reflection in the s. 27 multiculturalism clause; the women’s movement sees the s. 28 ‘guarantee of Charter rights and freedoms equally to male and female persons’ as their achievement; official language minorities view s. 23 ‘minority language educational rights’ as crucial supports for their linguistic survival; ‘equality seekers,’ as they have come to be called, view s. 15 as a powerful constitutional lever to advance their interests.

Although the label is controversial, Morton and Knopff (2000) have written of a ‘Court Party’ which employs the Charter in judicial arenas to pursue policy objectives less capable of achievement, they argue, in legislatures. Although their interpretation is debatable, and strongly contested by legal academics (Roach 2000; Hogg 2001/2002), it is clear that the Charter has greatly enhanced the role of the judiciary, especially the Supreme Court, in the overall constitutional order. The Supreme Court, to the surprise of commentators at the time of the Charter’s introduction, who thought that ingrained deference to legislatures would lead to judicial restraint, has treated the Charter very seriously - although ‘court-watchers’, not surprisingly, describe fluctuations in the Court’s treatment of Charter clauses.

Elsewhere in this volume, John Fossum assesses the position of the European Charter between ‘deep diversity’ (Charles Taylor) and ‘constitutional patriotism’ (Jürgen Habermas). An assessment of the Canadian Charter in terms of both criteria suggests the following:

1. Neither label was available in Canada’s constitutional vocabulary in the period leading to the introduction of the Charter. Indeed, ‘deep diversity’ was introduced by Charles Taylor in 1991 as a stinging critique of the clash between the equal rights message of the Charter and the need to recognize the deep diversity of Quebec (Taylor 1991: 74-6). In slightly different language, the francophone Quebec economist Pierre Fortin described the

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12 Refererring to Fossum 2003.
defeat of the Meech Lake Accord as the triumph of the Charter over Quebec’s ‘distinct society’ definition in the Accord.

2. The political purposes of the Charter—to weaken provincialism and strengthen the pan-Canadian community—were not highlighted in the politics leading up to the Charter’s introduction. To do so would have made all too clear the Charter’s role as, among other things, a federal government weapon in the unceasing intergovernmental struggle for recognition and jurisdiction.

3. The early tendency to discuss the Charter in terms of the rights it was to protect and the recognitions it was to grant was facilitated by the lead role of lawyers in the discussion, many of whom were oblivious of the Charter’s ‘nation-building’ political purposes. In addition, few citizens’ groups which appeared before legislative committees in the constitution-making era—1980–1982—were fully aware of the transformation in the role of the constitution in which they were participating.

4. It is difficult to make a case for the Charter as an instrument of ‘deep diversity’ recognition in Taylor’s sense. Taylor didn’t think it was. The government of Quebec systematically used the ‘notwithstanding clause’ (p. 33) in the immediate post Charter years to block its application to Quebec, fought the legality of the 1982 Constitution Act in the courts (and lost), and denied the Charter’s legitimacy when they were no longer able to challenge its constitutionality.

The other ‘deep diversity’—the Indian, Inuit and Metis peoples—received a major recognition breakthrough in s. 35 of the 1982 Constitution Act—but this was outside the Charter. Indeed, the Charter clauses that referred to Aboriginal peoples had the goal of protecting treaty and aboriginal rights against the Charter’s application. Further, First Nations, scholars, and the major aboriginal organization—the Assembly of First Nations—vigorously denied the appropriateness of the Charter’s application to First Nation governments.

5. Given the preceding, should the Charter be viewed as an instrument of constitutional patriotism? With the necessary reminder that a rights-based constitutional patriotism does not draw its sustenance from an abstract body of rights drawn from the western tradition, but is always subject to some tailoring to ensure its fit with society, constitutional patriotism clearly fits the case of the Canadian Charter.
6. The Charter arrived on the Canadian scene at an opportune moment. The Britishness of the pre-Charter written constitution no longer had the majesty of the prestige-giving constitutional way of life of its predecessor in the imperial era. This manifested itself in a gap in Canadian constitutional arrangements, especially at a time when a global rights revolution was transforming the meaning of citizenship for a better educated and less deferential electorate.

Conclusion

When Chou en Lai was asked what he thought of the French revolution, he reportedly replied that ‘It’s too early to tell’. The same cautious response is appropriate when we are asked of the long-run impact of the Charter on the governments and citizens of Canada. Multiple actors in a scattering of institutions nudge the Charter toward their vision of a preferred future. Various citizen groups employ the courts to protect, or even more desirably to enhance their Charter rights. Hein convincingly documents the dramatic increase in interest group litigation since the Charter, and concomitant changes in judicial culture. He writes of ‘identities energized by rights’, whose possessors appreciate that ‘rights have a certain majesty (...) [that] can turn ordinary political demands into principles that have to be respected’ (Hein 2000). Unpredictable international influences modify the environment to which the Canadian state and its citizens respond. Security concerns, prominent since the threat of terrorism following the September 2001 Twin Towers destruction in New York, have vaulted to the top of the democratic policy agenda, reducing the salience of rights.

Given the domestic and international uncertainties that will affect the future role of the Charter, it is still possible to extract some preliminary assessments of its impact, in addition to those noted on previous pages.

- At a macro-constitutional level, the Charter has contributed to a major constitutional rearrangement. Legislatures have lost status to courts. According to Mary Dawson, Associate Deputy Minister, Constitutional Affairs, Department of Justice in Ottawa, ‘power has flowed from the elected representatives to an appointed judiciary. These are clear facts’ (Dawson 2001: 16). The degree of deference that courts should pay to legislatures – often discussed as activism vs. restraint – elicits an unending, occasionally acrimonious debate. Federalism is challenged by non-territorial cleavages. The constitution

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13 See Hiebert (1999: 36) for a proposal to rearrange the division of labour in Charter issues by the establishment of ‘a parliamentary Charter committee to scrutinize proposed legislation from a rights perspective’.
itself has an enhanced status and profile in Canadian lives. The
Charter’s prominence has generated fundamental questions about the
composition of courts, especially the Supreme Court, and how judges
are appointed (Ziegel 1999). Representation on the Supreme Court is
no longer seen exclusively in terms of regional/federal criteria, but also
in terms of how many women, which ethnocultural minorities, and
what policy orientations are or should be present on the Court."

- There is no going back to a pre-charter world. The Charter’s
introduction may have been an experiment, but it is not an experiment
that can be dropped. Although criticisms of the Charter flourish on
both left and right positions on the political spectrum (Sigurdson
1993), it remains remarkably popular. Arguments for its abolition are
on the fringe of political discourse.

- The Charter’s impact on public consciousness has become an
impediment to major constitutional change. The 1982 Constitution
Act contained fundamentally incompatible visions. The amending
formula, the product of the provincial governments that opposed the
Charter, assumed that the governments of the federal system should be
the dominant actors in the process of formal constitutional amendment,
checked only by the necessity of legislative approval, which might
include public hearings. The vision here is of a ‘governments’
constitution’, for which federalism is the dominant organizing
principle. The Charter, in contrast, asserted the priority of citizen
rights, and for Trudeau asserted the sovereignty of the citizenry. This
citizen-state axis stimulated by the Charter gives substance to what can
appropriately be called the ‘citizens’ constitution’. The inevitable has
happened. The public, infused with a rights consciousness based on its
stake in the constitution, is unwilling to defer to the leadership of
governments which the amending formula presupposes. As a result,
both major efforts at constitutional change in the past two decades –
Accord – were defeated by public opposition. It is now commonly
assumed that major constitutional change requires public approval in a
referendum. The pursuit of such a goal is a very high risk endeavour
that leads to a confrontation between supporters of the ‘governments’
constitution’ and supporters of the ‘citizens’ constitution’.

- The Charter enshrines equality of citizens as a fundamental
constitutional principle, and derivatively the equality of provinces. The

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14 As I write, the press reports that a recent poll indicated that two-thirds of Canadians support
the election of Supreme Court judges, an opinion that was immediately rejected by Martin
Cauchon, the Minister of Justice (Chwialkowska 2002). See also the editorial by Dawson
(2002), which sympathizes with voter frustration for what the editorial views as unbridled
judicial activism in Charter cases.
Charter invests the qualities it recognizes with a powerful ‘social symbolism’. Its ‘great symbolic force tends to crowd out (...) respect for political autonomy’ for sub-national governments. It generates pressure to accord high value to uniformity, and is thus hostile to the recognition of Quebec as a distinct society. Equality of citizens also sets limits to the differential treatment of Aboriginal peoples (Webber 1993: 215, 222-3, 230). Thus, although the major Aboriginal organization, the Assembly of First Nations, has opposed the Charter’s application to Aboriginal self-government, the federal government has insisted on its applicability.

• The Charter has restructured constitutional discourse. The academic legal community, for whom ‘rights’ is a natural professional language, enjoys an enhanced role in constitutional advocacy and interpretation. The newly constitutionalized language of rights enjoys an uneasy relation with the historic constitutional language of federalism. The language of rights enhances the status of citizens in the constitutional order, and gives the latter a strengthened civic base.

The political purposes of the Charter are clarified by a brief historical reminder of the distribution of support for and opposition to the idea of constitutionally protected rights from 1960 to the present. The 1960 Diefenbaker Bill of Rights, conceived as a nation-building instrument, was resisted by the provinces and as a result applied only to the federal government. The federal government sponsored Charter in 1980 was initially opposed by eight of ten provinces, who correctly saw that the floor of rights it proposed was clearly intended to strengthen a pan-Canadian citizen identity. Significantly, the ‘notwithstanding clause’ (Section 33.), which allows a limited capacity to exempt legislation from Charter scrutiny, was a concession to the provinces, and was agreed to with great reluctance by the federal government. For Quebec nationalists, the Canadian Charter has been seen from the beginning as the servant of a rival Canadian nationalism hostile to special constitutional status for the Quebec nation.

The strongest continuing opposition to the Charter comes from elites claiming to speak for the ‘nations within’, the Quebec nation and Aboriginal nations, especially Indian First Nations. In both cases, they see the Charter as a threat to their own nationalist ambitions. The Charter is correctly seen as an instrument designed to weaken the allegiance of ‘their people’ to ‘their nation’ by linking them to the Canadian constitutional order by the vehicle of rights. The fact that Quebec support for the Charter is very high, in line with other Canadians, suggests, tentatively perhaps, that the Charter is serving a national unity function. The additional fact that the Native Women’s
Association of Canada has played a vanguard role in arguing that the Charter should apply to Aboriginal governments suggests, possibly even more tentatively, that the Charter may have a much broader Aboriginal constituency than is suggested by the rhetoric of its claimed incompatibility with Aboriginal values, as argued by Mary Ellen Turpel (1989-90).

Neither the initial hegemony of the inherited British tradition of responsible parliamentary government, nor its subsequent supplementation by the 1982 introduction of the Canadian Charter can be understood without resort to exogenous factors. Responsible parliamentary government without a Charter was not so much selected in 1867, as inherited. It pre–existed Confederation in the separate colonies, and in the absence of any desire to end the imperial link with the mother country its transference to the newly created central government was almost automatic. Indeed, as late as the 1950s ‘almost all the common law world outside the US functioned without an entrenched bill of rights’ (Malleson 1999: 24). The subsequent diffusion of bills of rights throughout the common law world was fed by the European Convention, by the UN Charter, by the Universal Declaration of Human Rights, and by the UN Covenants on Human Rights. By 1980, fundamental rights codes had been adopted by twenty-four Commonwealth countries. New Zealand, Israel, Hong Kong, and South Africa, as well as Canada, all had various bills of rights by the 1990s (ibid.).

Both Canada without a charter and Canada with one were and are consonant in their time with messages from the international environment. Views of the natural and proper in state–citizen relations do not exist in isolation from the evolution of international norms of the practical meaning of statehood.

The coming of the Charter to Canada can be partially explained in terms of a developing, increasingly pervasive allegiance to the constitutionalisation of citizen rights as a protection against future abuses. This changed civic consciousness was fed by emerging international norms of citizen–state relations, developed in reaction to what Robert Conquest called ‘a ravaged century’ (Conquest 2000). The implementation of the Charter, in the context of international pressures and messages which influenced both citizens and their political leaders, is a story of high constitutional politics in which rival governments in the federal system, and the spokespersons for ‘nations within’ battled over the Charter which they variously saw as an instrument which would serve or frustrate their ambitions.
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Chapter 7

The Sinews of Peace
Rights to Solidarity in the Charter of Fundamental Rights of the Union

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Introduction

This article aims at making sense of the provisions on social and economic rights contained in the Charter of Fundamental Rights of the European Union. After a conceptual clarification of the terms fundamental rights and rights to solidarity, four main claims are made. First, not all rights to solidarity are granted the status of fundamental rights in the Charter; this contrasts to the treatment provided to the right to private property. Second, positive law does not justify such an outcome. An analysis of the sources of the Charter clearly indicates that the right to private property is not a proper fundamental right as Community law stands. Third, rights to solidarity could be constructed as the repository of arguments that Member States and regions could invoke when claiming an exception to the four fundamental freedoms. Fourth, there is a normative case for entrenching some rights to solidarity as fundamental in primary European law.

1 Erik Oddvar Eriksen, John Erik Fossum, Oliver Gerstenberg and Massimo La Torre helped avoiding many errors. I am very thankful to Olivier De Schutter, from whom I have learned a lot on social rights. My short understanding is to be blamed for the remaining errors. No paper is an exclusively individual product, but its mistakes are.
Europeans are proud of their ‘social model’. What this exactly implies is far from clear. Be this as it may, the social dimension of Europe is usually identified with the welfare state. The welfare state aims at realising the substantive values of freedom and equality by means of providing insurance against a number of personal and social risks (Menéndez 2001a: 173ff). At the end of the day, this boils down to the granting of a series of ‘social’ and ‘economic’ rights to all permanent residents, complementing their civic and eventual political ones. The concrete rights and the precise companion institutional arrangements are not the same throughout Europe (see Ebbinghaus and Manow 2001), but the underpinning societal conception and the underlying basic principles are (quite plausibly) said to be the same. Social rights are the sinews of European peace, a major foundation of the legitimacy of political institutions and social arrangements in the old continent.

The crux of the social dimension of European integration is the tension between market-making (usually, but wrongly, labelled as negative harmonisation) and social standards protection (which would fit into the companion conception of positive harmonisation) (Joerges and Everson 2000: 169).

The project of the ‘common’ or ‘single market’ has been rather successful according to its own standards, that is, in terms of preventing war and promoting economic growth across Europe (See, for example, the Preamble of the Rome Treaty ). This might have helped fostering the national protection of social rights, to the extent that peace and growth are their main preconditions. However, it must be noted that social policy has been preserved as an area of almost exclusive national competence. Thus, the common market has not come hand in hand with the affirmation of social rights at the European level, although one might argue that it has helped establishing the preconditions for their affirmation at the national level (through peace and economic growth) (Menéndez 2001b).

This state of affairs seemed to allow Europeans to have the cake and eat it too, that is, to foster markets at the supranational level and enrich social rights at the national level. The two processes (market-making and deepening of social protection) seemed to reinforce each other, at least during the Trente Glorieuses.

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1 For opinion polls, see Newton 1998: 98-122. See also The European Social Agenda approved by the Nice European Council on 7-9 December 2000, OJ C 157, 30 May 2001: 4ff.
2 Marshall (1996) is the usual reference. But my argument does not entail any precise sequence in the granting of civic, political and social rights.
3 See The European Social Agenda, par. 9: ‘A society with more social cohesion and less exclusion betokens a more successful economy’.
But since the late seventies, market-making has been posing challenges to national welfare states. On the one hand, the dynamics of the common market leads to legal and factual changes that erode the economic and social basis of the welfare state. Consider the present understanding of the freedom of establishment and the free movement of capital. As they are interpreted, these two basic Community liberties allow entrepreneurs to eventually fish for the lower social standards around the Union. Without regulatory disciplining forces on capital, there is no longer a guarantee that higher social standards would not lead capital to escape a given state or region. Thus, ‘market making’ has resulted in a shift of power from political institutions to private agents (Maduro 1997). On the other hand, the lack of a robust social dimension in the European project might lead to active social dumping. As other regulatory competitive strategies are ruled out, national and regional lawmakers might try to increase investment flows by means of reducing the level of protection of social rights (De Schutter 2001).

The Charter of Fundamental Rights of the European Union has been proclaimed at such a critical crossroads in European integration. What has it to say about the social dimension of Europe? What are its social contents? Does it favour the market-making or the social-protection dimension of the European project?

This article aims at providing answers to these questions by making legal and normative sense of the provisions on social and economic rights contained in the Charter. Legal dogmatics is needed in order to provide conceptual and substantive clarification. We need to determine which are the fundamental social provisions relevant to our research and to figure out the status attributed to them in the Charter. Section I is intended to discharge such a task by defining rights to solidarity and providing a typology of fundamental legal positions in the Charter. Section II contains a four-fold assessment of the social provisions of the Charter. First, it is claimed that most rights to solidarity are not granted a fundamental status, in stark contrast to the treatment provided to the right to private property. Second, it is argued that the Charter is defective as a restatement of positive law. There is a clear imbalance between the status attributed to social rights and the status granted to the right to private property. Third, the Charter might be seen as providing the canon

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1 See Directive 88/361 for the implementation of the free movement of capital and Article TEC 56 (ex 73b), amended by the Treaty of Maastricht. See also Mohamed 1999: 88.
2 See, for example, Centros Ltd v Erhvervs- og Selskabsstyrelsen (Case C-212/97) [1999] ECR I-1489.
of arguments which national and regional legislators could invoke when claiming *social* exceptions to the four basic Community freedoms. Fourth, the selection and status granted to several rights to solidarity is open to criticism from a normative standpoint. It will be argued that more emphasis on the protection of social rights is needed.

Rights to solidarity as fundamental rights
The concept of rights to solidarity
The fourth chapter of the Charter contains normative statements on rights that are characteristically associated to the welfare state, such as the right to health, to social security or the right to work. Furthermore, some other social rights are scattered over the remaining sections of the Charter. To point out some examples: Article 14, devoted to the right to education, is contained in Chapter II (freedoms) and Article 23, which proclaims the equality of men and women, is inserted in Chapter III (equality).

Thus, the Charter is rich in normative statements on what are usually referred as *social rights*. This contrasts with the characterisation of the Communities, later the Union, as a purely *market-making* project, which would not require reference to social protection. Moreover, it reflects a change in the views of some of the delegates to the Convention, which were opposed to the inclusion of social, welfare rights in the text of the Charter.

However, the most innovative feature of the Charter might not be the series of statements on social rights, but the inclusion of *solidarity* as one of the founding values of the Union. The second paragraph of the Preamble affirms that the Union is founded on the values of human freedom, dignity, equality and *solidarity*. Moreover, *solidarity* is the title of the referred chapter IV, something that opens up for a systemic interpretation of the said rights in the light of such value.

The Charter characterises as *rights to solidarity* those rights that aim at realising the values of freedom and equality. This can be seen as a more appropriate term than social or welfare rights. On the one hand, all rights are *social*, imply a *social relationship*, so the term *social rights* is rather vague. On the other hand, the term *welfare rights* carries some *utilitarian connotations* (of the type of welfare

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7 See, among others, Mestmäcker 1994 and Majone 1996.
8 Lord Goldsmith, personal representative of the United Kingdom, was rather tepid towards the inclusion of social rights in the Charter. See CHARTE 4122/00 (in which he considers freedom of the establishment as example of economic and social rights) and CHARTE 4428/00 (where instead of rights to solidarity he favours principles of social protection).
economics) and is rather imprecise, as it might extend beyond and at the same time fall short the rights associated to the welfare state. The term rights to solidarity points correctly to those rights which aim at complementing the market (private property and contractual exchange) with solidaristic obligations to share social wealth.

The concept of rights to solidarity might well be seen as controversial. The key objection would typically be that this would entail the existence of obligations of solidarity. But that would go against the strongly felt assumption that solidarity is somehow spontaneous, that it must be embraced by the one showing it.

This is a forceful objection. However, it seems that we can find counterarguments that weaken severely its strength. Consider the following two. On the one hand, such objection is trapped into the assumption that solidarity is a matter of ethics, not of morality, and the companion applied view that the welfare state must be based on allegiance to a thick community based on the strong ties of history, culture and/or language (in short, in a national community). This is contradicted by the actual design of European welfare states, which presuppose allegiance to a thin community based on residence, both in terms of raising funds (taxation) and spending them (benefits provision). On the other hand, we tend to distinguish between being charitable and being solidaristic. Charity, not solidarity, is the concept that refers to spontaneous, uninstitutionalised transfers of resources. This would imply that solidarity needs to be supported through the legal medium, by means of imposing legal duties and granting legal rights.

At any rate, we can leave aside the more profound philosophical questions around the concept of rights to solidarity. The use of such a concept is authorised by the Charter itself. Rights to solidarity would point mainly to two

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9 This characterisation of rights to solidarity reflects the affirmation of the social dimension of Europe as the genuine acquis communautaire in normative terms. In historical terms, it is not difficult to see that only the welfare state has managed to awaken widespread and stable allegiance on the side of citizens. This is reflected in the resilience of arguments for the introduction of minimal standards on the protection of rights to solidarity at the European level, and, at the national level, on the tendency to refer politically (and sometimes legally) to the welfare state as providing a level of rights protection of historical relevance, which cannot be reduced.

10 Quite paradoxically, such a stance is shared by neo-liberals and communitarians. See for example, Buchanan (1975: 65): ‘In a large social group many persons can be predicted to default and the whole agreement becomes void unless the conditions of individual choice are somewhat fixed’ (my italics).
different types of positive rights, namely rights to normative regulation and rights to benefits. The former are those rights to obtain the protection of public institutions against third parties through norms (Alexy 2002: 435). Rights to benefits refer to legal positions which entitle to resources, goods or services that could hypothetically be obtained through exchange with other individuals, but to which the right-holder has no actual access because she/he lacks economic means or because there is not an adequate offer in the market (Alexy 2002: 428).

Further conceptual clarity can be achieved by classifying rights to solidarity according to the identity of the right-holder. On the one hand, work-related rights presuppose a worker or would-be-worker as right-holder. This reflects both the historical origin of such rights and the ethical choice made in certain European welfare states (Esping-Andersen 1990). This is the case of the right to work (Article 15), the right to equal treatment of men and women (Article 23), the right to fair and just working conditions (Article 31), the right to collective bargaining and action (Article 28), to information and consultation with the undertaking (Article 27), the right to protection in the event of unjustified dismissal (Article 30) or the right to special protection of working mothers (Article 33, section 2). On the other hand, some other rights are formulated in decommodified, universalistic terms, i.e., their right-holder is the permanent resident, regardless of its economic circumstances. That is the case of the right to education (Article 14), the rights of children (Article 24, first sentence), the rights to social security and social assistance (Article 34), the right to health care (Article 35), the right to environmental protection.

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11 A full conceptual elaboration would require lying out the basic ‘pieces’ of the legal system. Law is a matter of norms, which come mainly in two types, rules and principles. Rules are final reasons to action, while principles are only prima facie ones, open to be balanced and weighted with other principles. Thus, the collision rule is exclusion in the case of norms (one should apply one or the other) and weighting and balancing in the case of principles. Normative statements (or deontic statements on norms) can contain only principles, only norms or a combination of the two. At any rate, we should distinguish different legal positions, which would include rights along others, such as freedoms, competencies or duties. It should also be added that legal discourse tends to conflate rights as such with rates as a whole. The latter term refers to a bundle of legal positions ‘kept together’ by their adscription to a right norm. Thus, we usually talk of the right to private property, but we do intend to refer to a bundle of legal positions, not to a single one. Among legal positions, rights are characterised by a three-fold relationship between the right-holder, the addressee of the right and the object of the right. This differentiates them from freedoms or competencies. Rights come in two main types, positive and negative ones. Negative rights or rights of defence rule out certain actions on the side of public institutions, while positive rights require a certain action from the latter. Among positive rights, one can distinguish rights to normative regulation, rights to organisation and procedure and rights to benefits. I rely on Alexy 1993. On the right of private property as a bundle, see Honoré 1987.

12 See also Fabre (2000: 107-8) for a detailed elaboration on basic rights to benefits.
(Article 37) the right to access to services of general economic interest (Article 36), the rights of the elderly (Article 25) and the rights of the disabled (Article 26).

A final note of clarification. Although the right to private property is not a right to solidarity, its treatment in the Charter is considered in some detail in this article. This is justified by the mutual influence that rights to solidarity and the right to private property exert on each other. After all, rights to solidarity come into conflict with the right to private property quite often. Despite the usual tendency to frame rights question in terms of level of protection, the fact is that what matters most of the time is how rights are balanced and weighted when they apply simultaneously.13 Imagine a legal order in which the right to private property is included among the catalogue of fundamental rights, while no right to solidarity achieves such rank, and thus their realisation is completely up to the ordinary legislative process. In such a system, redistributive or regulatory measures might be challenged to the extent that they have an impact upon the right to private property. Thus, analysing the right to private property tells us something about the actual bite of the rights to solidarity.

The status of fundamental rights

If the argument of the previous section is accepted, then we have a clearer idea of what statements are of relevance for our research. The next question we should pose ourselves is what legal status is attached to them in the Charter.

This question is not artificial, but of great importance. Rights can be seen as reasons for action, but also as reasons for legal norms. By determining which rights are to be considered as fundamental and which ones are not, priority is given to certain normative contents against others. This becomes painfully clear when it is necessary to decide concrete cases, to weight and balance rights.

Are rights to solidarity regarded as fundamental? Or merely as ordinary rights or principles? What does this imply for the actual bite of rights to solidarity?

Lack of conceptual clarity in the text of the Charter, the jurisprudence of the Court and the mandate to the Convention

13As indicated in fn. 11, rights statements can contain either only principles, only rules or be a combination of principles and rules. A rights conflict takes place when two or more rights, formulated as principles or as a combination of principles and rules, enter into conflict. The true conflict is established between the principles. See Alexy 2002: 111.
The concept of ‘fundamental rights’ is highly contested. This is not peculiar, but characteristic of political and legal argumentation.\textsuperscript{14} For the purpose of legal-dogmatic elaboration, the question of which rights are to be considered as fundamental is determined \textit{formally}, that is, by reference to positive law (Alexy 2002: 66ff). It has become standard practice to define fundamental rights as ‘those freedoms or claims legally protected by virtue of the constitution or international treaties’.\textsuperscript{15} Constitutional law, filtered through the crafty and detailed jurisprudence of supreme or constitutional courts, gives an answer to the question of which are and which are not fundamental rights, and what this entails.\textsuperscript{16} The legal scholar assumes the legal system as it stands, so to say, and places herself in the position of a moot judge, from which it systematises norms with a view to find reasons for certain normative results (Bengoetxea 1994).

However, there are three reasons why the formal strategy fails when we confront the Charter. First, the Charter contains reference to a four-fold distinction between \textit{values}, \textit{principles}, \textit{freedoms} and \textit{rights}, but the \textit{legal meaning} of such a categorisation is not elaborated or even consistently followed through the text, not even in the preamble.\textsuperscript{17} Consider some examples. Equality is characterised as a \textit{value}, while the \textit{rule of law} is said to be a \textit{principle}, something far from fitting into the standard use in \textit{common constitutional traditions}.\textsuperscript{18} Chapter II is generally entitled ‘freedoms’, but Article 6 is devoted to the \textit{right} to liberty and security; within the same chapter, Article 11 is consecrated to the protection of the \textit{freedom of expression and information}, but its first paragraph reads ‘Everyone has the \textit{right} to freedom of expression’. What to make out of these distinctions is far from clear.

Second, we cannot rely on the jurisprudential elaboration of the fundamental legal provisions contained in the Charter. On the one hand, the text remains at present a solemn declaration with no immediate legal bite (but see De Witte 2001: 81–9 and Menéndez 2001b). On the other hand, the most likely

\textsuperscript{14} On persuasive definitions, see Stevenson 1938; Alexy 2002: 211; and Nino 1989: 15.
\textsuperscript{15} See, for example, the definition in \textit{La Enciclopedia Garzanti del Diritto} (2001) under ‘\textit{diritti fondamentali’}.
\textsuperscript{16} A similar argument in Heringa and Verhey 2001.
\textsuperscript{17} Different drafts labelled different things as \textit{values} or as \textit{principles}. This is documented by Schönlau 2001.
source of jurisprudential elaboration would be the judgments of the European Court of Justice on fundamental rights. It is a rather well-known fact that the original treaties constituting the Communities did not contain many references to fundamental rights. It was the Court of Justice which ‘found’ the general principle of fundamental rights protection among the ‘unwritten’ principles of Community law. This general principle was filled in a case by case basis by later jurisprudence. It has led to the affirmation of rights within Community law, but not to a problematisation of the position of such rights. All rights invoked by the Court have been conflated into the general principle of fundamental rights protection, and thus, fundamentalised (if the reader allows me the barbarism). Such inflation of rights is not a good guide when the time comes to balance rights against each other.

Third, the question cannot be sorted out by means of considering the mandate that the drafting Convention received. The mandate was to consolidate the acquis communautaire on fundamental rights (European Council 1999a, 1999b). It contained reference to the sources where the Convention should be looking for fundamental-rights statements (the well-known references to the European Convention of Human Rights, the Social Charter, the common constitutional traditions and the case law of the European Court of Justice), but only limited instructions concerning which legal positions should be institutionalised as fundamental rights. To put it bluntly, the Convention could not nominate new candidates for fundamental rights, but it was left to select those rights that were to be promoted to status as fundamental.

A rational reconstruction of the concept of fundamental rights

If a formal conception of fundamental rights is not available, we must proceed to a rational reconstruction of the concept. This combines a descriptive element, tied to the actual meaning of the concept in ordinary language, and a normative dimension, which will allow us to discriminate, to ‘refine’ the term to the use we intend to put it.

The concept of fundamental right has two close associations. First, it is clearly related to the idea of ‘moral rights’. Morality is the domain of autonomy, and consequently, of the self-determination of standards of conduct. To the extent that our action has effects on others, morality imposes obligations and grants rights. A set of moral rights thus refers to those rights that individuals should

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mutually recognise in their mutual interaction (Kant 1996: 393; Habermas 1996: 455, 1998: 190-1). Moral rights do not only point towards a thin substance which should be respected by all lawmakers (Estlund 1988), but also contain a clear reference to positive freedom, to the sovereignty of democratic procedures (Habermas 1996: 496). Thus, the rights that individuals should mutually recognise each other should be determined through deliberation. Second, fundamental rights are closely associated to the idea of the constitution as the higher law of the land. Under modern conditions, law is a necessary complement of morality (Habermas 1988: 221-79). Moral rights need to be translated into institutionalised rights, protected through legal techniques, without losing its normative, critical core (Alexy 1997). This points the way towards a dualistic conception of democracy, in which a higher track, the constitutional one, is characterised by a higher legitimacy, and thus determines the contents which must be respected by the lower track, that of ordinary legislation (Ackerman 1991: 6, 231ff, esp. pp. 236 and 241). Fundamental rights are associated on the one hand with normative reasons (rights as reasons for legal norms) and on the other hand with specific legal mechanisms of enforcement (rights as remedies) (Laporta 1987).

**Rights as reasons for (legal) norms**

The democratic principle states that only those statutes that could be agreed upon by all those affected are to be considered as legitimate (Rousseau 1967: 380, Habermas 1996: 408). This anchors legitimacy to a procedure of deliberation through which arguments are filtered and tested. Reflection on the pragmatic assumptions made by participants in this process leads to the enumeration of a series of rights ‘that citizens must accord to each other if they want to legitimately regulate their common life’ (Alexy 1999). A series of fundamental rights can be enumerated on such Kantian vein from the ‘thin’ substance of democracy. In this respect, fundamental rights constitute a concrete embodiment of the basic principles around which the political community is structured. This reveals the clear connection of fundamental rights with general practical reasoning, and especially with moral arguments, but also with ethical and pragmatic ones (Alexy 2000).

However, legal systems are not only ideal types, they are also intended to apply to concrete circumstances. This makes the law contingent, although not necessarily circumscribed to the nation-state, as legal dogmatics has tended to assume (MacCormick 1999). Basic choices are made implicitly or explicitly concerning the concrete structure of the socio-economic order, for example. The constitutional debate is usually uploaded with some of those contingent but extremely important circumstances. The key question there is that the
‘constitutionalisation’ of some key societal choices might have reverberations across the set of fundamental rights to be acknowledged, as we will see.

Rights as remedies
The second perspective translates into concrete legal means the characterisation of a right as fundamental. The democratic principle is not only connected to communicative action and deliberation, but also to concrete mechanisms of decision-making. The role of law as a complement of morality, taking care of the basic shortcomings of the latter, justifies constraining deliberation to fit worldly constraints. However, this renders very real the danger of a legitimacy gap of legislation, as not all those affected would have a real chance of participating in deliberation and decision-making (Dryzek 2000). This partial heteronomous character of ordinary legislation (MacCormick 1995) can be mediated by a dual conception of democracy, which distinguishes different modes of legitimacy.

Detailed implications vary across different constitutional systems, but in all of those falling upon the model of democratic constitutionalism, some form of constitutional dualism is relevant. This presupposes that the constitution is a differentiated form of law, it is in a relevant sense the higher law of the land. The dual (or even more plural) character of the sources of law is clearly linked to a complex understanding of the democratic principle of legitimacy. One finds legal norms supported by the full mode of legitimacy (the constitution), and ordinary laws which are based on a more viable type of legitimacy, and which are constrained in their contents and impact by the higher law. The archetypical kind of higher law is fundamental rights. Equipped with such rights, the citizen is given claims that, at the same time, protect the values lying behind the rights and that allow her to put in motion institutional mechanisms that alter the balance of power design in the constitution itself. Non-majoritarian institutions step in the way of ordinary statutes and either set it aside or create obstacles for their implementation in the name of the Constitution. Judicial review of legislation based on the infringement of fundamental rights and independent institutions in charge of ensuring the monitoring of rights (of the type of ombudsmen) are characteristic remedies associated to fundamental rights.

Thus, a fundamental right is both a shield protecting individuals and a sword that allows the individual to keep the balance of power between constitutional and ordinary legislator by means of having resort to the intricacies of the checks and balances imposed upon the ordinary political process.
A typology of legal positions in the Charter

Fundamental rights proper

Among rights statements, those that provide individual citizens with a shield or a sword vis à vis ordinary statutes (either secondary Community legislation or national laws) must be characterised as fundamental. These rights not only constitute an institutional embodiment of substantive moral claims, but are also given the form of individual claims that could be used against the action of the ordinary legislator.

Clear examples are Article 2, paragraph 2 (‘No one shall be condemned to the death penalty, or executed’), Article 7 (‘Everyone has the right to respect for his or her private and family life, home and communications’), or Article 39, section 1 (right to vote in European elections).

Whether it is openly stated or not, the characterisation of a right as fundamental does not imply that ordinary legislators cannot regulate such a right. In a way, the proper way of respecting a fundamental right is to make it positive, and to determine the means for its protection. This is clearly reflected in Article 51, section 1, first sentence: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms’. This provision reflects the common constitutional traditions on which Community law rests.21

It is in such a light that we have to interpret references such as the one contained in Article 3, section 2, first sentence (right of the patients to informed consent before being subject to medical or biological treatment). The referred provision acknowledges the right ‘according to the procedures laid down by law’. Such reference does not imply a full discretion of the ordinary legislator, but a mandate to respect the essence of the right.

Ordinary rights

But some other rights statements are of a dubious fundamental nature. This is the result of the interplay of Article 51 and a series of style clauses that refer to national legislation to determine the substantive content of the right.

Some legal statements contained in the Charter end up in one of the following style clauses: ‘under the conditions established by national laws and practices’,22 ‘in accordance with the national laws governing the exercise of

21 Similar implications have other style clauses such as ‘in accordance with the Treaty establishing the European community’.
22 Article 35 (health care).
such freedom and right,23 ‘in accordance with the general principles common to the laws of Member States’24 or ‘in accordance with Community law and national law and practices’.25 Such clauses do not seem very different from the ones associated with a mandate to the national legislator to respect the essence of the right when proceeding to its regulation.

However, the question is complicated by the division of competencies between the Union and its Member States. To the extent that such clauses reflect a lack of competence of the Union as law stands, they constitute a reiteration of the basic principle contained in Article 51, namely, that the Charter should not be read as expanding the competencies of the Union to the detriment of Member States. If this is so, this means that the fundamental legal statements qualified by such style clauses cannot be read as imposing constraints on national legislators different from those contained in their own constitutional law. But if that is so, the legal statements included in the Charter do not increase the judicial sharpness of the referred rights, as they do not add up anything to the arguments which individuals can make before courts in order to have legislation set aside in the name of rights.

Policy clauses

Moreover, not all fundamental legal statements give rise to fundamental rights. We can find norms that require public institutions to achieve a certain objective or goal, but without giving direct rise to any subjective fundamental position.26 Although a more refined analysis could establish also different types among them, we could use the general term ‘policy clauses’ to comprise such normative positions.

Some examples from the Charter are: Article 11, section 2 (‘the freedom and pluralism of the media shall be respected’), Article 25 (at least as formulated: rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life), Article 26 (protection of the disabled),

23 Article 9 (right to marry and found a family), Article 10 (right to conscientious objection), Article 14, section 3 (freedom to found educational establishments).
24 Article 41, section 3 (right to good administration; making good damages), Article 45, section 2 (free movement of nationals of third countries).
25 Article 16 (freedom to conduct a business), Article 27 (workers’ right to information and consultation with the undertaking), Article 28 (right to collective bargaining), Article 30 (protection in the event of unjustified dismissal), Article 34, sections 1, 2 and 3 (social security and social assistance).
26 CHARTRE 4414/00, submitted by the representative of the Spanish government, Mr. Rodríguez-Bereijo, seems to have heavily influenced the drafting of social rights. The three-folded typology between fundamental rights, ordinary rights and policy clauses is proposed there. But see also For a Europe of civil and Social Rights, Report by the Comité des sages, (European Commission, 1996), 51ff (‘Rights in the form of objectives to be achieved’).
Article 37 (‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’) or Article 38 (‘Union policies shall ensure a high level of consumer protection’).

The same argument made in relation to ordinary rights can be repeated here. To the extent that the policy clause is coupled with a style clause that reiterates the division of competencies between the Union and its member states, it does not have any bite vis à vis national legal systems. This means that it cannot be invoked at the Community level to review the adequacy of national legislation.

Assessing the contents of the Charter

This section provides an assessment of the contents of the Charter from four different standpoints. First, the status of rights to solidarity and the right to private property is determined in accordance with the typology laid out in the first section. Second, I look at the charter from the standpoint of the mandate received by the Convention that drafted it. If we assume that the present text of the Charter should be a restatement of positive Community law, we can consider whether it is an accurate one. Third, we can explore the social contents of the Charter from the standpoint of legal reasoning and argumentation. We can speculate whether the text favours or allows certain types of arguments concerning rights to redistribution. Fourth, we can proceed to a legally constrained moral argument, and wonder whether the ethical choices made on what concerns rights to redistribution are consistent with other choices made in the Charter, and with the commitment towards the idea of the welfare or social state.

The status of rights to solidarity

In the previous sections, we have established which concrete rights are relevant for our research (which are the rights to solidarity contained in the Charter) and the main statuses attributed to legal positions in the Charter. We can now proceed to discuss what is the status attributed to the different rights to solidarity.

Rights to solidarity

Not all rights to solidarity are recognised in the Charter as fundamental rights. If one looks for a pattern, one should have resort to the two-fold distinction between rights to solidarity pertaining to citizens and residents as opposed to
those the right-holder of which is the worker or would-be worker, and which was introduced above. While most *work-based* rights to solidarity are granted the fundamental status (see Table 2), most *universalistic* rights to solidarity are formulated either as ordinary rights or policy clauses (see Table 1).

Among the latter, only the rights to education and to the well-being of children (Article 24, first sentence) are qualified as fundamental rights. Most other rights are formulated as ordinary rights. Finally, the rights of the elderly, the disabled, consumer protection and human health protection are conveyed through policy clauses.

**Table 1. Typology of *universalistic* rights to solidarity.**

<table>
<thead>
<tr>
<th>Name</th>
<th>Article</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to education</td>
<td>14, first and second sentences</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Rights of Children (well-being)</td>
<td>24, first sentence</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Right to social security benefits</td>
<td>34.1</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Right to social security benefits when</td>
<td>34.2</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>exercising free movement of persons</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to social and housing</td>
<td>34.3</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>assistance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preventive health care</td>
<td>35.1</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Access to services of general economic</td>
<td>36</td>
<td>Ordinary right/ Policy clause (social and territorial cohesion of the Union)</td>
</tr>
<tr>
<td>interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Access to services of general economic</td>
<td>36</td>
<td>Ordinary right/ Policy clause (social and territorial cohesion of the Union)</td>
</tr>
<tr>
<td>interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rights of the elderly</td>
<td>25</td>
<td>Policy Clause</td>
</tr>
<tr>
<td>Rights of the disabled</td>
<td>26</td>
<td>Policy Clause</td>
</tr>
<tr>
<td>High level of human health protection</td>
<td>35.2</td>
<td>Policy Clause</td>
</tr>
</tbody>
</table>

Most of the rights to solidarity the right-holder of which is worker or would-be-worker are granted fundamental status. It is interesting to notice that in such cases, rights tend to be located not in Chapter IV of the Charter (solidarity) but somewhere else. Such is the case of right to work, the freedom to choose an occupation or the rights to equal payment.
Table 2. Typology of work-related rights to solidarity.

<table>
<thead>
<tr>
<th>Name</th>
<th>Article</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right to Work (stressing opportunity aspects)</td>
<td>15, sections 1 and 2</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Right to Work of third country nationals (stressing opportunity</td>
<td>15, section 3</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>aspects)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Equality between men and women</td>
<td>23</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Reinforced protection of mothers</td>
<td>33, section 2</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Collective bargaining and action</td>
<td>28</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Access to placement services</td>
<td>29</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Working conditions respecting health and safety at work</td>
<td>31, section 1</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Prohibition of Child Labour and protection of young people at work</td>
<td>32</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Limited working hours and paid holidays</td>
<td>31, section 2</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Workers’ right to information and consultation within the undertaking</td>
<td>27</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Protection in the event of unjustified dismissal</td>
<td>30</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Protection of the family</td>
<td>33, section 1</td>
<td>Policy Clause</td>
</tr>
<tr>
<td>Consumer Protection</td>
<td>38</td>
<td>Policy Clause</td>
</tr>
</tbody>
</table>

The right to private property

Article 17 of the Charter deals with the right to property. It reads:

‘1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated in so far as is necessary for the general interest.

2. Intellectual property shall be protected’

Leaving aside the second paragraph, one must distinguish three different contents of Article 17. First, it presupposes that the ordinary legislator would introduce a private property regime (‘her lawfully acquired possessions’). This institutional guarantee constitutes an implicit recognition of the legal and human-made character of property as an institution. Property is created by a system of
common action norms regulating the acquisition and transfer of economic resources, and not merely acknowledged as a pre-legal reality. The reference to ‘lawful’ acquisition invites the interpreter to consider the whole legal system and not only the provisions on private property in order to test the ‘lawful’ character of the acquisition (this is probably motivated by the reference to the First Protocol to the ECHR to the securing of 'the payment of taxes or other contributions or penalties'.

Second, it imposes constraints on the action of the ordinary legislator when dealing with acquired property rights; the essential content of the right to ‘own, use, dispose of and bequeath’ must be respected.

Third, the right to private property is basically defined as consisting in a stake in the economic value of the possessions more than of the possessions as such. The takings clause allows public institutions to regulate private property as far as is necessary for the ‘general interest’, but with the obligation to compensate if publicly aimed regulation amounts to deprivation of the economic substance of the right to private property.

A literal interpretation of Article 17 leads to the conclusion that the right to private property is entrenched as a fundamental right (including the right to bequeath property), not an ordinary right, in the Charter. This contrasts with the ordinary status attributed to the freedom to conduct a business (Article 16) and the right to intellectual property (Article 17, section 2).

Table 3. Typology of private property related rights.

<table>
<thead>
<tr>
<th>Name</th>
<th>Article</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private property</td>
<td>17</td>
<td>Fundamental Right</td>
</tr>
<tr>
<td>Freedom to conduct a business</td>
<td>16</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Freedom to found educational establishments</td>
<td>14, section 3</td>
<td>Ordinary right</td>
</tr>
<tr>
<td>Intellectual property</td>
<td>17, section 2</td>
<td>Ordinary right</td>
</tr>
</tbody>
</table>
Is Article 17 (private property) an accurate codification of positive law?

The Charter can be said to be a codification or restatement of positive Community law on fundamental rights (Menéndez 2001b). If this is so, one could reflect on whether the body in charge of drafting the Charter complied loyally with their task. Although one might find the drafting of the text defective in some points, it seems to be possible to argue that the final text reflects the *aquis communautaire* on what concerns rights to solidarity.\(^{27}\)

Having said that, one should equally notice that the literal tenor of Article 17, on the right to private property, is highly defective. Although the right to private property is not a right to solidarity. The status of the right to private property as fundamental implies a consequent constraint on the scope of action in terms of regulation of the economy and redistribution of resources.\(^{28}\)

There are two main criticisms to be addressed to Article 17. First, the unconditional attribution of the condition of *fundamental right* to property, when it is far from clear whether this can be said to have been the case in Community law as it stands. Second, the *scope* of private property. The reader might be surprised to see an explicit reference to the right to bequeath as part of the *essence* of the fundamental right to private property.

To make this double case, we should analyse briefly the standing of the right to private property in the *common constitutional traditions*, the European Convention of Human Rights and in the jurisprudence of the European Court of Justice. First, the emergence of the welfare state in the inter-war period and its consolidation in the aftermath of the Second World War led to the *materialisation* of the right to private property. This implied transcending the formalistic definition of property as the ‘*sole despotic dominion*’, in Blackstone’s dictum. Constitutional text and constitutional jurisprudence focused on the *social function* of private property. This is so the point that some Constitutional texts focused not so much on the right as such as on the

\(^{27}\) Another thing, as we will say, is whether we should endorse the *aquis* or endorse its amendment to guarantee a minimum level of protection of rights to solidarity at the European level. A more *ambitious* reading of the *aquis*, based on the revised version of the European Social Charter, is to be found in CHARTE 4593/00, the contribution submitted by Ieke van den Burg (MEP) on 20 September, but which the Presidium did not give a chance to discuss.

\(^{28}\) The status of private property as a legal and not fundamental right would have an impact upon the capacity of public institutions to pass laws with a clear redistributive impact. The rise of private property to a fundamental status will be translated into a reduction of the threshold to be overcome in order to get access to compensation. See the related argument of Ackerman 1977: 60.
takings clause, namely, the conditions under which property could be rendered public. 29

Second, it is far from obvious that Article 17 can find support on Article 1 of the Additional Protocol to the European Convention of Human Rights, which deals with property. 30 Not only the social function of property is more clearly stressed in the Protocol, but also no reference is made to the right to bequeath, for example.

Third, Article 295 of the Treaty establishing the European Community (ex Article 222) reads ‘[t]his Treaty shall in no way prejudice the rules in Member States governing the system of private ownership’. It is clear that membership of the Communities implies compliance with the basic market freedoms, so only hypothetically could it be possible to become or remain a member and introduce a high degree of socialisation of property. The clause must be read as making it clear that market-making should not be seen as incompatible with the social conception of private property that is entrenched in several national constitutions, as we have just seen. Article 295 must be read as a limit on the impact of Community law upon national law, with direct bite in the area of shared competencies, but with widespread implications. The way in which Member States define ‘property’ must be respected; this, one could argue, can only be done if a compatible definition of the right to private property is entrenched in Community law.

This is further confirmed by the jurisprudence of the Court of Justice. Judgments on cases such as Nold, 31 Hauer 32 or the Banana saga 33 have clearly established that the social function of property renders acceptable the

29 See Article 14 of the German Constitution, Article 42 of the Italian Constitution, Article 33 of the Spanish Constitution, Article 17 of the Greek Constitution and Article 62 of the Portuguese Constitution.

30 According to the explanatory memorandum of the Charter, the main source of Article 17 is Article 1 of the Additional Protocol to the European Convention, where one can read the following: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.

regulation of agricultural production and markets in the framework of the Common Agricultural Policy. 34

Social rights as canon of exceptions to market freedoms
The next standpoint to assess the Charter is legal reasoning. Does the Charter have any impact upon how legal actors would argue about social rights and values?

On the basis of what was said in the previous section, one might come to the conclusion that it does not. After all, it was argued that the Charter must be regarded as a consolidation of positive law. If the text does not innovate substantially, one might come to the conclusion that it does not alter the way in which we should argue in European law.

However, one should consider more closely the structure of the Charter. The text contains direct reference to some rights to solidarity which are not directly relevant within the actual field of competence of the Union. This does not have any direct implications, as the overlapping effect of Article 51 and style clauses that refer to national constitutional law rule out such interpretation. However, the inclusion of such rights within the Bill of Rights renders transparent that European integration is not merely about market-making. This is further reflected in the fact that the four Community market freedoms are only mentioned in the preamble, but they are not directly enumerated as among the fundamental rights of the European Union.

When viewed in such a light, we could regard the series of rights to redistribution in the Charter as evidence of the canon of arguments that might be invoked by Member States to claim exceptions to the four fundamental freedoms. This would fit into the progressive shift of the jurisprudence of the Court of Justice from an automatic affirmation of the four market freedoms to their balancing and weighting with other fundamental interests, which might transcend the repository of arguments contained in provisions such as Article TEC 30, TEC 39, section 3 or TEC 46, section 1.

34 In this respect, it is interesting to notice that a good deal of the dealing cases on the right to private property decided by the European Court of Justice originated within the German legal system. This is to be explained by the fact that the 1949 Fundamental Law stands out as one of formalistic ones among the post-war constitutions. See Alexy 2002: 483.

The only serious obstacle to such a use of rights to redistribution is the restrictive literal tenor of Article 51, section 1, which determines that Member States are bound by the Charter ‘when they are implementing Union law’. It has already been pointed out that such a wording is too narrow, as it was well-settled in the jurisprudence of the European Court of Justice that Member States were bound by ‘European’ fundamental rights standards when they invoked an exception to the market freedoms. However, such objection can be overcome with two further arguments. First, Article 51, section 1 can be read as determining the ‘compulsory’ scope of the Charter. It could not be read as precluding a Member State from invoking it even in an area where it is not bound by it. Second, the literal tenor of the provision should be interpreted as providing a succinct formulation of positive law at the time of the codification. Thus, the scope of the Charter should overlap with the scope of fundamental rights protection established by the Court of Justice. Therefore, ‘implementing’ must be interpreted as comprising also those cases in which Member States claim an exception to the economic freedoms.

The legal and normative basis of European solidarity
In the first part of this article, it was argued that fundamental rights reflect the thin normative substance associated with democracy, but also the ethical choices that the members of a political community make concerning its basic social and economic structure. Next to the ‘thin’ substance of democracy, we find ‘historical’, ‘ethical’ contents that reflect basic societal choices. From our present normative standpoint, the relationship between these two ingredients of any bill of rights is not static, but dynamic. Ethical choices presuppose a reference to a concrete factual and normative background. They reflect the ‘uploading’ of the thin substance with concrete data. But this raises a claim to legitimacy that should be checked by general practical discourse. This brings back the thin substance to the process, as the ultimate word in the general practical argument. Among other things, this implies that ethical choices cannot be seen as self-justified. Consequently, one can argue that a particular choice might only be justified in case other ethical choices are also made. ‘Concreteness’, in a way, feeds ‘concreteness’.

Thus, the ethical option for a concrete socioeconomic order (for example, a certain option for private entitlements to economic resources, free contract and exchange) triggers normative legitimacy questions (how can these choices be rendered legitimate?), the answer to which might require the spelling out of further rights within the constitutional structure. This is no recipe for ‘constitutionalisation’ of politics, but just a reminder that partial
constitutionalisation is equally controversial, as it leaves basic legitimacy questions unanswered.

Coherence across the board: the status of the right to private property vis-á-vis rights to solidarity

One can apply this argument to the Charter, and more concretely, to the relationship between the right to private property and the rights to solidarity. This is so because, taken together, the provisions on private property and solidarity rights of the Charter ‘upload’ the constitutional law of the Union with a certain socio-economic structure. Contrary to some proposals, the Convention did not include a direct reference to the four basic Community freedoms in the Charter, but one can read most of the constitutional framework of a market economy based on private property into its provisions. This set of socio-economic rights implies an ethical choice for a concrete way of ordering the entitlement to and exchange of economic resources within the Union.

The right to private property and most of the work-based rights to solidarity are affirmed as fundamental rights, while most of the universalistic rights to solidarity (the exception being the right to education and to the well-being of children) are formulated as ordinary rights. Given the character of the rights to solidarity included in the Charter, one can argue that the rationale for protecting all those rights is the same, but their status is clearly different.

It seems to me that a minimum protection of the rights to solidarity is badly needed for ensuring the legitimacy of the ethical choice for a market socio-economic structure. As I have argued elsewhere (Menéndez 2001a), redistribution of economic resources is the only promising strategy of bridging the legitimacy gap of such a model of the organisation of the economy.

To the extent that this is so, the only two coherent strategies are either to exclude from the scope of the Constitution all issues related to the socioeconomic structure or to constitutionalise not only the right to private property and the basic worker-centred rights to solidarity, but also the universalistic rights to solidarity.

This implies that the characterisation of rights to solidarity as ordinary rights cannot be supported by the argument that they are too contingent or detailed.

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36 Compare the final drafting of the Preamble with the proposal made by Lord Goldsmith representatives of the British government. His drafting would have given the four freedoms a more prominent position within the preamble. Cf. CHARTE 4429/00.

37 As seems to be the case in most Scandinavian countries, see Rytter 2001: 154.
By introducing other rights at a comparable kind of level of detail, which already provide much of the background design of the socio-economic structure, the different characterisation operates in fact as a bias against the actual protection of rights to solidarity.

**Beyond coherence**

In the previous section, it was argued that it is normatively unacceptable to entrench the right to private property as fundamental while leaving to the ordinary legislator the protection of rights to solidarity. It was argued that, from the standpoint of coherence, only the full exclusion of socio-economic questions from the constitutional realm, or the balanced affirmation of the rights to private property and the rights to solidarity could be seen as consistent. But we can go beyond coherence, and claim that in normative terms, only the second option can be a justified solution for the European Union. There are two reasons for this.

On the one hand, the drafting of the Charter reflects the qualitative transformation that the process of European integration has undergone through the years. From the Little Europe circumscribed to a limited set of economic issues we have gone through several transformations leading to a mature political community whose laws affect all European citizens quite directly. To the extent that we accept the definition of ‘political community’ as a ‘union of multitude of human beings under laws of rights’ (Kant 1996: 455), the European Union is already a political community. This entails that it is a new level of politics, a new level of government. Part of its legitimacy derives from its scope, from its prima facie legitimacy to deal with issues which have a basically supranational kind of audience. But a full legitimacy credit can only be based on the usual sources: participation of citizens in the making of the laws, guaranteed substantive outcomes through rights protection and foreseeing procedural rights to control the process of implementation of the law. Given the programmatic definition of the Union as a polity based on the four basic freedoms, the case for including rights to social solidarity within Union law becomes very strong.

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38 Kant was defining the state, but we should do better to reinterpret this as political community, to avoid the immediate association of state with nation-state. For an argument on why the European Union is a state in a Kantian sense, see Ferry 2000.

39 This triad is further developed in Menéndez 2000.

40 Even if legitimation through the protection of substantive rights complements but cannot substitute legitimation through participation in the making of the laws, it can be said that the emphasis on rights protection should be stronger the less room there is for direct citizen participation in the making of laws. That is not an argument for bread and circus, but for redressing the legitimacy deficit as much as possible within the existing structures.
On the other hand, the bracketing of socio-economic questions from the constitutional structure of a political community is acceptable only to the extent that there are other means available to ensure the actual fairness of the basic economic structure of that society. Constitutionalisation is not a panacea, but only a possible means to ensure that certain substantive outcomes are delivered by the ordinary legislator. Communitarians and neo-liberals argue that a basic degree of economic justice can be ensured through an ethical or self-interested commitment of the electorate to redistribution. However, this presupposes a type of social stratification and cohesion that is not characteristic of the European Union (and, contrary to romantic views, hardly any longer of any nation-state). Solidarity among strangers should, in my view, be the background model of democratic distributive justice. In that context, basic rights to solidarity, as the right to a basic income, the right to education, to housing or health care are part and parcel of the basic rights that citizens should mutually recognise each other. The ‘emptying’ of politics can be avoided by proceduraising as much as possible those basic social rights. This recommends moving away from the paternalistically tainted provision in kind (but see Michelman 1969) to more autonomy-respectful forms of redistribution, such as income transfers.\footnote{I am not claiming that the right to basic income, for example, is an all-purpose cure. In my mind, it is more promising to have a several layer mechanism of redistribution. For a more articulated policy proposal, see Ackerman and Alstott 1999.}

Conclusion

In the introduction to this article, we asked what the Charter has to say about social Europe and whether it tilts the balance in favour of market-making or in favour of social protection.

As things stand, the answer cannot be an easy one. On the one hand, there are reasons to be concerned about the imbalance between the status attributed to the right to private property (a fundamental right proper) and most universalistic rights to solidarity. Legal creativity would be needed to shield social rights protection from the negative implications of such drafting. On the other hand, the inclusion of social rights in the main text, and the confinement of the market freedoms to the preamble reflect the progressive shift in Union law from market-making to polity-making. The latter requires an emphasis on social protection at the European level, at the very least to allow national standards to remain in place and not be swept by neo-liberal or ordo-liberal understandings of the common market. This mixed diagnosis opens up for a normative discourse on how the Charter should be amended before it becomes primary law of the Union. Rights to solidarity should be
regarded as the sinews of peace and fairness. That is what European integration claims to strive to be about.\textsuperscript{42}

\footnote{See the \textit{European Social Agenda}, fn. 2.}
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Chapter 8
Reconfiguring Popular Sovereignty in Post-Charter Canada
The View from the New Right

David Laycock
Simon Fraser University, British Columbia

Introduction
Many non-Canadian academics see Canada as an ethnically inclusive democracy that combines meaningful multiculturalism, flexible federalism, a progressively evolving constitutional order with an entrenched bill of rights, and somewhat solidaristic social programs. Less well known outside Canada is the fact that significant political forces in English Canada contest this direction for the Canadian constitutional and political order. The most notable opponents are parties, think tanks and academics associated with Canada’s new right. Since the 1982 constitutional entrenchment of the Charter of Rights and Freedoms, the new right’s opposition to Aboriginal self-government, affirmative action and substantive equality for women, protection of gays from discrimination, and state support for ethnic minorities’, has been an important part of the contested politics of social citizenship in Canada. Like the new right in the USA, Australia and much of Europe, Canada’s new right now opposes expansion of equality rights under the banner of ‘no special rights for special interests,’ and opposition to elite power. In Canada, as in other countries, the agenda of what one could call ‘progressive multiculturalism’, involving enhanced social rights and political inclusion for ethnic minorities, women and traditionally disadvantaged groups, has been even more aggressively opposed by the new right than the
economic re-distributive social rights of evolving welfare states were opposed by conservatives through the first three decades of the post-war period.

In this paper I wish to show how understanding the Canadian new right’s response to ‘equality seeking’ in courts and legislatures assists our appreciation of ideological debates over contemporary equality rights. To focus my analysis, I frame this opposition to increased substantive equality via progressive multiculturalism in terms of the new right’s most surprising strategic and rhetorical move: an attempt to re-configure popular sovereignty as part of their revised case against the expansion of social equality. I begin by putting this Charter-focused element of Canadian new right activity into a broader context, then sketch the basic ideological contours of Canadian conservatives’ efforts to prevent judicial and legislative expansion of Charter equality rights.

Setting the stage
Following the widespread post-war adoption of the welfare state and its equality-enhancing policy agenda throughout OECD countries, conservative parties were faced with a political dilemma. Most voters clearly supported redistribution of the resources and opportunities generated within the marketplace. How could the campaign against further egalitarian social reform be made in ways that were not blatantly elitist and simply unpopular with a large majority of voters?

Since the constitutional entrenchment of a Charter of Rights and Freedoms in Canada (1982), the Canadian conservative response to this strategic dilemma has relied in large measure on its winning the populist high ground from forces on the political left and centre. This victory has turned rhetorically on a re-definition of popular sovereignty, equality and elites, in ways congenial to the conservative political and social project.

A key part of this innovative right-wing populism has been an attack on ‘the Charter revolution’ and the variety of social interests that have acquired a higher public profile and state-backed protection since 1982. The women’s movement, aboriginal peoples’ organizations, gay and lesbian groups, and ethnic minority associations have mobilized more clout in the Canadian policy process. They have also mobilized to encourage Canadian courts to interpret the Charter to protect them from discrimination, and to expand their opportunities to benefit from public institutions, social services and enhanced social status. As one recent study has put it, ‘the big change is that courts now hear from interests that struggled for decades to win access; …
citizens who organized to address public problems were usually sent away’ (Hein 2001: 222-3).

Political successes associated with this mobilization have become anathema to the Canadian new right and its university-based intellectuals, a small number of whom now provide decisive policy advice for the Conservative party of Canada, now the authoritative national voice of Canada’s partisan right wing.

In its battles against egalitarian policies and more extensive participation by ‘equality-seekers’ in public debate and policy development, the post-war political right has employed a strategic political repertoire involving some combination of five basic elements. This five-point account over-simplifies a complicated field of political phenomena, and can’t begin to show the importance of the first four elements’ roots stretching back to at least the late eighteenth century. But acknowledging the range of conservative strategies helps to put the last one into perspective. Considering these choices as a package that has failed to achieve the full range of intended results helps us to understand why the political right has turned to populist politics.

**Using financial support from the business community**

Using financial support from the business community to fund right-wing parties is as old as competitive party systems, and more or less ubiquitous within them. In Canada, the business community has always been most comfortable with the Conservative party (1867-1943) and its successor, the Progressive Conservative party (1943-2003). With several revealing provincial exceptions,\(^1\) this has been true in national and provincial competitions.

As in most of Europe, the US, and Australia, however, business support for parties of the right in Canada has not precluded its substantial support for a more centrist party. Extension of the franchise and then development of the welfare state meant that the business community could not put all of its political financing eggs into one party basket. Where centrist parties were successful in preventing parties of the social democratic left from gaining national power – and none have been more so than Canada’s Liberal party – the business community could not risk supporting only the conservative party that would give it almost all that it wanted. In Canada, supporting both a centrist party and a centre-right or rightist party has often been the price paid

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\(^1\) The most notable exceptions are with business community support for the Liberal party in Québec since the middle 1960s, for the Liberal party in Saskatchewan from the middle 1930s through the late 1970s, and for the re-fashioned Liberal party led by Gordon Campbell in British Columbia since the middle 1990s.
by the business community for keeping a party of the left out of office federally and sometimes provincially.

Think tanks
Think tanks are a relatively recent part of the new right’s ideological arsenal. The political fortunes of new right elements within conservative parties have been advanced by and closely intertwined with corporate-funded ‘think tanks’ in the Anglo-American democracies since the early 1970s. To take the most striking case, wealthy American conservatives wishing to re-cast the Republican Party directed large resources to conservative think tanks. They were convinced that the party needed a new and effective source of policy ideas to combat the Democratic Party and its left-leaning (by post-1970 American standards) policy advisors in the academy and various policy institutes.2

In Canada, the Vancouver-based Fraser Institute had become a major source of policy advice and inspiration for conservative provincial governments by the early 1990s, as well as a regular source of commentary on social and economic policies for the conservative daily papers. Researchers and publicists at the Institute inspired by Milton Friedman and Friedric Hayek have also been comfortable within the senior policy-making ranks of the Reform party and its successor, the Canadian Alliance party, from 1987 through 2003, and in the Conservative party since 2003. Stephen Harper, the last leader of the Alliance and current leader of the Conservative party, has been both a Research Fellow with the Fraser Institute, and the President of the National Citizen’s Coalition (1998-2000). The NCC is a new right advocacy group financed by many of the same companies that fund the Fraser Institute. Harper’s chief policy advisor until late 2004, Tom Flanagan, is another Fraser Institute Fellow, as is the founder of the Reform party, Preston Manning, and the most vocal new right academic critic of judicial activism, F.L. Morton.

Daily print media
In Canada the policy orientation of the new right has been well conveyed by the daily print media. Both national daily papers, The Globe and Mail and The National Post, have editorially endorsed major tax cuts and social program reductions – the Globe over at least the past 15 years, and the National Post since its inception in 1996. The Globe has remained socially liberal, however, as shown in its endorsement of equal marriage rights for gays and lesbians. By

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2 For brief overviews from opposite perspectives, see Lapham 2004 and Micklethwait and Wooldridge 2004 (Chapter 6).
contrast, *National Post* editors, columnists, and *Post* op-ed writers from various new-right think tanks and publications have campaigned against gay rights, affirmative action programs for women and visible minorities, as well as consistently rejecting Aboriginal claims for self-government, compensation for past abuse, and land title.

Many English-Canadian cities’ broadsheet daily papers are owned by the same media conglomerate, CanWest Global, that published the *National Post*. Another chain of *Sun* tabloid papers offers its half dozen major urban audiences a combination of sports, sex, and right-populist sensationalist political coverage. Like the broadsheet dailies, they support the most conservative of the viable political parties in every provincial competition. In sum, Canadian newspapers share a decidedly rightward tilt. Their enthusiasm for tax cuts for high income earners and business is a vein, as is their steady pressure for welfare state ‘rationalization’.

**Laissez-faire liberalism**

Conservatives have been the strongest advocates of laissez-faire liberalism since the early twenties century. With several exceptions in the middle 1930s and late 1950s, Canadian conservatives followed the lead set by contemporary English Conservatives and American Republicans. The Canadian Progressive Conservative party (1943-2003) wasn’t as fervently anti-communist as Republicans in the 1950s and 1960s, nor as slow as British Conservatives during the 1980s to recognize obligations that societal multiculturalism placed on governments. By the 1960s, mainstream Canadian conservatives had accepted that laissez-faire could not be the sole ideological/policy mainstay for a competitive party. In their contest with Liberals for Canada’s median voters, Conservatives were pressured to make their peace with some version of the welfare state after the war.

However, when the new right had gathered enough political momentum in Britain and the USA to elect Margaret Thatcher and Ronald Reagan, Canadian conservatives started to follow their rightward drift. The 1984-93 Progressive Conservative government collapsed dramatically in the 1993
Like new right activists and intellectuals in many other western countries, those in the Reform party understood that the first four elements of a conservative strategy, even when simultaneously applied, simply hadn’t delivered the goods that serious anti-welfare state conservatives wanted. After two terms of Progressive Conservative government, the Canadian state continued to tax more heavily, constrain more market activity, and support more social programmes than the new right could abide. The Mulroney government had not actively condemned feminist, gay, ethnic minority and Aboriginal pursuit of egalitarian agendas through the courts or in public discussion. This worried social conservatives inside and outside the Reform party.

Conservative ideological re-positioning: new right populism

Conservative Ideological Re-positioning: New Right Populism. Breaking with historical conservative ideological positioning, by the middle 1970s American conservative entrepreneurs had begun to contend that conservative policy goals were contrary to the interests of prevailing elites, supportive of true equality, and that exercises in popular sovereignty were required to combat the machinations of new, state-assisted elites. Since the 1986 founding of the Reform party, the English-Canadian political right’s innovative ‘new right populist’ strategy has altered the Canadian public debate over popular sovereignty, democracy, equality and constitutional change. In discussing the Canadian new right’s attempt to reconfigure public debate along these lines, I will focus on prominent academic and political party contributions to this project.

Invoking popular sovereignty against elites

Like other ideological key terms, popular sovereignty is an essentially contested concept. For Norberto Bobbio, democracy’s first ‘broken promise’ involved party and other political elites’ refusal to facilitate ‘true’ popular sovereignty through direct rule by ‘the people’ (Bobbio 1987: 28). Comparative survey research has shown that widespread political cynicism is partly informed by a public recognition of the range and depth of democratic broken promises, and of the survival of rule by elites.¹ This cynicism

facilitates populist attacks on groups and institutions that allegedly practice forms of elite rule.

Promotion of direct democratic remedies to these ‘political market failures’ has been a common feature of new right populisms in North America and Europe. Canada’s Reform party (1986–2000) was typical in this regard, advocating citizens’ initiatives on everything from capital punishment to balanced budgets to aboriginal self-government agreements. Proposals for particular referenda were always accompanied by the suggestion that new state-funded elites were preventing the popular will from being implemented. The Reform party alleged that corrupt old party legislators had failed to represent their constituents’ preferences, while Courts bowed to pressure from ‘special interests’ and created democratically illegitimate ‘judge-made law.’ Reform advocated recall procedures to force elected officials to heed the people’s voice and stop pandering to the special interests that held old-line parties hostage.

On the populist right, direct democracy is valued as a way of battling the proliferation of mediating forces between citizens’ preferences and policy development or implementation. In their view, social democratic and centre-left parties and organized interests since World War II have supported extensive and expensive social programs, new rights for selfish minorities, and heavy-handed business regulation. Such developments have perverted the natural translation of individual preferences into social results through market transactions. Political market failure thus resulted from a statist, party-manipulated, socially engineered blockage of consumer/taxpayer sovereignty. Reform promoted regular exercises in popular sovereignty - initiatives and referenda - to deliver what the people wanted: a low-tax, minimally interventionist state, an unshackled marketplace, the prevalence of traditional values in family and public life, and a substantial boost to law and order.

Fortuitously for the new party, Reform’s formation was quickly followed by a major public outcry against the elitist, backroom character of federal-provincial negotiations on constitutional change between 1987 and 1990. When the Charlottetown Accord proposal for constitutional change emerged in 1992, Manning’s advisors Stephen Harper and Tom Flanagan convinced him that Reform could benefit from leading the ‘No’ side in the referendum campaign on the Accord (Flanagan 1995: 102–3).

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1 See Laycock 2001 (Chapters 5 and 6).
2 For a fuller account of this Reform/Alliance party view, see Laycock 2001 (Chapters 2–5).
Reform supporters welcomed its image as the only party to ‘stand up to Ottawa’ and articulate western concerns about the Accord. The party rejected the extra powers and status that the Accord would provide for Quebec. It expressed concern about the additional boost the Accord would give to Aboriginal self-government and land claims. And it condemned the prospect that the Accord’s ‘Social Charter’ would obligate federal and provincial governments to expand Canada’s welfare state. The three major parties all supported the Accord including the NDP, Canada’s social democratic party with what were then the strongest populist credentials.

Reform was the clear partisan winner in the October 1992 Charlottetown Accord referendum, which went down to a narrow defeat across the country. In the long term, Reform’s successful use of anti-elitist appeals during the referendum campaign was decisive for its future strategy and regional success. This eventually led to a party merger with the Progressive Conservatives and a marginalization of progressive and centrist voices from that party. In the short term, Reform obtained invaluable democratic credentials in western Canada after the 1992 referendum as the ally and trusted instrument of the people’s sovereign will prepared to take on a consensus of the ‘old-line’ parties and the national media.

Promotion of direct democracy was not just about giving ‘the people’ a voice. It was as much about impugning the legitimacy of existing governments, and implying that political parties and interest groups had corrupted representational and policy processes. Reform’s promotion of direct democracy encouraged citizens to transfer their frustration with discredited politicians and corrupted public life to support for a new right electoral and policy package. Reform promised that this package would restore some of their hijacked sovereignty by reducing the role of the state in the marketplace, and by curtailing the power of legislative, bureaucratic and judicial elites.

By the early 1990s, Reform leaders and activists had become convinced that the Canadian judiciary had entered into a cozy conspiracy with a well-mobilized coalition of ‘special interests’, in whose interests judges interpreted the Charter of Rights and Freedoms. So Reform added the Supreme Court, and ‘equality-seeker’ litigants in Charter court cases, to the list of illegitimate actors working to stifle popular sovereignty. As the case for direct democracy

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* Following the 1993 election, all of the daily press continually equated Reform victories in a majority of western Canadian Parliamentary seats with overwhelming western support for its neo-conservative policy package. For an argument that this was never the case, see Laycock 2001 (Chapter 8).
became less central to the Reform appeal, the case against ‘jurocracy’ attained increasing prominence in new right attempts to re-configure the public understanding of popular sovereignty.

**Rejecting the ‘charter revolution’ and the ‘court party’**

Even without substantial academic assistance, the Reform party would have concluded that the Supreme Court’s post-1985 interpretation of the Charter was contrary to its major policy and ideological objectives. The Charter had entrenched constitutional protection for state-sponsored bilingualism, which had been anathema to western Canadian conservatives since the Liberal government had legislated official bilingualism in the late 1960s. The Charter’s language on equality in section 15 explicitly made room for affirmative action programs, allowing far more state intervention than Reform could abide. By the middle 1980s it was clear that Canadian women’s movement organizations, with support from the federal government, would initiate Charter litigation aimed at expanding substantive, constitutionally protected and social policy-based equality.

The Charter also appeared to give Courts reasons to legitimize state spending in aid of ‘multiculturalism.’ Reformers found this both offensively interventionist and destructive of their preferred ‘un-hyphenated-Canadianism’. And the Charter appeared to support growing demands for financial compensation, land and self-government by Canada’s Aboriginal communities. Reform leader Preston Manning’s economic philosophy led him to reject anything resembling group rights. These were in evidence in some form in the Charter’s provision for minority language rights, minority language educational rights (sections 23 and 24), in the section 15 equality provisions, and in the sections on native and ethnic minority (multicultural) rights. One of the earliest Reform party constitutional reform proposals was to reverse the Charter’s silence on property rights. For Reformers, a constitution that did not entrench private property rights against the state Leviathan, while opening the door to ‘collective rights,’ was a recipe for continued attacks on individual freedom.

Lorainne Weinrib summed up the problem posed by the Charter for social and economic conservatives in 1999. She contended rather polemically that ‘the Charter was designed to transform the Canadian legal system’, and that it has ‘transformed the values and institutional responsibility [between courts and legislatures] at the core of Canadian constitutionalism’. The Charter was knowingly drafted to be
unequivocal in departing from the values of a stable, hierarchical, paternalistic and patriarchal society … it does not entrench property rights; guarantees equality before and under the law, as well as equal protection and equal benefit of the law; prohibits state discrimination based on features of personal and communal identity; permits affirmative action for disadvantaged groups; and requires that interpretation respect gender equality as well as multiculturalism.

(Weinrib 1999: 28)

While we need to take Weinrib’s reading of the anti-hierarchical character of the Charter with a grain of salt, it is nonetheless unsurprising that the Canadian new right would find any Charter adjudication problematic unless it upheld the conservative values consciously rejected by the politicians and public who have so overwhelmingly supported the Charter (Flanagan 2002: 132; Knopff and Morton 2000: 76–7). As Weinrib put it triumphantly – and prematurely – the conservative critique of judicial activism in Canada was ‘the expression of a world view in demise’ (Weinrib 1999: 30).

So from the time of its creation in 1987, the Reform party was at odds with many elements of the Charter. The political challenge was to convert this antagonism to the Charter into partisan and ideological advantage, in ways that could help secure broader public support for Reform’s new right policy agenda.

The court party vs. popular sovereignty and majoritarianism

By the late 1980s, a small but ideologically unified and energetic group of right-wing academics had begun to respond to this challenge. The most sustained and politically engaged response to the Charter’s prominence in Canadian politics came from several political scientists at the University of Calgary. Beginning in the late 1980s, Tom Flanagan, Rainer Knopff and F.L. Morton produced a steady stream of criticism of the Supreme Court’s adjudication of the Charter. Though Knopff and Morton’s recent work is more narrowly focused on judicial politics than Flanagan’s, it offers a more revealing expression of the ideological animus that the Canadian new right has towards our post-Charter political order.9

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9 This is reflected, on one level, in the kind of reception their 2000 book received in the right-wing press. Not only was it praised by National Post and Report Magazine reviewers, but Knopff and Morton were given several pages in the Fraser Institute’s Fraser Forum – which goes out to all of their corporate subscribers and other members – to write a review of their own book!
Knopff and Morton’s 2000 *Charter Revolution and the Court Party* takes square aim at a ‘Charter Revolution’ engineered by the ‘Court party’. Their Court party includes feminist organizations, gay rights activists, aboriginal organizations, advocates for the elderly and the disabled, ethnic minority and minority language organizations, civil libertarians and liberal criminal law reformers. It also includes most law school academics, federal and provincial human rights commission employees, and government agency supporters of these ‘post-materialist’ equality-seeking groups. Knopff and Morton decry all federal government subsidies to elements of the Court party ‘coalition’, in particular a Court Challenges programme that financed litigation and intervention on equality and language rights cases. They also condemn financial support by provincial legal aid programs and human rights commissions for ‘equality seekers’ in court.

On the Knopff and Morton account, since the Charter’s constitutional entrenchment, the Court Party has cajoled and cleverly pushed the Canadian judiciary to expand application of Charter rights across a widening range of social and economic policy. Perhaps even worse, the Court party has encouraged an anti-democratic judicial activism. Here we see a Canadian application of American new-right icon Robert Bork’s ‘strict constructionist’ critique of ‘judge made law’.

Using the Charter as a pretext, the Supreme Court has created new law at variance with the intentions of ‘the founders’. The Court has thus re-shaped public policy in ways that have no warrant in the ‘traditional understandings’ on which our constitutional order is allegedly based, let alone public opinion or legislative decision-making. Knopff and Morton (2000: 155) contend that ‘the real effect of the Court Party project is not to protect rights in any fundamental sense, but to encourage rights claiming, a partisan exercise whose objective is … to change public policy through the public creation of new rights’. In 1998, Morton had insisted that the Charter protects neither the ‘basic rights and freedoms of Canadians’, nor individual liberty by promoting the practice of ‘limited government’. The *Charter Revolution* attacks the judiciary for abandoning the ‘traditional understandings’ of the proper relationship between the state and civil society.
that Morton, Knopff and allied academics refer to as ‘liberal constitutionalism’.12

In a 2002 contribution to the Fraser Institute’s *Fraser Forum*, Ted Morton identified a key source of public policy upset to Canada’s new right. After three Ontario court rulings had declared several elements of Ontario Conservative government social and labour policy unconstitutional in 2001-02, Morton (2002: 9) warned that ‘in the coming decade, it will not be enough to defeat tax-and-spend political parties in elections. Unless these Ontario precedents are reversed, the clientele groups of Canada’s bloated welfare state will be able to retreat to the courts and effectively obstruct attempts to reform health, welfare, or labour policy’. Any evidence that judicial interpretation of the Charter protects the welfare state will trigger a worried response among Canada’s new right.13

Knopff and Morton do not portray Supreme Court and provincial superior court judges as innocent dupes of Court party scheming. Rather, they characterize a majority of Supreme Court justices, especially female justices, as arrogant co-conspirators in the ‘Charter revolution’ undermining Canadian legislatures and public opinion. By favouring exactly the groups in Court rulings that the federal government has financially supported, judges act as ‘agents’ of the federal government and behind the backs of democratically responsible legislatures (Knopff and Morton 2000: 128). As Knopff and Morton put it,

> Our primary objection to the Charter Revolution is that it is deeply and fundamentally undemocratic, not just in the simple and obvious sense that it is anti-majoritarian, but also in the more serious sense of eroding the habits and temperment of representative democracy. … The kind of courtroom politics promoted by the Court Party, in short, is authoritarian, not just in process, but more dangerously, in spirit.

*(Knopff and Morton 2000: 149)*

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12 A Straussian-inspired commitment to these ‘traditional understandings’ of ‘liberal constitutionalism’ links the Canadian political commentary of Knopff and Morton, see Peacock 1996 and 2002; Ajzenstadt 1995, 1998a and 1998b. For a brief but telling critique of this ‘strict constructionist’ view of meaning and drafters’ intents, see Ball and Pocock 1988 (pp. 8-11).

13 See also Ajzenstadt 1998b.

14 The irony involved in Straussians accusing popular court rulings of being animated by an authoritarian spirit can be better appreciated by reading Drury 1988 and Norton 2004.
This last quote highlights a key dimension of new right Charter criticism, widely adopted by allied new right commentators on Canada’s constitutional evolution since the late 1980s (Peacock 1996, 2002; Gairdner 1998). In their campaign against ‘equality-seekers’ and their political allies, Knopff and Morton have increasingly used the language and categories of new right populism to portray a conspiracy among the ‘jurocracy’ and allied special interest elites to impose authoritarian rule. Their complaint that citizens’ popular sovereignty is now stifled by a revolutionary jurocracy and its Court Party supporters is ironically reminiscent of earlier North American populist attacks on ‘plutocracy’.

Three key new right populist elements feature in the Knopff and Morton case against the ‘Charter Revolution.’ One is an analytical reduction of democratic sovereignty to majority rule in legislatures, in regimes that give supremacy to legislative power, occasionally augmented by majoritarian mandates from ‘the people’ in referenda. The second key element is rhetorical construction of a new set of elites operating against the careful deliberative will of legislatures and the people’s expressed interests. The third is a redefinition of equality compatible with their labelling of special interests and their selective majoritarianism.

**The new (right) majoritarianism**

The Knopff and Morton case for majoritarianism as the central principle in democratic politics can be simply stated. Representative assemblies, accountable to the people through elections, are the only legitimate institutional venues for democratic deliberation over and decision-making about public policy. Bodies exercising delegated legislative power, such as human rights commissions, can’t do so legitimately, as they can’t be held electorally accountable to citizens. Such federal and provincial commissions unaccountably press Court Party privilege-seeking agendas into the marketplace, the family, and other private sphere domains, all under the cover of promoting equality (Knopff and Morton 2002: 114–6). With even more autonomy from elected bodies and (hence) the popular will, courts are even less legitimate actors in the policy process. Courts and human rights commissions allow privilege-seeking minorities to opt out of what Knopff and Morton call ‘the sine qua non of a sovereign people: the willingness to abide by the rule of majorities with which one disagrees’ (Knopff and Morton 2000: 158). In post-Charter Canada, the cumulative effect has been to

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15 The Gairdner collection includes comments by Brian Lee Crowley, Janet Ajzenstadt, Michael Lusztig, and others, on the federal-provincial ‘Social Union’ agreement, which they see as constitutional change by stealth to entrench an extensive Canadian welfare state.
‘embitter politics and decrease the inclination of political opponents to treat each other as fellow citizens – that is, as members of a sovereign people’ (ibid. 165).

As a variety of commentators have pointed out, this account of democracy is at odds with the post-war consensus that democracy requires a balancing of majority rule with minority rights, and that fair political pluralism involves some state support for disadvantaged minorities (Sigurdson 1993; Sossin 2000; Elliott 2002; Weinrib 1999). It disregards the fact that before and after the Charter’s constitutional entrenchment in 1982, corporate litigants were far more likely than ‘equality seekers’ to find judicial alternatives to the policies produced by legislatures. It ignores the reality that before and after 1982, Canadian governments have discriminated regularly against women, linguistic and ethnic minorities, and gays. As Miriam Smith comments,

in ignoring the imbalance of social, economic and political power between men and women, whites and non-whites, Aboriginal peoples and Euro-Canadians, heterosexuals and homosexuals in our society, [Knopff and Morton] create a ‘world turned upside down’ … in which the last are first and the first are last. By focusing solely on litigation and ignoring the other means by which corporations, business associations or interest groups influence the political system, this type of Charter critique provides a false picture of group political life and its connection to litigation.

(Smith 2002: 14)

The Knopff and Morton idealization of representative assemblies, inspired by Straussian readings of James Madison’s American constitutional writings (Knopff and Morton 2000: Ch. 2; Knopff 1998), makes very little contact with contemporary Canadian reality. Neither pre- nor post-Charter Canadian federal and provincial legislative majorities have been regular instruments of careful, inclusive deliberation (Sigurdson 1993; Sossin 2000; Smith 2002). Madison’s optimism that legislators could determine the public interest in ways that transcend the self-interest of social and political factions was based on a view that majoritarian public opinion needed to be trumped, not championed, by legislators who were clearly the superiors of the democratic

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16 See the systematic study of post-Charter litigation patterns by Hein 2001 (p. 222). As Hein puts it, ‘court dockets are still laden with corporations, more so than all other categories of litigants combined’.

17 See Hein 2001 for evidence from a systematic study of interest group litigation in Canadian courts that supports Smith’s claim.
rabble. In presenting legislative majorities as the agents of a sovereign popular will that is then being stifled by judges, Knopff and Morton are trying to have their Madisonian cake and eat it too. They wish to use Madison’s anti-majoritarian rationale for legislative power to bash the purportedly anti-majoritarian positions taken by judges, without acknowledging that their inspiration comes from the classic statement of opposition to popular sovereignty in the founding American constitutional debates. The irony of using Madison to make a case for popular sovereignty is of course well appreciated by Knopff and Morton, but it is lost on a Canadian audience that has not read *The Federalist Papers* as part of public school civics education.

The provincial governments of Canadian new right heroes Ralph Klein and Mike Harris also demonstrate how badly out of step the Knopff and Morton idealization of deliberative, democratic legislatures with Canadian political practice. Klein has led the Alberta provincial government since 1993, while Harris was Premier of Ontario between 1995 and 2003. Their governments have taken extraordinary steps to minimize representation of non-business citizen interests in the few legislative committee hearings they saw fit to countenance. Theirs were among the most rigidly cabinet-dominated provincial governments in modern Canadian history, offering no viable democratic alternative to rule by ‘jurocracy.’ At the federal level, Reform Party MPs have indirectly criticized the federal government for not following Klein and Harris’s example, complaining bitterly about parliamentary committee submissions by ‘Court party’ groups, and suggesting that representation of such voices in federal parliamentary business was illegitimate and contrary to the will of the ‘real’ people.

In practice, the people’s sovereignty, new right style, involves no mediation by organized non-business interests in any part of the policy process. In ways that James Madison would surely endorse, this means systematic exclusion, from legislatures and courts, of many groups opposed to either the policy agenda of business-oriented parties and governments, or to forms of discrimination allowed by existing statutes and regulatory regimes. Tellingly, the new right account of the people’s sovereignty does not entail exclusion of business interests from the deliberative or policy process. Two major Charter cases launched by the National Citizen’s Coalition indicate that the Canadian new right welcomes business-financed challenges to the powers of Canadian

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18 See Introduction to Ball 2003 for a good account of Madison’s opposition to what he and other authors of *The Federalist Papers* saw as the hyper-democratic proposals of the Anti-Federalist in the founding constitutional debates.

19 For a further discussion of Reform and provincial Conservative government rejections of inclusive legislative deliberation, see Laycock 2001 (pp. 36ff).
unions,\textsuperscript{20} and uses the courts to remove federal restrictions on ‘third party’ spending during election campaigns. Each of these cases was contested on the basis of a claim to seek protection from Charter rights to freedom of expression (Sossin 2000: 534).

As Lorne Sossin has pointed out, the NCC Charter challenge to the \textit{Canada Elections Act} proposed ‘entrenching a constitutional right to advertise and a constitutional right for special interests to contribute unlimited amounts’ in support of political parties during election campaigns. Sossin’s suggestion that these policy changes were ‘unlikely to have emerged on any legislative agenda in Canada’ (Sossin 2000: 535) was correct at the time, but will turn out to be wrong if the Conservative party wins the next federal election. As Conservative leader, Harper strongly opposed 2004 federal legislation prohibiting large corporate donations to political parties, and made cancelling this legislation an early part of his party’s legislative agenda.\textsuperscript{21}

Ted Morton has championed a kind of adjunct constitutional majoritarianism, through proposals for regular provincial government use of the section 33 ‘notwithstanding’ of the \textit{Constitution Act}. He has suggested that this ‘Charter override clause’ be deployed by provincial governments, particularly Alberta’s, after referenda are held to obtain direct popular mandates for its use. Such overrides would apply to specific federal legislation or specific Supreme Court rulings. After all, ‘judges have used the Charter of Rights and Freedoms to revamp health policy, labour law, and welfare benefits, and in the process have dismantled much of the Harris common sense revolution in Ontario’ (Morton 2003a: 30). So ‘before dismissing the idea of resurrecting the not withstanding clause by democratizing its exercise, ask who represents a more serious threat to the long-term freedom, prosperity and happiness of our country – the Court party or the Canadian people?’ (ibid. 32).

Intellectuals active in the Reform party had discussed potential uses of section 33 during the early to mid-1990s.\textsuperscript{22} In 1998, the Supreme Court ruled in \textit{Vriend v. Alberta} that the Alberta government was required to amend its human rights code to prohibit discrimination the basis of sexual orientation. This triggered a major outcry from social conservatives inside English

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\textsuperscript{20} Lavigne vs. Ontario Public Service Employees’ Union [Lavigne v. OPSEU (1991), 2 S.C.R. 211].
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\textsuperscript{22} See for example Reid 1996.
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Canada, especially in Alberta. Ted Morton and eventual Canadian Alliance party leader (then Alberta Finance Minister) Stockwell Day were bitterly disappointed when the Premier decided not to use section 33 to override the Court’s decision. As Lorraine Weinrib observed,

> What a defeat it was for them when Premier Klein announced he would not use his electoral majority to suppress the equality rights successfully claimed in *Vriend*, … The premier urged Albertans to tolerance and respect for their fellow citizens’ personal dignity. This denouement to the *Vriend* case embodies the critics’ worst nightmare: the spectre of conservative politicians, their last, best hope, internalizing the Charter’s core values.

(Weinrib 1999: 30)

The social conservative campaign against equal rights for gays has recently been expanded, following a succession of provincial court rulings stating that federal marriage legislation abridges Charter equality rights by defining marriage in heterosexual terms. After the Supreme Court responded positively to a federal government reference on this issue, Conservative party leader Harper condemned the federal government’s willingness to let the Supreme Court define Canadian law on this matter, arguing that Canadians would certainly vote against such rights in a referendum. Once government legislation extending marriage rights to gays had been tabled, Harper contended that opening the door to gay marriage would lead eventually to legalized polygamy, and that granting marriage rights to gays would undermine Canadian multiculturalism. Shortly after provincial courts began to rule heterosexual-only marriage laws unconstitutional, Ted Morton attacked the ‘jurocracy’ as an out of control, anti-democratic menace happy to impose its minority taste for gay marriage on a traditionalist majority.  

New right court critiques are not simply underpinned by selective defences of populist majoritarianism. Morton revealed this with a proposal that Alberta and other provinces ‘patriate’ their constitutions from the federal government. He suggests that this be done with provincial referendums and/or a special legislative majority, to legitimize the results and make them less vulnerable to future legislative tampering. Why is this important? According to Professor Morton:

> A made-in-Alberta constitution … would allow Albertans – if they chose – to ‘cement in’ some of the more important achievements of

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23 See for example Morton 2003d.
the Klein government by way of constitutional (as opposed to statutory) requirements for balanced budgets and referendums to approve tax increases. An entrenched Alberta constitution could also protect the Alberta Heritage Trust Fund from future raids by vote-hungry politicians. In the future ... Albertans might choose to add other protections and guarantees to an Albertan constitution. Possibilities include the protection of property rights (which are not protected by the federal Charter); democratic processes such as initiative and referendum; and the right of each individual to ‘equality before the law’ (not the ‘group rights’ and ethnic/racial preferences that the Supreme Court has ‘read into’ the equality section of the Charter). ... Just because Canadians are denied much-needed democratic reform in Ottawa does not mean that meaningful reform cannot be pursued in the provinces. ... The more Canadians experience accountable, open and honest government in their provinces, the less they will tolerate the democratic deficit endemic to the nation’s capital.

(Morton 2003c: 16; Morton 2005)

This passage raises a variety of issues in relation to democratic constitutional design. First, although he proposes a referendum majority vote to ratify any such package, Morton also recommends putting its amendment out of reach for future legislative and popular majorities. This is justified because Klein’s ‘legislative achievements’, along with entrenched private property rights and a scaled-down version of equality, are so important that future majorities should not have a viable amendment option. This strategy is somewhat reminiscent of Hayek’s proposal to constitutionally limit the powers of government so as to prevent ‘social engineering’ and rent-seeking bribery of voters through state incursions into the ‘market order’ (Hayek 1979). But Hayek was not prepared to pander to majoritarian democratic sensibilities; he clearly believed that the liberty central to free-market capitalism should trump the venality of politicians and the foolishness of voters happy to be bribed with their own money. Morton seems to agree with Hayek on this, even though he proposes a one-shot exercise in ‘popular sovereignty’ to set up a then-unalterable constitution that would protect values dear to new right politicians’ hearts. Sceptics can be forgiven for wondering whether this shell game of popular sovereignty is as cynical as it appears.

A second issue raised by Morton’s proposal is whether provincial governments possess the legal power to include constitutional provisions regarding equality that would clearly contradict Supreme Court jurisprudence concerning the Charter. It is unlikely that provinces have this right, except
when they use section 33. And Section 33 overrides must be legislatively renewed every five years, while Morton’s proposal envisages a continuing provincial regime of restricted equality rights, constraints on state action and spending, and protection for individual property rights.

It is doubtful that Morton doesn’t understand these problems, or the sense in which they are at odds with the populist majoritarianism he invokes to extend the political appeal of his proposal. What is clear, however, is that this proposal speaks directly to a long-standing Alberta majority frustration with the power of the federal state, and that it does so in the language of a faux popular sovereignty. In this sense, it is typical of the highly successful Reform and Alliance appeal to western Canadians. ‘Ottawa-bashing’ has long been basic to regional discourses of popular sovereignty, and thus *de rigueur* for parties on the right (and left) that wish to electorally harvest western Canadian hinterland regionalism and anti-central government feeling.

The Reform party’s first proposal for constitutional change concerned Senate reform. Reform’s ‘Triple E Senate’ proposal suggested that the upper house be elected, effective,24 and ‘equal’. Equality here meant what it does in the American Senate: each regional jurisdiction would send the same number of Senators.

The Triple E Senate proposal was explicitly conceived as an instrument of regional, anti-majoritarian defence against federal government power. If implemented with the range of powers Reform proposed, such a Senate would produce a significant re-balancing of government power in Canada’s federation. So the anti-majoritarianism of the Triple E proposal has a clear de-centralist bias. But it would also generate dramatic power imbalances among Canadian voters. Given population differences, current Alberta voters would have four times Ontarians’ voting power in a Triple E Senate election.

There may be a case for this Triple-E second chamber in Canada’s parliament. But its advocates have never acknowledged that it is profoundly anti-majoritarian, and is driven by a logic at odds with their advocacy of direct democracy, and their attacks on ‘jurocracy’. The irony of an anti-majoritarian legislative chamber as a counterweight to constitutional change allegedly contrary to the majority’s interests is one of the many entertaining aspects of life in a federal state.

24 That is, capable of both initiating money bills, and vetoes over House of Commons’ bills.
The case for greater power to the regions against the centre has also been expressed in continual Reform, Alliance and now Conservative party demands for a decentralization of power to the provinces within the federal system.\(^21\) There is a long tradition of equating decentralized power with popular sovereignty in not English and French-speaking Canada. Recently, this equation of popular sovereignty and enhanced provincial government power was articulated in a call for Alberta to place a constitutional ‘firewall’ around its purported realm of provincial jurisdiction, to allow the provincial government to engage in more social programme cuts and expansion of private health care services. This proposal for Klein’s government to unilaterally take sole responsibility for a variety of services and programmes came from six new right activists in Alberta, including Ted Morton, Rainer Knopff, Tom Flanagan, and Stephen Harper.\(^26\)

Morton’s proposal for a ‘patriated’ Alberta constitution speaks to another proposal long important to the Canadian new right: the idea that private property rights need to be constitutionally entrenched. A 1996 Reform party Task Force on the Charter contended that Canadian citizens’ freedom would remain dangerously vulnerable without such an entrenchment. The Task Force proposed submitting other constitutional reform proposals to national referendums, but insisted – and the Reform Assembly agreed – on a unilateral federal constitutional amendment to entrench these rights. How could such unilateral action seem appropriate to party activists and leaders? Presumably they reasoned that it was unwise to take the risks entailed in a referendum vote when the goal was so fundamental: to protect the majority against special interests and state elites who seek to deprive the majority of hard-working Canadians of security over their personal property.

**Re-defining special interests and elites**

Central within the Canadian new right’s majoritarian talk is the idea that powerful minorities are working to obstruct the will of the people. These minorities are anti-democratic because they do not accept the will of the majority, and are called by two classically populist names: ‘special interests’ and ‘elites’.

With the help of an increasingly right-wing popular media in the United States, the new right in North America has managed to alter a long-standing

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\(^21\) For the Conservative party’s provisional policy on these matters, especially pertaining to healthcare and other social policy, see Conservative Party of Canada, ‘Partial Policy Statement’, pp. 7–8.

definition of ‘special interests’. In both the USA and Canada, left-populism after the 1880s shaped popular discourse on ‘special interests’ to associate them with corporate capitalists and their political allies. The new right has successfully re-defined special interests to include groups that support or benefit from the welfare state, those opposed to major tax cuts, and really any group that proposes that social resources and opportunities, including recognition and respect, should be allocated on the basis of non-market principles.27

‘The Court Party’ is Morton and Knopff’s catch-all coalition of the people’s special interest enemies. We saw earlier that the Court Party elites are feminists, ethnic minority group advocates, Aboriginal leaders, trade union leaders, and gay rights activists, as well as legal academics, human rights commission employees,28 and sympathetic state bureaucrats who justify and allocate funds to these groups. The Court party supports a Supreme Court whose ‘jurocratic’ power is now exercised as autonomously and unaccountably as any elite could wish.

Morton and Knopff follow Reform party usage in referring to Court party groups as ‘special interests’, elites seeking and savouring special privileges courtesy of an overbearing state. However, Knopff and Morton pioneered the case that the judicial elite and its Court Party backers are the major threat to Canadian democracy. In doing so, Court party players were implementing logical extensions of what Knopff and Morton, and Reform advisor Tom Flanagan, refer to as ‘Trudeau’s revolution’ (Flanagan 2002: 32; Knopff and Morton 2000: 76-7). Knopff and Morton are so attracted to this revolutionary analogy that they draw explicit comparisons between Prime Minister Pierre Trudeau and Lenin (ibid. 76). This account of how one devious Rousseau-inspired Legislator29 took trusting Canadians down a path of revolutionary social change overlooks a basic electoral fact. Canadians electorally supported this ‘revolution,’ both by re-electing Trudeau’s Liberal government in 1972, 1974 and 1980, and by re-electing most of the provincial governments that had endorsed this ‘revolution’ by giving provincial approval to the 1982 Constitution Act, including its Charter.

The response to questions about how clearly disadvantaged groups can be thought of as special interests, and their leaders as powerful elites, is typified

27 For a fuller discussion of this re-definition of special interests, and the specifics of Reform’s re-definition in the Canadian setting, see Laycock 2001: Chapters 1, 2 and 4.
29 Influential Canadian Conservative organizer and writer William Gairdner attempts to prove that Trudeau was a closet Rousseauian, see Gairdner 2000.
in the Reform/Alliance position on ‘the native industry’. They conceded that Aboriginal people are, on average, much poorer and less healthy than non-Aboriginal Canadians. But this is a function of their being treated differently by law than other Canadians, and because neither government nor native leaders have understood that their only salvation is through ‘assimilation’ into the Canadian economic mainstream. Until they accept this, Aboriginal people will continue to be a ‘special interest’ as their leaders insist on ‘special, race-based rights’ while pursuing land claims, seeking self-government, or demanding state support. In any case, Reform contended, ordinary native people don’t really want and can’t benefit from things demanded by the native leadership ‘elite’ – especially ‘collective property rights’ within self-government.

For Manning, Stephen Harper, and their advisor Tom Flanagan, Aboriginal peoples’ interests, like those of all Canadians, lie in sharing the same institutions, and benefiting from the same freedom-enhancing private property rights, as other Canadians. Their ‘rent-seeking’ leaders, however, are clearly in line to benefit from special rights. They benefit from federal financial support to native bands, and will benefit from the elite power they would obtain over their communities if self-government were arranged, and collective property rights were the norm. The lawyers pressing these demands in courts are obviously rent-seekers, picking the pockets of both ordinary native peoples and Canadian taxpayers. While doing their best to make hard-working Canadians feel guilty about the plight of native peoples, and claiming to work on behalf of their people, these lawyers and native leaders are merely pursuing their own selfish interests. For the ‘Aboriginal industry’, as for all equality seekers and special interests with constitutionally-focused rights claims, new right intellectuals have a ready supply of rational choice, rent-seeking explanations.30

Following several years in which Canadian gays and lesbians have used the courts to seek first spousal benefit rights and now marriage rights, social conservatives like Morton see gay activists and advocates as full members of the Court party elite. Gays and lesbians are alleged to want special dispensations to behave differently from ‘normal people’, plus special kinds of protection dispensed by human rights commissions. They want all the legal rights and state benefits that heterosexuals get, without having to abide by the same moral code. In the 1996 parliamentary debate on proposed changes to the Canadian Human Rights Act, Preston Manning contended that the Act

30 See the introduction in James et al. 2002 for a good example of this. Knopff and Morton 2000 also allege that Court Party ‘equality seekers’ are essentially driven by selfish interests, against the interests of ‘the many’ (p. 84).
should not include sexual orientation in the list of prohibited grounds of discrimination, but should ‘base the entitlement to special help and protection not on personal characteristics or membership in a special group, but simply on the naked fact that those people are Canadians period, entitled to equality before the law’. The ‘chief advocate’ of this ‘equality approach to affirming rights and preventing discrimination’ was his Reform party.

Manning also acknowledged that Reform was opposed to ‘special rights’ for gays because of the grave impact they’d have on the family, and because such special rights were contrary to Christian teachings, which warn against the creation of invidious distinctions among people. ‘The Christian ideal is … the elimination of the very conceptualizations and categorizations, the end of categories, upon which prejudice feeds’ (Manning 1996: 2582–3). So to be pro-special rights, for gays or anyone else, is not only to support elites and threatening special interests; it may also be un-Christian.

Ethnic minority organizations are special interests because they receive funds from the federal government by virtue of their ‘multiculturalness,’ and receive rights to special treatment, thanks to sections 23, 24 and 27 of the Charter. 31 For the Reform party and its successor parties, the most problematic aspect of the Charter’s ‘group rights’ is their legitimation of affirmative action programs that distort market incentives, rewards and signals. These parties have supported the idea that ‘individuals or groups are free to preserve their cultural heritage using their own resources’. If the benefits of multiculturalism can be purchased through market earnings, they are legitimate; if not, they are illegitimate, will be delivered via elitist state interference in civil society, and should thus be seen as oppressive to the dominant cultural majority. 32

Finally, it is crucial to the new right case against the Charter and the Court party that judges are characterized as the elite of the elites. In their 2000 book, Knopff and Morton emphasize the political unaccountability and professional self-regulation judges enjoy, and contend that judges, their clerks, and their law school professor friends are increasingly ‘postmodern’ in training and temperament (Chapter 5), and ‘postmaterialist’ in ideological

31 Section 27 reads: ‘This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians’.
32 See the discussion in Laycock 2001: 77–92. For a clear expression of some more extreme but still Reform-friendly opposition to multiculturalism on the Canadian right, see Gairdner 1990 (Chapter 15: ‘The Silent Destruction of English Canada’). Gairdner was a popular speaker at early Reform meetings, and retains close links to new right intellectuals and pundits through his ‘Civitas’ organization, and his virtual conservative community, http://conservativeforum.org.
orientation (Chapter 3, esp. 77-86). This all places them at odds with ordinary people. As Morton said in a 2003 article, ‘Judges are drawn from the elite lawyering class – one tenth of 1 per cent of Canadians – unelected and appointed until age 75. The pretence that they are an accurate barometer of changing public opinion verges on farce’ (Morton 2003b: 29).

Public opinion research does not back up such claims. It shows that Canadians overwhelmingly trust judges more than politicians to protect rights that matter to them. The research also shows that, compared to post-1985 Supreme Court rulings, Canada’s ‘Charter Contras’ are very far from mainstream public opinion on equality rights questions (CRIC 2002; Fletcher and Howe 2000; Fletcher 2002; Howe and Johnson 2000: 150-68). For example, a 2002 national survey found that 24 per cent of the sample felt that the Charter did not go far enough, and 56 per cent felt it went just far enough, in protecting the rights of minority groups, while 33 per cent felt the Charter didn’t go far enough, and 55 per cent thought it went just far enough, in protecting women’s rights. Only 11 per cent felt the Charter goes too far in protecting rights of minority groups, and only 6 per cent felt it goes too far protecting women’s rights (CRIC 2002: 26, figure 7).

The Canadian new right’s understanding of equality

Canadian new right representations of equality are key to their reconfiguration of popular sovereignty. Knopff and Morton’s majoritarian attack on judicial and Court Party elitism has fuelled new right efforts to undermine the Supreme Court’s interpretation of constitutional equality rights. This critique is linked to the Canadian new right’s project of redefining equality in ways that enhance conservatives’ legitimacy in contemporary debates over public policy and constitutional practice. It involves an interesting variation on what Michael Freeden refers to as the ‘mirror imaging’ ideological response to perceived threats from ‘progressive’ ideologies that is characteristic of conservative ideologies. Freeden suggests that in such cases, core concepts from these ideologies are intentionally misconstrued, imbued with meanings contrary to the social intentions of the progressive ideologies, then downgraded to a lower conceptual status and import in the overall ideology (Freeden 1996: 336, 343). To compete more effectively within political cultures that allot a high regard for some idea of equality, the variation on new right ideology that we see here assigns its own ‘decontestations’ of equality a prominent place in public appeals. As Freeden says, this is intended to support the core ideological commitment to reversing social change and restoring a more natural social order.
Reform and Alliance party accounts of how the people can be sovereign in post-Charter Canada relied heavily on their derivative attempts to replace the idea of equality of opportunity integral to the post-war Canadian welfare state with one more congenial to a new right ideological agenda.\textsuperscript{33} The credibility of this understanding of equality, in turn, has relied on the right-populist attack on elites. I have analyzed the new right re-conceptualization of equality in considerable detail elsewhere.\textsuperscript{34} Here, I will summarize this case in relation to two key rhetorical moves. The first attempts to re-cast equality of opportunity in terms that present the welfare state as an obstacle to rather than a support for such equality. The second characterizes contemporary equality seeking groups within the Court party as proponents of a threatening ‘equality of outcome’.

The idea that equality of opportunity is desirable is almost unassailable in contemporary western democracies. From the 1940s through the 1970s, it was particularly associated with justification and development of the welfare state. This put conservatives at a considerable ideological and political disadvantage. They needed to develop a way of attacking the policy substance of equality of opportunity while obtaining political credit for its promotion.

By the middle 1970s, American and British intellectuals on the right had discovered that they could merge a Hayekian critique of the interventionist welfare state with a populist attack on state elites. They applied Hayek’s re-definition of equality of opportunity to this task with considerable ingenuity. Hayek had argued that equality of opportunity, properly understood, had nothing to do with normative justifications and policies of re-distribution, and everything to do with requiring all citizens to operate in a largely unconstrained market economy, equally subject to the same rule of law, with exactly the same rights. To claim a special benefit courtesy of government programs targeted to specific groups was to reject equal opportunity, and automatically qualify as a ‘special interest.’ Far from advancing equality of opportunity, such forms of state intervention in the market order undermined it. And to make things worse, post-war welfare states’ corrupted form of equality of opportunity had seriously reduced individual freedom and economic efficiency.

Hayek also provided some of the most important intellectual support for the new right’s allegation that supporters of the welfare state and its redistributive programs were in fact proponents of an ominous ‘equality of results’. Behind

\textsuperscript{33} For accounts of earlier, American sources of these arguments, see Ansell 1998; Stefancic and Delgado 1996; Micklethwait and Woolridge 2004.

\textsuperscript{34} See Laycock 2001, especially Chapters 2 and 4.
their sunny-sounding slogans of ‘social justice’, the special interest lobbies were really seeking an unnatural levelling, and special privileges, to be achieved through political means, at great cost to taxpayers, and against the legitimate outcomes of market relationships. The political world was portrayed as essentially bi-polar: whether they knew it or not, well-meaning liberals who supported equality of opportunity via an active state were really pawns in an essentially socialist plot, in which statist social engineering would oppress and dominate citizens. The only alternative to this distopian scenario was to allow the market to operate free from regulation and redistributive interventions, subject to a true equality of opportunity within the marketplace, where equal opportunity to enter contracts and enjoy property rights were upheld by the rule of law.

Reform party platforms and documents illustrated the re-casting of equality that has marked new right rhetoric across Anglo-American democracies. Their 1996–97 statement of party principles supported constitutional reform to promote equality by affirming ‘the equality of every individual before and under the law and the right to equal protection and benefit of the law’, and that ‘all federal legislation should reflect this principle of equality, which is negated by group rights’. The document also supports the judicial interpretation of the equality guarantee in section 15(1) of the Charter of Rights and Freedoms as mandating equality of opportunity rather than equality of outcome (Laycock 2001: 80). The 1996 Reform party convention overwhelmingly endorsed a party Task Force recommendation of that proposed repeal of section 15(2) of the Charter, because it permits the use of reverse discrimination and “affirmative action”, which is “intolerable in a society where all citizens are equal under the law” (ibid. 86).

This characterization of section 15 as mandating (not just allowing) ‘reverse discrimination,’ and leading to ‘equality of outcome,’ is also found in Reform-allied Canadian academics’ commentary on the Charter and judicial supremacy. A common theme is that having moved beyond formal ‘equality under the law,’ Charter advocates have unleashed the forces of rampant social engineering, reckless special interest lobbying, destruction of basic liberal rights and freedoms, and hence the eclipse of liberal democracy. All of the ‘group-differentiated rights’ in the Charter – directed to women, ethnic minorities, linguistic minorities, and Aboriginal peoples – are condemned by these academics as an affront to true equality, meaningful freedom, and real

35 See Knopff and Morton 2000: 74ff on the Court Party’s ‘social engineer’ faction.
democracy, under the guise of ‘egalitarianism’ (Knopff 1987; Gairdner et. al 1998; Peacock 1996, 2002).  

Conclusion

When combined with the demand for ‘equality among provinces’ (which rules out special powers or recognition for Quebec, and requires a ‘Triple E’ Senate), and citizen equality in the popular sovereignty offered by direct democracy, the Reform case for equality among citizens extended a powerful appeal to western Canadians. It bolstered an effective populist critique of unaccountable federal politicians, powerful judges, and new social movement actors with whom many people cannot identify. Reform, the Canadian Alliance, and now the Conservative party have promised a ‘special interest free zone’ of purified and simplified political interaction, in which elites are sent packing and people have more scope for truly free activity in the marketplace.

As I have argued, however, this political project is also about reversing modest state efforts to redistribute resources and opportunities to social groups who, prior to 1982, had enjoyed very little political clout or social standing in Canada. The Canadian new right now believes that this battle must be fought in courts as well as in elections, so are now campaigning to dramatically reduce ‘equality seekers’ access to courts. As Gregory Hein points out, this

would hinder interests concerned about racism, homophobia, gender inequality, environmental degradation, poverty, the lives of the disabled and the plight of Aboriginal peoples. Traditional judicial review would not, however, frustrate litigants advancing conventional pecuniary claims, and legal action would still be an effective strategy for interests that want to resist state intervention.

(Hein 2001: 245)

The new right attack on the Charter, its legislative and judicial implementers, and its supporters in Canadian society, is a constitutional and political intervention with clear ideological and policy goals. In attempting to rhetorically reconfigure popular sovereignty, the Canadian new right has sought to compensate for its failure to achieve its anti-egalitarian agenda through federal and provincial political parties, think tanks and lobby

37 Occasionally, the term equality will be ceded to the enemy – but only after it has been soiled by association with special rights-seekers, contrasted with ‘democracy,’ and portrayed as ‘the real threat to human rights’. For an example of this, see Morton 1998b.
organizations, the media, and a culturally wide-ranging critique of state intervention in the marketplace. The new right’s account of constitutional change and evolution is at least as political, and just as ideologically engaged, as the actions of the Court Party ‘special interests’ they revile. This right-populist critique of judicial politics has been transmitted increasingly effectively through new right parties, think tanks, and the media over the past decade.

In retrospect, the politics of the Charter seem bound to have become a lightning rod for right-wing attacks on egalitarian initiatives in Canada. We can expect the campaign against a special interest-beholden ‘jurocracy’ to continue until the Canadian right has the same opportunities to reverse the ideological sign of such activism as the American right now enjoys. With the Harper-led Conservative party now poised to strongly contest the next federal election, we can expect to hear even more Canadian ‘Charter Contra’ attacks on ‘equality seekers’ and their Court party defenders.

What broad insights can be drawn from the Canadian case regarding the clash between the new right, on the one hand, and the extension of equality rights? First, this case shows that the campaign against judicially-assisted and state-sponsored support for multiculturalism is intimately linked to an older conservative case against state intervention in the economy and redistribution of opportunities and resources via the programmes and agencies of the welfare state. Activist judges are problems, from this perspective, for the same reasons that activist legislatures are. By ruling on questions of justice as they apply to ethnic minorities, genders, communities of sexual preference, and employee rights in the marketplace, judges add to the damage done by post-war legislatures. The new right reacts politically in increasingly sophisticated ways, as they see courts intrude further in the workings of the market order, provide additional grounds on which property rights can be overridden, tilt the distribution of social resources towards a broader range of undeserving groups, and do more to undermine traditional institutions and relationships in the family and civil society. That such intrusions have not reversed an overall North American trend towards increasing social inequality seems not to have curbed their desire to stem the tide of egalitarianism.

The Canadian new right’s opposition to extension of equality rights also shows how creative the new right has become in appropriating the language of democratic reform movements on the left. Prior to the 1970s,

38 See ‘American Democracy in an Age of Rising Inequality’, the report of the American Political Science Association Task Force on Inequality and American Democracy (2004), at http://www.apsanet.org/section_256.cfm
conservatives had not discovered how to contest the commanding heights of the democratic imaginary with reference to popular sovereignty, equality and the antagonism shown by ‘the special interests’ towards ordinary citizens. With roots in a re-vitalized conservative movement in the US, this alternative democratic logic has been central to the Canadian right, both in the language and symbols of new party activity, and in the work of academics making the case against judicial activism. In other western countries this appropriation of what were once the left’s democratic symbols and appeals has also proceeded quite some distance. Australia and Austria provide two revealing cases of this trend, though the judiciary can’t be presented as central agents of anti-majoritarian revolution there, so parties, bureaucrats and intellectuals are targeted more directly.

Nonetheless, whether ‘partyocracy’ or ‘jurocracy’ is the target, it is clear that parties of the new right throughout Europe, North America and the Antipodes have become quite comfortable with, and learn from each others experiments in, new right populism. Prior to the 1970s, a populist conservatism would have seemed oxymoronic in both theory and practice to partisans of the right, left and centre. Now that the rhetorical groundwork has been well laid, and applied to such a wide range of equality-seeking targets, there are still problems of ideological consistency. But there is no doubt that new right populist packages displaying a reconfigured understanding of popular sovereignty offer powerful weapons for parties and other forces on the right wishing to combat multiculturalism and other expressions of modern egalitarianism.

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39 On Australia, see Sawer and Hindess 2004; regarding Austria, see McGann and Kitschelt 2005 and Betz 2004.
40 For a conceptual exploration of this populism, see Laycock 2001 and 2005.
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Chapter 9

Looking into the Abyss
The Need for a Plan C

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In his book \textit{Impossible Nation}, Ray Conlogue writes:

\begin{quote}
The qualities that make our country so attractive to others and to ourselves – a century-and-a-half of domestic peace, a comfortable standard of living, an idealized notion of ourselves as a kind and gentle people – are the worst possible qualities for dealing with a crisis of this kind.

(Conlogue 1996: 19)
\end{quote}

He is, of course, referring to the fact that, sometime in the next decade, Canadians may face the breakup of one of the oldest continuously

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functioning constitutional democracies on Earth – their own. The outcome of the October 1995 Quebec referendum confirms, irrefutably, that the breakup of Canada is no longer the implausible, hypothetical future crisis that should not concern practical people.

Canada’s history ill prepares us for this challenge. In modern times, Canadians have not experienced invasion, foreign occupation, or revolution. Instead, the lessons of the past have, nineteenth-century rebellions aside, induced us to view certainty, stability, and continuity as natural. This stable history might, of course, suggest that Canadians are more skilled in averting the threats to their survival to which other, less adroit peoples have succumbed. To some extent, this is true. Canadians have enjoyed a living, adaptable Constitution, expanded peacefully from four provinces to ten, and incrementally extricated themselves from the embrace of their imperial mother across the Atlantic. Canadians have weathered depressions and contributed significantly to victory in two world wars. Their federal system has gone through cycles of centralization and decentralization – in most cases without any formal changes to the Constitution. Canadians have democratized the constitutional order and accommodated new categories of voters, and they have developed their own versions of the welfare state and of social rights.

These accomplishments are, without question, major tributes to Canadians’ resourcefulness in managing their affairs, but in relative terms the challenges Canadians have confronted have been minor. In the past, the self-congratulatory assertions of some Canadians that theirs was a difficult country to govern must have been heard with incredulity by most members of the United Nations or of the earlier League of Nations. In fact, by the standards of most of the world, Canada has been an unusually easy country to govern. This historical truth, however, may no longer apply. Federalists may not be able to keep Quebec within Canada; if Quebec goes, Canadians and their governments in the rest of Canada (ROC) may mismanage the terms of secession, making more difficult a subsequent harmonious coexistence with an independent Quebec; and the ROC may bungle the fashioning of a new constitution for those left in the truncated Canada that nobody sought.

This Commentary focuses on the initial steps toward meeting the third of these challenges – fashioning Canada’s future without Quebec. My purpose is not to argue that Canada without Quebec must survive as a single entity, although that is my strong preference, or that the survivors should continue into the distant future with constitutional arrangements that mirror the
current ones. Nor is my task to try to dictate the precise constitutional arrangements appropriate for Canada without Quebec. Rather, I want to suggest ways to increase the likelihood that those arrangements, whatever they might be, emerge out of a reasoned process of constitution making, and to minimize the instability, panic, and chaos inherent in a breakup. The first requirement, therefore, is to reduce the turbulence that would likely follow a ‘yes’ vote in Quebec. The second, related, requirement is to gain time so that Canadians outside Quebec do not face having to re-constitute themselves while simultaneously removing Quebec as a province in their formerly shared country, as well as working out a limited coexistence with the now foreign neighbor that would then separate Ontario from Atlantic Canada.

Canadians have not faced challenges of this magnitude since before Confederation. Yet, we are almost completely unprepared for the major task of reconstructing Canada without Quebec; indeed, our lack of preparation is essentially inherent in our situation. Thus, the question to which this paper provides one answer, is: How can Canadians outside Quebec prepare to respond intelligently to the reconstitution of the ROC should Quebecers vote convincingly ‘yes’ in the next referendum?

I begin by providing some background to current responses to the Quebec sovereignty issue and by suggesting why they are insufficient. In the following brief, but crucial, section, I discuss how and why Canadians are in a state of almost total ignorance about the fate of the ROC in the event of Quebec’s secession. In the section after that, I discuss how difficult the situation would be for Canadians in such an event, not just in practical terms but in psychological ones as well.

I then come to the heart of the Commentary: a proposal to take the first simple, but necessary, step toward reconstituting Canada without Quebec by establishing an interim arrangement that would be as much like the status quo as possible, to provide Canadians with the breathing room to plan for the longer term. I follow this proposal with a brief discussion of what such a transition period might be like, and offer a few hints as to the kinds of steps Canadians might take from there. I conclude the Commentary with a plea for governments and key actors to accept the need for ‘Plan C’, so that Canadians are not completely unprepared to face an increasingly possible future without Quebec.
Plan B: not enough

The secession of Quebec and the resultant breakup of Canada have been serious possibilities for at least 30 years (Canada Royal Commission on Bilingualism and Biculturalism 1965: 13). Until recently, the response to that threat to Canada’s survival focused on renewing the federal system by constitutional and non constitutional changes designed to increase the attractiveness to Quebecers of remaining in Canada.

In the wake of the October 1995 referendum result, however, the federal government and many Canadians came to realize that something more was needed in response to the Quebec sovereignty movement. So renewed federalism was dubbed ‘Plan A’, and a supplementary strategy, ‘Plan B’, haltingly emerged as both an addition to federalist arguments against secession and a contingency policy in case all arguments, in the end, fail.

The exact scope and meaning of Plan B varies with the commentator who uses the term. For the purposes of this Commentary, I use Plan B to refer basically to: ‘an elaboration of the ground rules governing a secession attempt; and an indication that the costs of secession, especially in the case of a unilateral declaration of independence (UDI), would be very high’. These steps are important and, regrettably, necessary. But they do not address the most important problem that the ROC would confront if Quebec were to secede: the survival and reconstitution of Canada without Quebec. The obvious rubric for policy directed toward this crucial issue is Plan C, a term I use in this way throughout the paper. At the level of official public policy, however, this fundamental concern is not part of any government’s plan under any label. This deficiency, as I discuss later, is not merely a regrettable, easily rectifiable oversight, but an inescapable consequence of constraints on

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1 The first ‘official’ warning came in 1965: ‘Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history...the state of affairs established in 1867, and never since seriously challenged, is now for the first time being rejected by the French Canadians of Quebec’.

2 Plan B, according to Terrance Wills (1996), ‘is really a way to prevent separation by portraying its excruciating effects for all to see’. It is intended to undermine the strategy of ‘the separatist leadership [which] has spent years, without inhibition or contradiction, developing the myth of a cake-walk to separation’. See also Jenson and Maioni 1996: 98-101.

3 The term ‘Plan C’ has occasionally been put to other uses in the course of the Canadian constitutional debate. The Reform Party, for example, has used it to refer to its proposal for ‘new federalizing’. Here I use it to mean the process of reconstituting the rest of Canada in the event of Quebec’s secession, a process that can only begin once any bargaining over the actual secession process (Plan B) is completed.
Looking into the Abyss: The Need for a Plan C

To understand why a Plan C does not now exist and why it is necessary to have one, a tour of Plans A and B – and of their inadequacies – is a necessary preliminary. Such a tour shows the immense difficulty governments have in responding to the challenge of accommodating Quebec within Canada, or of the ROC’s survival without Quebec.

Plan A
Plan A, the attempt to renew federalism, has a long history punctuated by major inquiries, such as the Laurendeau-Dunton Commission, the Pepin-Robarts Task Force, and the Spicer Commission, and by major efforts to amend the Constitution, including the Victoria Charter, Bill C-60, the Constitution Act, 1982, and the Meech Lake and Charlottetown Accords. Only the complex process following the 1980 Quebec referendum led to formal change: the Constitution Act, 1982, which, however, the Quebec National Assembly has never approved.

While Plan A is driven primarily by the special need to accommodate Quebec, it cannot, in the 1990s, ignore the other provinces or such stakeholders as women, aboriginal peoples, or Charter Canadians, who can frustrate any process that appears to slight their concerns. Consequently, the scant package of constitutional changes directed to federalism in the 1971 Victoria Charter had expanded by the 1992 Charlottetown Accord into a comprehensive smorgasbord that went far beyond federalism in its scope and that spoke directly to all Canadians.

The federal government’s latest version of Plan A is a combination of decentralization – devolving responsibilities for tourism, recreation, mining, social housing, forestry, and labor market training to the provinces – a symbolic recognition of Quebec as a distinct society by Parliament, and an amending-formula veto for Quebec as part of the federal government’s ‘loan’

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1 The House of Commons resolution introduced by the Prime Minister on 29 November 1995, reads as follows: ‘Whereas the People of Quebec have expressed the desire for recognition of Quebec’s distinct society; 1) the House recognize that Quebec is a distinct society within Canada; 2) the House recognize that Quebec’s distinct society includes its French-speaking majority, unique culture and civil law tradition; 3) the House undertake to be guided by this reality; 4) the House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided accordingly’. See Canada, Parliament, House of Commons, Debates, 29 November 1995, p. 16971. The resolution was passed on division 148-91; see the Debates of 11 December 1995, pp. 17536-7.
of its amending veto to the five regions of Canada.\(^6\)

This very veto, coupled with the developing convention of requiring a referendum on major constitutional changes, weakens the feasibility and attractiveness of formal constitutional change as a route to solving the problems of federalism. Another reason to avoid the constitutional route is the belief that the Parti Québécois (PQ) government is not open to any effort to renew the federation. The only feasible strategy, therefore, is to work with the opposition Quebec Liberal Party and be prepared to move quickly on constitutional issues with the Quebec provincial government if and when the Liberals are returned to power. Not surprisingly, the federal minister of intergovernmental affairs recently indicated that no formal constitutional changes were planned (Bryden 1996; Fraser 1996). Therefore, compared with previous versions, the current official Plan A is relatively unambitious, constrained as it is by memories of how major attempts at formal change have failed in the past. (As Roger Gibbins shrewdly notes, however, Plan A’s provincialist thrust – linked to a massive increase in intergovernmental machinery – might result in extensive, if incremental, de facto change).\(^7\)

The 1997 version of Plan A may not be enough to win the next referendum for the federalists, but it may not be possible to do more. The emergence of Plan B outside Quebec is a belated recognition of the fact that two different constitutional games are under way simultaneously: one to renew federalism, the other leading to the more drastic outcome of Quebec sovereignty (and by necessary inference the sovereignty of a residual Canada outside Quebec). Quebec politicians have played both games concurrently for 30 years. Until the October 1995 referendum, Canada/ROC had officially played only the renewed federalism game.

Until recently, political actors outside Quebec have avoided outlining a Plan B on the grounds that to prepare for a breakup was to admit publicly that a breakup was possible – and thus to give legitimacy to an unwanted result. Plan B – preparations for the possible failure of Plan A – was, in effect, a taboo subject, surrounded by ‘keep out’ signs.\(^8\) The fear of a self-fulfilling prophecy has not gone away, but it has been overwhelmed by the closeness


\(^7\) See Gibbins 1997. Given the minimum public input characteristic of this kind of incrementalism de facto constitutional changes by stealth.

\(^8\) For a discussion of this phenomenon, see Cairns 1991.
of the October 1995 referendum result, which graphically underlined how totally unprepared governments outside Quebec were for a ‘yes’ victory."

According to Charles Taylor, something ‘snapped’ in Quebec after the defeat of the Meech Lake constitutional proposals, as Quebecers realized that a modest constitutional package could not make its way through the formalities of the amending process (Taylor 1991). After the October 1995 referendum, something snapped outside Quebec. Complacency was no longer a defensible stance. In addition to the elementary recognition that an almost total unpreparedness for an increasingly plausible ‘yes’ victory could be disastrous at the bargaining table, many in the ROC experienced a degree of humiliation at the thought that they and their governments had been so naïve, even Panglossian, in their optimism. Those who were politically involved felt a certain shame and anger that they had believed the soothing utterances of their leaders that everything was under control.

Hence, today, there is widespread recognition outside Quebec by opinion leaders and ordinary people alike that Plan A is not enough. If no other options are explored, all constitutional and other efforts will be directed to a project that may fail, leaving Canadians and their governments in the ROC unprepared to respond to the outcome they had hoped to forestall. In a recent article, Douglas Brown notes how academics and other analysts are now remarkably willing to discuss the formerly taboo subjects of responding to a ‘yes’ victory and thinking about the future of Canada without Quebec (Brown 1997). Accordingly, Plan B now attracts significant attention.

Plan B

Plan B signals that one can no longer assume that Canada will acquiesce quietly in its destruction in a constitutional game determined by its opponents. The plan’s two essential purposes reinforce each other: by laying out a plan to protect Canada’s interests should Quebeckers vote ‘yes’, it also helps to reduce the chances of such a result. The Reform Party has been in the vanguard of advocates of Plan B, stressing that it ‘would show the separatists what they would be up against in a real secession negotiation...and

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9 See, for example Rose 1995; Berger 1995; Spicer 1996a; Simpson 1995b. For additional references, see Cairns 1996: 39, n12.

10 For example Brian Dickson retired chief justice of the Supreme Court of Canada, asserts the importance of ‘discuss[ing] now, in an open and democratic fashion, the ground rules that ought to apply in any future referendum campaign and its aftermath’, see Globe and Mail 1996b. He adds that the rule of law must apply ’to the secession of a province’. See also Gwyn 1995; Bliss 1995; Simpson 1995a.
make it crystal clear to every Quebecer... exactly what the negative implications of secession are’ (Manning 1995).

Gordon Robertson (1996) sums up the prevailing mood in his justification for federal contingency legislation for a Quebec referendum: such legislation would reduce the risk and make very clear to the ‘yes’ side that it will be up against a well-prepared federal government before there is any agreement to secession by Quebec.

Plan B, as Robertson’s statement suggests, elaborates a crucial distinction that hitherto had been obfuscated by the focus on whether or not the federal government would respect a ‘yes’ vote. Plan B distinguishes between the acceptance of a ‘yes’ and the agreement on the terms of implementing it, including constitutional amendments. It makes clear that a fair question and a convincing ‘yes’ only get the two parties to the bargaining table, where the terms of separation would then have to be worked out – that the terms cannot be determined unilaterally by one party on the basis of a ‘yes’ vote. In the event of such a vote, then, the goal of Plan B would be to effect an orderly separation process, one that is subject to the rule of law.

Such, at any rate, is the theory. At the official level, at least, Plan B today is less a plan than an inchoate set of assumptions that in many cases are still tentative. The term ‘plan’ in fact suggests a degree of specificity, comprehensiveness, and coherence for an official response that does not exist.

The federal government’s version of Plan B is an orientation, not a program. It is not summarized in any document. It is an aggregation of specifics, such as the recent reference to the Supreme Court of Canada and statements by the prime minister and his cabinet colleagues. Some of these statements, often

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11 Manning (1994) further addressed to the prime minister 20 ‘hard questions being asked by rank and file Canadians regarding Quebec’s potential separation from Canada’. The Reform Party (1994) subsequently published its own hard-line answers.

12 See the excellent discussion by Hogg (1996), see also Monahan and Bryant (1996: 23, 30). Then-justice minister Allan Rock’s speech to the House of Commons, 26 September 1996, announcing the federal government’s reference to the Supreme Court of Canada on whether domestic or international law gives Quebec the right to a unilateral declaration of independence, is a eulogy to the rule of law, the framework of order, and refers to his own role as ‘custodian of the Constitution of our country’ (Rock 1996). José Woehrling, however, argues that the complexities of the amending formula could justify a Quebec UDI, based on agreed bargained terms, should an amendment not get over all the hurdles, on the grounds ‘that ROC had been reduced to incoherence and paralysis by the unwieldy amending formula of the Canadian Constitution’ (Woehrling 1996: 96).

phrased as warnings or questions, are simply trial balloons designed to test opinion and rattle the other side. In fact, part of Plan B may be a scattergun approach of warnings and threats, the very randomness, incompleteness, and possibly even incoherence of which may be deliberate attempts to destabilize the sovereignty movement. Alternatively, the hesitancy that attends Plan B may reflect the fact that it occupies new policy territory. Unlike Plan A, which has a library of material to build on, Plan B has no predecessor, no inherited intellectual capital to exploit. Its creators are necessarily feeling their way in a policy area they have only reluctantly entered. They have a long way to go.

More than a year and a half after a referendum in which the ‘yes’ forces almost triumphed, there are no legislative committees or task forces examining alternative futures, and not a single major position paper dealing with either Plan A or Plan B has come from any government outside Quebec. The silence is startling and deeply disturbing. The future of Canada without Quebec is not a public concern of any government in the country. Fortunately, Plan B thinking is not confined to governments. In fact, one of the striking characteristics of the post-1995 Quebec referendum situation is the unwillingness of individuals and organizations to leave the responsibility of either renewing federalism or preparing a response to a future ‘yes’ victory to governments. Yet it is deeply disturbing that so much of the asking and tentative answering of the fundamental questions of Canada’s present and future constitutional existence – with or without Quebec – comes from nongovernmental sources: journalists and academics, with a leading role played by think tanks. Laments over the somnolence outside Quebec on the constitutional abyss that Canadians face are common in English-language newspapers and elsewhere.

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14 Young (1995a: 181-2) discusses the federalist strategy to increase uncertainty by refusing to specify Ottawa’s position on contentious issues, such as the necessary size of an acceptable majority. See also page 292.
15 The government of British Columbia is a possible exception. Andrew Petter, Minister Responsible for Intergovernmental Relations, has established a group headed by MLA Gordon F.D. Wilson, leader of the Progressive Democratic Alliance, to advise the government, and British Columbians generally, on national unity issues from a BC perspective. Apparently, the group’s mandate includes British Columbia’s options if Quebec were to secede.
16 See Canada Watch 4 (August 1996, nos. 5 and 6), a special double issue focusing on Plan B.
17 For example, the discussion of Plan B has been immeasurably advanced by Monahan and Bryant 1996.
18 See, for example, Simpson 1996, reporting former Alberta premier Peter Lougheed’s distress over the inactivity.
Plan B territory, some of it occupied and some of it only gingerly explored, has been mapped out. Drawing on the contributions of several commentators, I consider that it encompasses the following:

- **A requirement that the process for determining the will of Quebecers be fair and transparent**—for example, through the use of a fair question (Young 1995a: 113-14, citing Richard Simeon). This means that the rules of the secession game should not leave the unilateral power to determine the wording of the referendum question to a self-interested actor, the Quebec government, which may again, as in the past, be irresistibly tempted to ask a mobilizing question. If a referendum were held on an unacceptably biased question, federalist forces outside Quebec might declare the referendum result invalid.

- **An agreement as to what constitutes an acceptable majority.** Both Chrétien and Dion have stated explicitly that 50 per cent plus one would not be enough. Relevant considerations include: (i) the fact that an issue of such surpassing importance might necessitate a supermajority; (ii) the fact that, internally, Quebec is a pluralistic society, with anglophones, allophones, and aboriginal peoples as well as francophones; is a majority in which they do not participate adequate to deprive them of their connection to Canada?; and (iii) the extent to which the failure of the federal government to specify more than a simple majority in the referendums of 1980 and 1995 constitutes a precedent that cannot be over-turned (Monahan and Bryant 1996: 13-14).

- **A decision as to whether one referendum would be enough or a second would be required to deal with the results of the negotiations on the terms of separation.** According to José Woehrling, a leading Quebec nationalist law professor, to implement separation on the basis of an initial referendum before the voters can know the consequences of their action would not only offend Canadian law, but it [would] also be undemocratic and hence indefensible before international public opinion or on the basis of international law (Woehrling: 1996: 95).  

- **Consideration of the special position of aboriginal peoples within Quebec.** Would they be expected simply to go along with a majority 'yes' if...
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their own wishes were overwhelmingly ‘no’, as they were in October 1995? The answer must take account of the distinct position of aboriginal peoples in domestic and international law.\(^{22}\) The issue of the territorial integrity of a seceding Quebec, and the linked question of the right of aboriginal peoples to determine the larger community to which they wish to belong.\(^{23}\) The general and volatile issue of partition as it relates to other dissenting ‘no’ minorities is also relevant here.\(^{27}\)

- *Contingency legislation that would subject Quebec’s secession to the rule of law and minimize disruption.* Gordon Robertson’s proposals for such legislation include: (i) the illegality and non-recognition of a UDI; (ii) the continuing applicability of federal law in Quebec regardless of the wishes of the Quebec government; (iii) the retention of all Canadian institutions until Parliament or the Governor-in-Council declares otherwise; and (iv) advance agreement on the procedures to finalize the agreed terms of secession (Robertson 1996: 93-5).

- *Substantive issues of immediate, practical concern that would attend the breakup of the country, the responses to which could not be delayed.* These include division of federal debt and assets, the creation of a land corridor between Ontario and the Maritimes, control over the St. Lawrence Seaway, division of the armed forces and the civil service, the position and future of aboriginal nations, the territorial integrity of Quebec, and a few others. Many partnership and some other issues would have to await the reconstitution of Canada after Quebec had departed and hence would not be part of Plan B in this bargaining transition stage.

**The view from Quebec**

Although Quebec sovereigntists have had counterparts to both Plan A and Plan B since the 1960s, the emergence of the federal government’s own shaky Plan B has evoked outraged responses from both the PQ and the Bloc Québécois, presumably because their Plan B presupposed, or hoped for, a defenseless, co-operative partner on the other side.\(^{23}\) A more cynical view, suggested by one reviewer of this paper, holds that the PQ and the Bloc knew the bargaining would be brutal, but thought their success in a referendum required keeping that information from Quebec voters.

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\(^{23}\) See the various statements by then-Indian affairs minister Ron Irwin supporting the rights of aboriginal peoples to remain with Canada should Quebec secede, reported in Aubry 1996a and 1996b. The PQ government’s reply is summed up in McKenzie 1996a; and Séguin 1996a.

\(^{24}\) For federalist statements on the divisibility of Quebec, see Ottawa Citizen 1996; Cox 1996; Howard 1996a; Globe and Mail 1996a.

\(^{25}\) See for example Authier 1995a, 1995b; Thompson 1996a; McKenzie 1996; Wills and Wells 1996.
The contemporary sovereigntist alternative to federalism is well developed. The PQ and the Bloc claim that Quebec has an unfettered right to secede unilaterally. They assert that the Canadian Constitution is irrelevant to such a unilateral act, and they justify using their own referendum legislation, which gives the Quebec government control of the timing and wording of the referendum question. They assume that a 50 percent plus one majority would be adequate. They assert that the territorial integrity of Quebec is inviolable, and they claim that, politically, Quebecers are a single people – despite the massive ethnic divisions revealed by the October 1995 referendum, in which anglophones, allophones, and aboriginal nations overwhelmingly voted ‘no’.

Prior to the 1995 referendum, the PQ had prepared itself for a ‘yes’ victory. The Quebec government was ready to move expeditiously and vigorously to implement the mandate it would claim from the electorate. Visits to foreign capitals were to be orchestrated and foreign embassies contacted. There was an understanding – or at least a hope – that France would move quickly to recognize Quebec’s independence and then pressure the United States to follow suit. Further, the Quebec government had amassed a $19 billion fund to prop up the Canadian dollar, much of it taken from pension funds. Premier Jacques Parizeau had his victory speech ready. A one-year time-table had been established for negotiation of an economic partnership with Canada, a task to which then-Bloc leader Lucien Bouchard had been appointed and for which organized proposals to Ottawa had been prepared.

A victorious PQ was ready to launch what a press report described as a massive assault on an unprepared Ottawa ‘to bring the federal government to its knees’ (Séguin 1995). Further, the PQ government had indicated its willingness to resort to a UDI if negotiations had not proceeded satisfactorily. Hence, the PQ did not see an agreement on the multitude of issues to be resolved with Canada/ROC to have been a prerequisite to independence. More pointedly, the PQ treated the Canadian Constitution as having negligible relevance for the secession process. In brief, Canada outside Quebec was assigned the role of spectator in the referendum while Quebecers – as Quebecers, not as Canadians – decided their (and Canada’s) future. Nationalist rhetoric also suggested the ROC would play the role of a complaisant, cooperative partner of an independent Quebec following the hoped-for ‘yes’ vote.

The PQ justified this readiness for rapid action by rhetoric that assumed Quebecers had a remarkable degree of discretion in determining the route to
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sovereignty. What made this strategy believable was the relative silence and lack of preparation outside Quebec, on the part of governments and ordinary citizens, concerning a sovereigntist outcome for which many Quebeckers had been preparing for three decades.

The juggling game

Although both Quebec and Ottawa are now engaged in Plan A and Plan B activities, it is much easier for Quebec than for Ottawa to juggle the two games. In Quebec, diametrically opposed futures have been explored and pursued with vigor since the late 1960s, mostly through competing political parties (the fédéra-list Liberals and the sovereigntist PQ). Occasionally, one party has moved in the direction of the other, as when PQ premier René Lévesque, after the Constitution Act, 1982, decided to accept the beau risque of renewed federalism, or when Liberal premier Robert Bourassa, after the failure of the Meech Lake Accord, flirted with more drastic options and commissioned what became the Allaire Report, which recommended a renewed federalism with an emasculated Ottawa. Whichever party was in power, the two possibilities were part of official debate: in addition to the Allaire Report, the Bélanger-Campeau Commission and two National Assembly committees explored Quebec’s options after Meech Lake.

Outside Quebec, however, it has been much more difficult to play the two games simultaneously. One reason for this is psychological. Not only are the two plans directed to different futures, but the scenario behind each plan portrays the other party in a different light depending on the goal that is sought. Thus, Plan A presupposes a friendly counterpart who can be conciliated, who is now and will remain a member of the same political community. Plan B portrays the other party as the breaker of the nation, as a hostile actor preparing to exit the Canadian community and thus not deserving of the empathy that is reserved for fellow citizens – in other words, it treats Quebeckers as the foreigners they might become. By generating contradictory images of the ‘other party’, the two plans transmit contradictory messages to those who draft policy and prepare its implementation. With in a single government, sometimes within a single individual, these contradictory cues evoke tensions that are not easily managed. Also, of course, for a single government publicly to play both A and B games simultaneously easily leads to charges of insincerity from its opponents.

Plan B also generates tension between the federalist forces inside and outside Quebec. Naturally, the Daniel Johnson-led provincial Liberals find any focus on Plan B disturbing, as it deflects attention away from Plan A, in which they
have placed their faith, and looks to a future in which that plan has failed. Their concern is not irrational, for if Ottawa came to believe that it had boxed Quebec in with court cases and threats of using the stick, it might be less inclined to use the carrot of renewed federalism to induce Quebec to stay. Plan B is opposed by both the sovereigntist PQ government and the official Liberal opposition, although for different reasons. It also probably divides federalist forces within Quebec, getting its strongest support from those anglophones and allophones sympathetic to partition (Globe and Mail 1996c).

The limitations of Plan B
The leading role with respect to Plan B should come from the federal government, the only government capable of straddling the diversity of interests outside Quebec. For Ottawa to take a leadership role now would position it to continue in that role in the event of a ‘yes’ vote in Quebec, when its leadership might well be challenged.

But the federal government’s Plan B is not intended to be a comprehensive response to the major issues that would emerge should Quebecers vote ‘yes’. Its reach is selective: Ottawa is more interested in those aspects of Plan B that seek to influence the rules governing secession, and some of the hard bargaining issues, than in the all-important question of how to reconstitute Canada without Quebec.

Ottawa’s dilemma, however, is that, until a ‘yes’ victory has been accepted, it is obliged to speak for all Canadians, including all Quebecers, which effectively prevents it from assuming the leadership role in devising a plan to carry on should those millions of Quebecers decide to leave. Further, in keeping Plan B focused on the rules of secession and on hard bargaining, Ottawa hopes to maximize the plan’s effect as a deterrent to secession, as a stick to reinforce the carrot of Plan A. By contrast, the ROC’s reconstitution would not be a threat to sovereigntists, so focusing on it would not add to

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26 Jenson and Maion (1996: 101) note the negative effect of tough Plan B talk, especially partition talk, on Quebec federalists, ‘in silencing...those who will have to conduct the next referendum on the ground’. For discussion of the split between federalists inside and outside Quebec over Plan B, see McIvor 1996; Séguin and Delacourt 1996; Séguin 1996b, 1996c, 1996d; Thompson 1996b.

27 Denis Stairs (1996: 36) notes: ‘Starkly put, the government of a united Canada cannot act for the people of a partitioned Canada’. Young (1995a: 160) states that, ‘as the central government and legislature contain representatives from the potentially seceding state, they cannot readily acknowledge the possibility of fragmentation before it occurs, even to the point of commissioning reports and contemplating scenarios’. See also Kent 1991: 323.
the federalist arsenal. On the contrary, sovereigntists would interpret Ottawa’s planning for the ROC’s reconstitution in advance of a ‘yes’ vote as an indication the ROC was preparing to become the kind of partner that Bouchard has so often said it would.

Provincial governments will not do what Ottawa cannot do. Preparations by the provinces for Quebec’s secession, if they exist at all, will be secret, and focused on the future of the province, not the country, on economic issues (the gains and losses to be expected from Quebec’s departure), not on longer term constitutional concerns. Even if some provincial governments overcome these biases, they are unlikely to want to begin preparing their publics for a constitutional future without Quebec. People in particular provinces may derive some solace from the knowledge that their provincial governments are quietly looking to a future that cannot be publicly discussed, and that they can look to their provincial governments for leadership if Quebec goes. But while such backroom preparations and the knowledge that they are taking place should not be discounted, neither should their significance be exaggerated.

For the PQ and the Bloc, the sovereignty project is their raison d’être. For them, Quebec’s sovereignty would be a triumph. By contrast, the current federal government has no similar stake in the future of a Canada without Quebec – indeed, for it, such an outcome would be a humiliating defeat, and is yet another reason it cannot play a leadership role in pre-referendum thinking about the reconstitution of Canada without Quebec. In sum, the federal government cannot prepare the ROC for a future without Quebec and, since it is not a politically organized entity in its own right, the ROC cannot prepare itself.

This lack of leadership on such a key issue is a serious matter. In a sense, of course, the Reform Party is positioned to become the voice of the ROC, but even Reform’s focus so far has been more on the terms of secession and on Plan A changes to the existing system than on the constitutional future of the ROC should Quebec leave.

For the most part, then, the possible future of a smaller, reconstituted Canada is not Ottawa’s concern. Plan B inside Quebec and Plan B outside Quebec are not mirror images of each other. The future of Canada after Quebec leaves – its identity, its constitutional structure, its unity – are likely to remain relatively unexamined by governments in the period preceding a possible ‘yes’ vote. Such examination as does take place will be secret, infused with a
provincial rather than a federal perspective, and inadequate because it will not have been informed and moderated by discussion with other governments or by a dialogue with the public.

The next step: Plan C

Outside Quebec, therefore, Plan B is not enough, and neither governments nor private commentators, with a few exceptions, have addressed the issue of the longer-term fate of the ROC after a Quebec secession – that is, Plan C.\(^{28}\)

While the rudimentary development of an official Plan B to supplement Plan A is a positive one, for Canadians outside Quebec it still does not answer several fundamental questions: How prepared would they be for that future they do not seek? The inevitable answer is: Very little. How, and how successfully, would the ROC reconstitute itself? The question has scarcely been asked, let alone been answered. The immediate aftermath of the referendum would be a remarkably inauspicious time in which to undertake this task. In the absence of preparation, there would be widespread panic, and the task of arranging terms on certain inescapable issues with a seceding Quebec would have priority.

Canadians have overcome the taboo that once kept them from publicly discussing Plan B. Their governments, however, continue to maintain a taboo on discussing Plan C; it is policy territory they will not enter. This lack of preparation would matter little if the shape of Canada’s future without Quebec were highly predictable. But it is not.

Ignorance

The most fundamental point about the possible breakup of Canada is the depth of Canadians’ ignorance of what would follow. As the following brief survey makes clear, to read the literature that seeks to describe Canadians’

\(^{28}\) Admittedly, Monahan and Bryant do not ignore the issue completely. They recommend that the existing Constitution remain in place throughout the negotiating period, until Quebec has formally seceded, and that, after the necessary amendments to excise Quebec have been enacted, the Constitution continue in place until ‘time and careful study’ have informed Canadians of the fundamental changes to it that will probably be necessary. In fact, Monahan and Bryant succinctly present the gist of the arguments that I elaborate on in subsequent sections of this Commentary, but they do so only as a postscript. See Monahan and Bryant 1996: 38-9. One honorable and significant exception to the relative lack of thinking about this issue is Gordon Gibson (1994), who originally coined the term ‘Plan B’ but specifically to refer to the survival of the ROC. As noted above, however, the term has come to have a different focus.
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future on both sides of a possible divide is to realize our limited capacity – inside and outside Quebec – to discern our destination.

The literature: no consensus

Predictions of Canada’s future without Quebec display stark disagreement on all the major issues.

Quebec sovereigntists in the partnership camp portray future Quebec-Canada relations in rosy hues, based on the premise that Canadians and their governments outside Quebec would adopt an accounting mentality of narrow self-interest and, after a brief hangover, strike the kind of cooperative partnership arrangements the sovereigntists seek. That, at least, has been their public posture.\(^{29}\)

Commentators outside Quebec usually characterize this scenario as a fairy tale. On the contrary, they say, the bargaining would be hard, the will to compromise weak, and the ROC’s response driven by a visceral anger – the expression of a wounded and cornered nationalism.\(^{30}\)

Alternatively, commentators outside Quebec sometimes suggest that there would be no ‘other side’ for Quebec to bargain with following a ‘yes’ vote. Remarkably, even Prime Minister Chrétien raised this possibility in the closing days of the 1995 referendum campaign (Ha 1995; Stewart 1995).\(^{31}\)

The argument is that either the federal government would virtually collapse as its legitimacy crumbled in the face of its humiliating failure to live up to its raison d’être – keeping the country in one piece – or primary attention would be focused on the more pressing task of reconstituting the ROC. Thus, Gordon Gibson argues that a humiliated federal government, its moral authority in tatters, and a triumvirate of the three ‘have’ provinces (Ontario, Alberta, and British Columbia) would impose a tough deal on Quebec, cooperating only on the bare essentials. Canada would then turn its back on Quebec and attend to the overriding task of deciding its own constitutional future (Gibson 1994: Ch. 7, 1995: 8-17).

Other analysts dispute such a scenario, however, and predict a rush to the

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\(^{29}\) See Hogg (1996: 98) on the unrealistic picture portrayed by the ‘yes’ forces during the 1995 referendum campaign.

\(^{30}\) See, for example, Stairs 1996: 5-7; Covell 1991: 27; Whitaker 1996: 2, 3; Resnick 1992: 83-4; Banting 1992: 167.

\(^{31}\) See also Cairns 1995b and Monahan 1995: 18-20.
Alan Cairns

center as shocked Canadians invest their security wishes in a federal government that they hope would minimize the financial crisis and strike the best deal possible with Quebec. According to Robert A. Young, once it became clear that the secession process was irreversible, there would be a ‘tremendous premium on solidarity’ on both sides, which would strengthen Ottawa’s leadership role in the post-‘yes’ bargaining with Quebec (Young 1995b: 4).

Views on the chances for the ROC’s survival, constitutional structure, and cohesion share little except their tendency to contradict each other. Former Progressive Conservative cabinet minister John Crosbie, for example, has taken the apocalyptic view of a battered Canada breaking up after Quebec’s exit (Walker 1996). Others who doubt either the will or the capacity of the ROC to survive without Quebec include the late Robert Bourassa, Peter Leslie, and US scholar Charles Doran, writing in the influential journal, Foreign Affairs (Mackie 1995). Joseph Jockel (1996: 13), testifying before a US House of Representatives committee in 1996, said he did not believe that ‘English Canada’ would fragment in the short run, but that, in the long run, he considered its surviving as one country or dividing into several fragments as ‘equally likely’.

Those who advocate the contrary view, that Canada without Quebec would survive as a united polity, tend to stress as unifying factors cultural homogeneity, positive identification with the idea of Canada, the nationalism of Canadians outside Quebec, allegiance to the Charter of Rights and Freedoms, and Canadians’ strong feeling of their distinctiveness on the North American continent.

In short, pessimists see Canada structurally in terms of its provincial divisions; optimists stress the citizen base of the constitutional order. These themes run through the writings of several prominent academic commentators. On the other hand, the hopes of even the optimists are guarded. Keith Banting (1992: 178), for example, casts a vote for a continuing Canada, but qualifies it by saying that ‘collapse...seems unlikely, at least in the short and medium term’.

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32 See also Watson 1995: 90-2 and Freeman and Grady 1995: 27, 33, 34, 44.
33 There is, however, some ambiguity in Bourassa’s position, as he appears to waver between saying that Canada would breakup and that it could breakup. See also Leslie 1991: 132-4 and Doran 1996.
34 See the discussion in Brown 1997: 34.
Those who do see Canada as surviving without Quebec nevertheless disagree on the kind of country it would be. Dan Usher sees a virtual unitary state emerging with the eroding of the federalist rationale by Quebec’s departure; the largely homogeneous remainder, he says, responding to its own cultural coherence, would quickly assume a unitary posture (Usher 1991). Robert Young, in the most exhaustive available analysis of the post-’yes’ scenario, predicts the emergence of a Canada with a strong central government following Quebec’s departure. His prediction appears to be based partly on the assumption that bargaining the terms of secession and reconstituting the ROC would occur simultaneously. He sees the requirement for solidarity dictated by the former as providing momentum for expanding the role of a strong central government in a reconstituted ROC (Young 1995a: 191-8, 1995b: 7, 13, 17, 18). Gordon Gibson, by contrast, possibly influenced by his location in British Columbia, sees a future Canada without Quebec as profoundly decentralized, with a weakened, caretaker central government reduced to limited responsibilities. He does not discount additional fragmentation leading to the possible breakup of the country (Gibson 1995: 17, 1994: Chs. 4, 6, 8).

An additional area of uncertainty deserves a brief comment. The assumption that Canadians are a peaceable people, immune to incitements to violence, is now held with diminishing conviction. The possibility of violence, although almost universally discouraged, is now almost routinely mentioned. Such talk was almost completely absent at the time of the 1980 referendum. The now-admitted possibility of violence and its unpredictable consequences, coupled with a continuing constraint against serious analysis of the possibility of civil disorder, add to the difficulty of predicting what would happen following a ’yes’ vote. It also reinforces the desirability of a negotiated departure by Quebec, to minimize the possibility of violence.

The preceding discussion was meant to be illustrative, not exhaustive. Nevertheless, the conclusion that dissensus reigns supreme among the analysts and commentators is shared by others who have surveyed the predictions of the Quebec–Canada future following a ’yes’ vote (Brown 1997), and it confirms that the post-breakup future is a huge question mark.

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An inevitable uncertainty

This uncertainty is a recurring theme of Robert Young’s The Secession of Quebec and the Future of Canada, the most serious analysis of the consequences of secession yet undertaken. His point is simple: ‘[N]o one knows what will happen if Quebec secedes’ (Young 1995a: 89). Political debate and leadership, he argues, have unpredictable outcomes, yet they are especially important in secession crises, which weaken the impact of socioeconomic factors; the past provides limited guidance for such unique events (ibid. 90-1).

Young addresses several crucial questions: How would a Quebec UDI be received in the international community? There is no consensus about the relevant legal principles or about their application to Quebec (ibid. 101). Is it possible to predict the outcome of negotiations between Quebec and the ROC, and how the latter would be reconstituted? No, Young says, one can choose only between ‘profound uncertainty ... [and] disagreement about several basic issues’ (ibid. 125). Would a surviving Canada be more centralized or more decentralized? There are pressures in both directions (ibid. 76, 289). How would Canadians in the ROC respond to a smaller, fractured country once Quebec had gone? Would their loyalties be pulled toward the center or to the provinces? One can know only after Quebec goes (ibid. 82).

The uncertainty that Young reiterates in area after area is inherent in the situation. There are so many actors, domestic and international, whose behavior would be modified by the breakup of Canada, that no one can predict how the aggregate of this behavior – in which each actor influences the others – would turn out. Further, the odds on particular outcomes would change as the leading actors modify their behavior in the period leading up to secession to increase the likelihood of achieving their goals. Thus, the emergence of Plan B now means that the outcome and consequences of a future ‘yes’ vote will be very different from what would have occurred had Quebecers voted ‘yes’ in the 1995 referendum, when no Plan B existed.

The uncertainty of the situation is compounded by the politicized nature of much of the scholarship that self-interestedly seeks to analyze it. Young (1995a: 3) writes: ‘Partisans of both federalism and sovereignty construct and deploy alternative futures, aiming to influence the expectations and behaviour of citizens...[which] makes many extant analyses more suspect than is usual in the social sciences’. Maureen Covell (1991: 2) agrees, noting that discussions
of the future of a Canada without Quebec are of necessity an exercise in political science fiction that is only partly grounded in verifiable data and that gives a large role to the assumptions and preferences of the author. One must, therefore, assume that some of the literature that purports to shed light on the issue is actually an exercise in disinformation.

The particular uncertainty that is the focus of this Commentary – the shape of the ROC after Quebec’s secession – is unlikely to be reduced in the period leading up to the next referendum. As I have already discussed, governments will engage in neither public discussion of, nor public preparation for, the future of Canada without Quebec. Ottawa is clearly incapable of planning for a future predicated on its own repudiation. Provincial governments, despite the (probably minimal) in-house research they may undertake, can do no more than prepare covert, partial, self-interested visions of what one out of many actors would prefer.

Yet democratic constitution making requires more than the aggregation of separate visions formed in private by governments and in isolation from other players. It involves the testing and shaping of views and proposals that are not initially complementary, in a process of debate and bargaining with other participants. In the contemporary era, Plan C, constitution making for a Canada without Quebec, has to be a shared responsibility of citizens and governments. That such a process could be mounted prior to the next Quebec referendum is inconceivable. That Canadian governments would even discuss with their citizens options for a Canada without Quebec prior to another referendum is highly implausible. That their in-house preparedness would be limited, fragmented, self-interested, and uncoordinated is certain. That, as a people, Canadians would be unprepared is unavoidable. This lack of preparation, therefore, for what would happen to the ROC should Quebecers vote ‘yes’ is inherent in the circumstances.

In my view, therefore, the situation on the morning after a ‘yes’ vote would be as follows:

- The scholarly and other literature to which one normally looks for guidance would be in disarray.
- Governments would have prepared Canadians in the rest of Canada only minimally, if at all, for the task of deciding on their constitutional future.
- Canadians in the ROC would be ignorant about the future, not just in the sense of their normal inability to predict tomorrow’s events in detail, but about the very shape of their society. The old order would
be in the process of breaking up, habit and routine shattered, and everyday constraints on behavior slackened. This is the kind of ‘unpredictability that attends situations when historic civic identities come undone, historic ongoingness has departed, and the future becomes frighteningly open to both exciting and threatening possibilities’ (Cairns 1995b: 11).

This fundamental, unavoidable ignorance, therefore, is the overwhelming fact Canadians must keep in mind as they confront a possible post-breakup future. We are truly looking into a dark, unknowable abyss.36

Panic, fear, and insecurity after a ‘yes’ vote

In the absence of preparation, the period after a ‘yes’ vote in another Quebec referendum that is sufficiently impressive to suggest that two or more new states are in the making north of the US border would be one of panic, fear, and uncertainty in the ROC. Who we are as Canadians and what country we would belong to in a few years would be question marks. Media headlines and the questions on the minds of citizens would be scary: How far will the unraveling go? Will my savings, my pension, my property, my children’s future, and my job be safe? Most important for non-Quebecers, will I still be a Canadian citizen and, if so, what will that mean in the new circumstances? Or will I become a citizen of the newly independent states of, say, British Columbia, Newfoundland, a union of the former Maritime provinces, or even the United States?

A lamentably unprepared public would be fearful about its future and angry with those it held responsible. According to Banting (1992: 167), sovereignist Quebeckers naively underestimate ‘the political turmoil’ that secession would precipitate in the ROC, which would be ‘thrown into crisis’. He contrasts the psychological climate inside and outside Quebec that would follow a ‘yes’ vote. Quebec, he argues, would start with three advantages that the ROC would lack. First, independence would be ‘a national affirmation for the Québécois... [and] in many ways the central psychological framework of that historic society would remain intact’.

36 Several readers of an earlier version of this paper suggested that I should do my bit to dispel the prevailing ignorance and adjudicate between the conflicting predictions in area after area of this section, such as ‘Will the ROC stay together or not?’ To do so, however, would have been counterproductive. One more speculation added to the competing ones that already exist would not advance our knowledge. Were I to privilege my own views, I would divert attention from the fundamental fact that one cannot know what Quebec’s secession would bring. What I know, and what I wish to signal, is that we are ignorant.
Second, independence would build on the prior thought and planning that had been devoted to its achievement. Third, Quebec would ‘start with a coherent set of political institutions’, with the province of Quebec simply being redefined as a state (ibid. 162-3).

Outside Quebec, there would be little celebration. Instead, Canadians would undergo a ‘collective psychological disorientation’, supplemented by anger and resentment. The ROC would be intellectually and emotionally unprepared, as it would not have ‘engaged in a collective reflection about how to proceed without Quebec’. Third, and ‘most critically, Canada would lack stable political institutions through which to develop a conception of its future’ (ibid. 167-8).

In spite of the advantages Quebec would enjoy, however, its domestic situation would also be grave and beset with massive uncertainty. Would aboriginal peoples resist their incorporation in an independent Quebec? Would the partitionist movement now stirring remain small and ineffectual, or grow in scope and support into a dynamic force? How would the 40 percent or so who would have voted ‘no’ accept the sundering of their civic ties with Canada? ‘No’ voters would include virtually all of Quebec’s anglophones, allophones, and aboriginal peoples, and the ethnic divisions would be wide, deep, and bitter. Banting argues that, within Quebec, instability triggered by the resistance of aboriginal peoples, by the anger of minorities, and by the problem of borders ‘hold[s] considerable potential for violence’ (ibid. 164-5). Even Premier Bouchard does not disagree. He spoke simple truth when he stated in June 1994 that a narrow sovereigntist referendum victory could put ‘the political solidarity of Quebeckers in question’ and challenge Quebec’s ‘political cohesion’ (Montreal Gazette 1994). But even a more decisive victory would not placate the losers, who would include an overwhelming majority of the non-francophone population. Logically, a more decisive victory would be based on an even more divisive ethnic split than the 1995 result, with a smaller percentage of francophone voters on the ‘no’ side.

Both inside and outside Quebec, public opinion would be unanchored, and volatile. Demagogues skilled at inflaming ethnic or nationalistic passions would find this environment to their liking.

The breakup of a mature, capitalist democracy in which state and society are deeply intertwined can only be traumatic, especially when the catalyst is a politicized nationalism. Both Quebec and the ROC, despite the greater
preparedness of the former, would be buffeted by domestic and international forces beyond their control. Their interactions with each other, following a polarizing referendum that would have stimulated ethnic nationalism in Quebec and resentment and shock outside Quebec, likely would be acrimonious. The governments of both Quebec and the now-truncated Canada would be struggling to maintain their authority. The exhilaration of the winners would be accompanied by the same fears and insecurities that would be rife among the losers. In these circumstances, ripe for anomic behavior, policies to minimize disorder and impose some certainty and predictability would be essential.

Plan C and a plea for time

Who will we be?

If Quebec were to vote to secede, Canadians outside Quebec would have to begin to decide who they are and what they wish to be — something francophone Quebecers have spent the past few decades doing. Even the labels one now uses to describe this entity — ‘the rest of Canada’ or ‘Canada without Quebec’ — graphically reveal how far Canadians have to go in this traumatic journey of self-discovery. No self-respecting people describes itself as a rest of anything, or in terms of what it is without. As soon as Quebec’s departure became definite, these transitional labels probably would be replaced by a redefined use of ‘Canada’, unless the country disintegrated rapidly into smaller entities.

If Quebec’s departure were to happen, according to Covell (1991: 3), it ‘will be too late to begin the process of imagining the future of what remains of Canada in conditions allowing for rational thought and the exercise of originality’. On the other hand, as I have already argued, governments will not undertake this anticipatory thinking and planning before a ‘yes’ vote, and in the immediate post-referendum bargaining context, they would be too busy to focus simultaneously on reconstitution issues. The limited intellectual capital on this issue on Canada’s bookshelves would make only a marginal contribution to the fundamental political task of educating a distraught people on alternative futures.

Fortunately, as they peer into the abyss, Canadians would have a few certain ‘givens’, which would be challenged only at the margins: an independent judiciary and the rule of law, the Charter of Rights and Freedoms, responsible parliamentary government, and a head of state who would be above the fray. Canadians can hope for quick agreement on these anchors,
even while realizing that many big questions about their future would remain untouched.

The major issue would be whether we can refashion federalism – both the division of powers and the composition of a revised Senate – that would keep us together. Would Canadians be able to find a workable balance between their federal and provincial selves in new circumstances? A closely linked issue would be the accommodation of aboriginal peoples with significant powers of self-government; with one component of Canada's multinational existence gone, the historically neglected aboriginal dimension would come to the fore and require sensitive constitutional consideration.

In reality, then, the overarching question would be: Could Canadians outside Quebec overcome their divisions and survive as a single people albeit with divided civic identities? While institutional ingenuity would play a big part in success or failure, the outcome would depend more on will, desire, and community identification. These attributes, however, are neither simple inheritances nor automatic. They would need to be uncovered, worked on, and refashioned – a task that cannot be completed through hasty action.

Avoiding hasty decisions
If Canadians had to reconstitute the ROC quickly in an atmosphere of panic, their decisions would reflect their lack of preparation. The uncertainty, the erosion of confidence as we adapt to a world we formerly viewed as friendly, and the ambiguity of who we are and who we might become would leave us prey to unpredictable passions. Two antithetical scenarios, focusing on our peoplehood, reveal how short-run considerations can generate long-run constitutional consequences.

The centrifugal bias
Quebec’s departure could destabilize the surviving ROC for two reasons. First, the federal government might be viewed as a humiliated and defeated Goliath. Second, powerful centrifugal forces might be released, forces that pulled the provinces away from Ottawa’s influence in the wake of a traumatic self-examination. In either case, the resultant panic would trigger a frantic search for security.

Such a decentralizing scenario would be most likely if the shock of a ‘yes’ vote were compounded by the second shock of a Quebec UDI. In this outcome, the federal government would be seen as having failed in its most
fundamental task – that of preserving the unity and territorial integrity of the
country entrusted to it. Further, it would be the federal Parliament,
bureaucracy, and land mass – its population diminished by a quarter, its
territory by 15 per cent – not those of the remaining nine provinces, that
would have shrunk. It follows that it would be the federal, not the provincial,
dimension of the citizenry that would be wounded.

In such circumstances, the search for the ROC’s’ reconstitution after
Quebec’s departure would, other things being equal, likely privilege
provincial governments, especially those of the wealthier provinces, and thus
lead to a more fragmented, provincialized successor state than would be
probable if haste could be avoided. It might even result in two or more
separate polities.

A province’s capacity and willingness to pursue its own self-interest devoid of
empathy for the other provinces should not, however, be exaggerated.
Provincial governments would also be unprepared, and their citizens
troubled, fearful, and unready for bold leaps. All the provinces would be
restrained by a surviving sense of Canadianism that would be reinforced by
ties of family and kinship that cross provincial boundaries. Further, the ‘have-
not’ provinces would come to the aid of the center.

The fact remains, however, that, in this scenario, provincial governments
would emerge from a ‘yes’ vote in Quebec with much less damage to their
integrity and continuity than would the federal government. They might be
unprepared to pursue their own aggrandizement, especially to the point of
leaving, but they would not have to carry, during the reconstitution process,
the opprobrium of having lost a country.

This exaggerated provincialism, if it came about, would owe its victory not
to having survived a democratic process of constitutional deliberation, but
simply because it happened to dominate the stage when a decision had to be
made. This fractionated future would be less likely to shape the reconstituted
ROC if a relative state of normality were allowed to return before any
constitutional decisions were made.

The centripetal bias
An alternative scenario suggests the opposite of the preceding scenario. It is
plausible that hasty decisions on the reconstitutional front could lead to a
more centralized future for a smaller, more homogeneous Canada than would
emerge if reconstitution were delayed. The likelihood of this outcome would
be strengthened if the federal government – perhaps following some version of Robertson’s (1996) proposal for adopting contingency legislation in advance of the next referendum – were to take charge of the post-‘yes’ situation, increase the cost to Quebec of a UDI, negotiate a package of agreements with Quebec that is well received outside Quebec, and orchestrate Quebec’s exit via the formal amending process, thus preserving the rule of law. Successfully playing the leading role in Quebec’s negotiated exit would reestablish the federal government’s legitimacy.

If this were to happen, it would reduce the perception of rupture, increase the perception of continuity, and enhance support for the central government. Further, the support engendered for the central government in a successful bargaining process with Quebec almost certainly would lead the provinces to maintain a low profile, their appeals to self-interest having been muted by the crisis. The relevant analogy here is Canada’s wartime experience. In this scenario, a hasty reconstitution would doubtless lead to a strong center backed by a positive public response to the temporary nourishment of decisive federal government leadership. The exercise of such leadership in the closing months of the old Canada by what still nominally remained the government of all of Canada would encourage the federal government to transfer its leading role to the new, smaller Canada waiting in the wings for its constitutional redefinition.

One can conjecture many more post-‘yes’ scenarios – each of which might tilt the balance between centralization and decentralization in one way or another and lead to different long-range constitutional futures for the ROC. But would it be wise to allow the ROC’s constitutional future to be heavily influenced by the accident of events immediately flowing from a ‘yes’ vote, when Canadians’ preparedness would be close to nil, or is it possible to find a better, less frantic context for the ROC’s reconstitution?

The crux of Plan C: take time
Thus, it is too soon for governments to prepare in advance for a ‘yes’ vote in another Quebec referendum, and it would be too late, according to some analysts, to think about the ROC’s future immediately following such a result. But there is a way out of this dilemma. The solution, which should be the first step of Plan C, would be to buy time, to delay the reconstitution process. There is no need for Canadians to feel trapped and obliged to act on the ROC’s reconstitution immediately following Quebec’s exit. Why not delay the process and so increase the role of reasoned discussion and debate in making constitutional choices?
In the event of Quebec’s secession, therefore, the ROC should continue the existing constitutional arrangements, with Quebec excised, for a transitional period of, say, three to five years (I have a strong preference for the shorter period).

Advantages of interim stability

Stability

One advantage of interim continuity is that it would be the easiest course of action. The machinery would already be in place and, most important, Canadians and their governments in the ROC would be unprepared for anything else. This stabilizing response would reassure not only Canadians outside Quebec but also the international financial community that governments and legitimate authority were still functioning. Disruption of the known, the familiar, and the trusted would be minimized. Federalism, parliamentary government, the constitutional monarchy, the Charter, the existing electoral system, and the administrative structure that applies ongoing policies would remain. The party system, while having to adapt to the new situation, would at least be familiar.

An aid to bargaining

Interim continuity would also make it easier for the ROC to bargain with Quebec on a limited set of unavoidable issues prior to a negotiated independence respectful of the Canadian Constitution. Staggering the tasks of bargaining with Quebec and reconstituting the ROC would prevent the agenda from becoming unmanageable. (Such questions as precisely how the bargaining would take place (presuming no Quebec UDI), who the bargainers would be, what the Canadian side would be prepared to discuss, and what would have to be put off until after the ROC’s reconstitution remain immensely complicated and controversial issues beyond the scope of this Commentary.)

Until Quebec’s departure was finalized, however, bargaining between the two sides probably would take place under the aegis of a small commission consisting of the existing federal government, with a drastically diminished role for its Quebec members (whose legitimacy would be gravely eroded), some representation from the provinces, territories, and aboriginal peoples, and possibly from the opposition parties.  

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37 The composition of the team would depend on whether the bargaining presupposed Quebec’s independence or was a last-ditch effort for renewed federalism. The more the latter,
Many of the issues on Quebec’s agenda would be sidelined – those that were not urgent, and those that could not be addressed until the shape of the reconstituted ROC had crystallized. Instead, the negotiators would focus on disentanglement, not on partnership or interstate agreements that lacked urgency for the ROC side. In any case, the ROC could not enter into partnership arrangements on commercial, economic, political, or other matters that presupposed its stability, identity, and continuity until the reconstitution process was completed.

Getting to Know the New Quebec State
Delay would also allow the ROC to learn more about its new neighbor. As the heady days of the referendum triumph receded, Quebec would be settling into its new status and the answers to a number of important post-secession questions would become clearer: How significant would be the exodus of population from Quebec following its secession? Would ‘no’ voters who chose to remain in Quebec seem to be adjusting to the new reality, or would a sovereign Quebec remain a bitterly divided society? What would be the state of relations between Quebec and its aboriginal peoples? What would be its fiscal situation? How would the initial limited agreements between Quebec and the ROC be working? Answers to these questions would be relevant to the ROC’s reconstitution. The foreign environment of the ROC’s existence would have changed; for the first time, as Denis Stairs reminds us, Canada would have two foreign, next-door neighbors (Stairs 1996: 26). Finally, the ROC could learn from mistakes made by its newly independent neighbor.

An unfair advantage to the status quo?
Some people might oppose a multiyear transition period on the grounds that it would favor the development of a shrunken version of the old constitutional order but with a stronger central government. In other words, such a plan would disadvantage those actors whose influence would be greatest in the period of maximum uncertainty following a ‘yes’ vote, when Canadians would be anxious for security but the federal government on the greater would be the legitimacy of the federal government’s role. If the former, then the federal government’s leadership role would be weakened and the claims of spokespersons for the reconstituted Canada ambiguously waiting in the wings would be strengthened. The possibility that either or both the PQ and the ROC would be playing the renewed federalism game and the breakup game at the same time – a plausible scenario – would require a role-playing dexterity far too complex to explore in a note. These concerns are not, however, central to my argument, which focuses on the future of Canada without Quebec.
which they normally would have relied might have crumbled. In general, then, delay might have less appeal for those who see decentralization as the wave of the future, and even less for those who support secessionist movements in other provinces.

It is true that the transitional stability of the status quo would work against any actor who would profit, politically or otherwise, from the uncertainty my proposal is designed to reduce. That indeed is its purpose. Further, and positively, delay would increase the likelihood of the ROC’s survival as one country. Assuming that survival, however, it is still unclear whether a rapid reconstitution following Quebec’s departure would serve centralizing or decentralizing forces.

Those who fear that a transitional regime would give extra leverage to the central government in the ROC’s reconstitution forget that it would, after all, only be a caretaker government. Provincial governments, by contrast, would be less constrained. Their party systems would suffer a lesser shock. Unlike the federal government, they would still govern the same society as they did before Quebec’s departure, and they would not be subject to the same hesitations about their roles as their federal counterpart. Further, if the old system were as inapplicable to the new circumstances as its opponents argue, the transition period experiment would surely confirm their beliefs.

The constitution and Quebec

Much of the difficulty of reconstituting a smaller Canada reflects the deeply embedded presence of Quebec in the theory and practice of the country’s constitutional evolution. The constitutional arrangements of the old Canada have been shaped profoundly by Quebec’s presence.

Many of the crucial developments in Canada’s history – the Riel rebellion, the conscription crises in both world wars, the role of Quebec in shaping the party system, the role of francophone prime ministers, and the halting evolution of the welfare state – underline Quebec’s impact on the political life of Canada in the first century after Confederation. In the past three decades, that impact has increased.

Pressure from Quebec has driven the country along a centrifugal path. The constitutional principle – some would say dogma – of the equality of provinces has allowed other provinces to acquire more autonomy on the coattails of Quebec’s demands. Although the linkage is indirect, Quebec nationalism has stimulated aboriginal nationalism, by example and by
widening the constitutional agenda and providing a stage on which aboriginal peoples have been able to press their claims. Even those who resent Quebec’s prominence in Canada’s decades-long constitutional introspection nevertheless have become acclimatized to a political world in which Quebec is part of ‘us’. To break out of this manner of thinking would take time. Quebec’s departure would not end the constitutional introspection of the surviving Canada. From the 1970s onward, constitutional pressures for change have emanated from other parts of the country as well. Quebec’s absence would precipitate difficult new rounds of constitutional self-examination, and require Canadians to develop a new language of constitutional self-understanding. Senate reform, a third order of government (for aboriginal nations), the amending formula, the Charter’s place in constitutional arrangements, the issue of popular sovereignty, and the relative roles of the federal and provincial governments would all be revisited in the context of Canada without Quebec. And behind all the others would lurk one crucial question: Can Canadians, without Quebec, survive as one people?

A Herculean task

It is easier to underestimate than to overestimate the difficulties of the ROC’s reconstitution. The task would be nothing less than the creation of a new nation, a new people. Canadians have been schooled by their history, education, lived experiences, and the symbols of their nationhood to think of themselves as including Quebec. Quebec has been central to Canada’s self-definition, geographically, culturally, linguistically, and in other ways. The ‘rest of Canada’ is headless, voiceless, and without definition as long as Quebec remains in Canada. Citizens outside Quebec think of themselves as Canadians. Their leaders have believed that to stimulate a separate identity for the ROC, or for ‘English Canada’, would undermine Canadian unity. Abraham Rotstein argues that Canadians view themselves in terms of ‘mappism’ – an inability to ‘conceptualize the country except as a geographical unity’ (quoted in Whitaker 1992: 75). The ROC’s post-‘yes’ task would necessitate a psychological and intellectual shift to a new identity that would take time to fashion. It would not be possible to extrapolate from Meech Lake (the Quebec round) or Charlottetown (the Canada round) to the kinds of constitutional changes that would be sought if Quebec seceded. In both of those rounds, Quebec’s demanding presence influenced the behavior of all the other actors, particularly the federal government.

Unquestionably, three decades of constitutional introspection have
contributed to an emerging anticipatory sense of self for the ROC that excludes Quebec. This self, however, is clearly underdeveloped, does not yet think of itself as a people ready for a state of its own, and has not willingly and fully extricated itself from the traditional Canadian self that includes Quebec. It can do so only if and when the old Canada dies.

In the event of Quebec’s secession, Canada would not be in the relatively fortunate position of the former Czechoslovakia, where a ‘velvet divorce’ was possible because the central authority could simply fade away while power naturally devolved to the two successor states. The Czechoslovak case is more accurately characterized as a split than as a secession of one part. Canada’s case would be different. Canada is a federal state – a system of competing governments ruling a citizen body with the distinct civic identities appropriate to federalism. If Canada’s center simply faded Czechoslovak-style, the recipients of jurisdictional powers outside Quebec would be nine provinces and two territories – an unacceptable outcome. On the other hand, the excision of Quebec from an otherwise unchanged constitutional structure would leave the ROC with constitutional arrangements that might be inappropriate to the new circumstances.

The departure of Quebec and the resultant shaking of established arrangements might stimulate formerly forbidden thoughts in other provincial capitals and among the citizenry, jeopardizing our ability to stay together as one people. If Quebec were to leave by a UDI, the psychological destabilization that might follow could precipitate such a loss of confidence that imitators might surface in other provincial capitals. Even if Quebec were to depart by a negotiated process, to deny the same option to the citizens and governments of other provinces would be difficult. Delay would not prevent such a possibility.

Continuity with or without a UDI

A transitional constitutional continuity would provide a secure context within which the ROC could concentrate attention on its future after Quebec had gone. That continuity would be desirable whether Quebec departed by a UDI or through a negotiated procedure that employed the existing constitutional amending formula – although the latter would be infinitely preferable.38 In either case, however, Canadians would have to rethink their constitutional existence. If Quebec’s departure were negotiated,

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38 For a powerful argument against a UDI and for the use of the existing constitutional machinery if Quebec were to leave, see Russell and Ryder 1997.
the lead role the federal government presumably would play in guiding that process would provide a certain naturalness to keeping the old constitutional structure, minus Quebec, for an interim period. If constitutional thinking about the ROC’s future were to follow on a Quebec UDI, however, the necessity for a federal role in such perilous circumstances would still remain, even though Ottawa’s legitimacy would be severely weakened. As I discussed earlier, the possibility of a vacuum at the federal level would stimulate centrifugal pressures, encourage the ‘have’ provinces to take charge, and enhance the likelihood of erratic, panic behavior throughout the system. In such a case, the need for the continuity and security provided by a stable federal framework would be enhanced. Thus, under either a UDI or a negotiated exit by Quebec, it would be wise to continue the existing system while the new Canada sorted itself out.

After the interim
The process by which the peoples and governments of the ROC should pursue their constitutional redefinition is not the subject of this Commentary. To address that question here would distract attention from my basic message: that, in the event of Quebec’s secession, precipitous action should be avoided, and that a Plan C is needed, the first step of which should be to create time to canvass alternative futures. Once we have agreed on this first step, we can then turn to the second component of Plan C: how to proceed to decide on the ROC’s future. In doing so, Canadians need to remember that their task would be to fashion a new people, not just new governing arrangements. Room should be left for constitutional imagination, meaning that governments must not be allowed to dominate the constitution-making process. The ratification process should include a countrywide referendum that would not be subject to the stranglehold of unanimity. Finally, the approval of electorates should be an alternative to the approval of governments – not, as in the Charlottetown Accord, an additional requirement. The most serious mistake Canadians could make would be to forget that the constitutional order has been democratized, that the founding of a new people is not a task for elite manipulation.

A difficult transition
If it came to pass, Quebec’s sovereignty would usher in a new world for both Quebecers and their new Canadian neighbors. The new Canada would enter that world and adapt to the changed circumstances it presented in three stages: first, the immediate, short-term transition period between a ‘yes’ vote and Quebec’s exit, whether by the constitutional rules or by a successful
UDI; second, the longer, medium-term transition period after Quebec’s departure, during which the reconstitution of a smaller Canada would be worked out; and third, the long-term implementation of the constitutional arrangements worked out in stage two.

In stage one, the federal government, still the government of all of Canada, would be involved in negotiations with Quebec, or in responding to the early stages of a Quebec UDI. Ottawa’s legitimacy and efficacy and the extent to which its various roles would have to incorporate provincial and other input cannot be predicted in advance. In the second stage, assuming the strategy suggested in this Commentary were followed, the inherited constitutional structure, minus Quebec, would provide institutional continuity while Canadians outside Quebec decided on their future.

This three-to-five-year transition period would be stressful. The sooner a considered reconstitution was achieved, the better. Even if Quebec’s departure were peaceful and negotiated, many issues would remain to be resolved between the two sides, and while I have argued that many of them should be put on hold while the new Canada decided on its future, irritations and tensions would inevitably arise, not all of which could be shelved. The unsettled state of co-existence between Quebec and Canada would overlap with the question mark of the future of the smaller Canada being worked out by whatever reconstitution-making process was chosen.

In the transitional regime following Quebec’s excision from the Canadian Constitution, there would be no Quebeckers in Parliament, the Supreme Court of Canada, or the numerous federal boards and commissions that now have Quebec representation. These changes and many others would necessarily and immediately follow either from Quebec’s negotiated departure or from an effective UDI. They may seem straightforward – as Young (1995b: 20) notes, ‘it is surprising how little excision is required to eliminate Quebec from the constitution’. In reality, however, such changes would be immensely difficult, time consuming, and psychologically debilitating. Rules, operating procedures, decision-making practices, and informal understandings would have to be modified in hundreds of offices and in the major institutions of government.

With respect to legislation and policies, Quebec’s presence could be deleted easily in some cases, but where Quebec’s presence has been significant, such as in marketing boards and equalization, modifications would be necessary. Logically, for example, language policy would be a candidate for quick
modification, as much of its rationale would disappear with Quebec’s departure. This would not be accomplished easily, however, because crucial components of the policy are constitutionally enshrined, and to amend those aspects of the Constitution under what would clearly be a transitional regime might encourage similar attempts in other areas, thus defeating the purpose of such a regime – to buy time to sort out where Canadians would like to go.

The removal of Quebec’s three members from the Supreme Court of Canada would leave a total of six, increasing the likelihood of judicial stalemates. The francophone-anglophone composition of the House of Commons, which has influenced its social and intellectual climate and many of its practices, would be gone, and the self-definition of the remaining members would be transformed. The society they represented would be more homogeneous, geographically discontinuous, and agitated and uncertain about its future.

These changes are only the tip of the iceberg. Canadian governments and societies are deeply entangled through both law and policy. Their selective disentanglement would require shrewd political leadership.

The transitional period in which the old constitutional structure, minus Quebec, temporarily prevailed would be ambiguous. To the extent that the emerging constitutional arrangements for the new Canada appeared likely to depart from the old structure, the latter’s legitimacy and efficacy would be weakened. Canadians would be working with one constitutional structure devised for a vision of Canada that was no longer relevant, while preparing a new set of constitutional arrangements for the Canada that was emerging. The authority of the transitional arrangements would be weakened by competing visions of what the new identity and governing structures should be. The transitional structure would be seen as a holding operation, possibly one leading not to a new, united Canada but to a fragmented group of successor states.

One major problem the transitional regime would confront would be the greatly increased relative clout of Ontario in the new Canada. With its share of MPs in the new House of Commons increased to 45 percent, not only would Ontario’s bloc of political power in the transitional regime be viewed with suspicion in the other provinces; it would also be unlikely to survive the remaking of a smaller Canada without some modification. The transitional regime’s legitimacy, therefore, would depend on Ontario’s forbearance in translating its numbers into self-interested policy; the price of a heavy Ontario hand would be very high. Ideally, the transitional regime would develop
understandings and conventions that underlined its caretaker status.

In the transitional regime, MPs and their senior bureaucratic advisors would have little capacity to undertake new initiatives. Even with good fortune, the post-breakup period would almost certainly be one of budgetary stringency and program cutbacks. Major new initiatives would be construed as unfair attempts to tie the future’s hands – as attempts to reduce Canadians’ maneuvering room in their quest for a new identity. Thus, the transitional period would restrict agreements with Quebec to those that were minimally necessary. Progress toward any kind of association or partnership, especially of a political nature, would be put on hold until the identity, composition, and unity of the new Canada became known.

The issue of the position of aboriginal peoples in a new Canada would not be easily shelved – indeed, the report of the recent Royal Commission on Aboriginal Peoples has given new salience to their concerns. On the other hand, it would be inappropriate to address such concerns during the transitional period. It follows, then, that aboriginal peoples would have to be accorded a prominent place in the remaking of Canada without Quebec, and with the Royal Commission’s recommendations in hand, they would have the advantage of a ready-made package to bring to the constitutional process.

Presiding over the process of applying the transitional constitutional order to a shrunken Canada would be a new party system, likely ushered in by new elections following Quebec’s leave taking. The revamped system, responding to the new reality of a Canada geographically bifurcated by Quebec’s departure, would itself be volatile. The Liberals and Progressive Conservatives, with their historic pan-Canadian roles and party histories deeply influenced by the presence of Quebec, would be affected the most. Reform and, to a lesser extent, the New Democrats, would have much less baggage to shed. All parties would have to respond to the changed configuration of social forces in the new Canada, and to the new issues of identity, alternative constitutional futures, and relations with an independent Quebec that would come to dominate the agenda. Further, as noted above, the inherent ambiguity of the transitional regime would require the parties to live in two worlds at the same time: the known, but perhaps ephemeral, transitional regime, and its emerging, perhaps permanent, but unknown successor.

Politicians and parties would limit their investment in the transitional regime as they looked to the successor regime on the horizon. Some members of the
transitional Parliament would advocate either a stronger or a weaker role for an institution that, in more normal times, would routinely capture their loyalty. Politicians’ contributions to the creation of a successor regime would be influenced by their natural tendency to see as desirable the kind of future constitutional arrangements in which their party would flourish.

In the three-to-five-year period following Quebec’s departure, there might be as many as a dozen provincial elections, three or more territorial (if Nunavut were under way), and one or two federal. These would be important means through which the new Canada would find its voice and debate its future. Although, remarkably, given the constitutional odyssey of recent decades, past elections have paid scant attention to constitutional issues, that aversion to playing constitutional politics through the party system would be unlikely to repeat itself. The elections that took place in the years immediately after Quebec’s departure would both highlight the ambiguity of the situation, as alternative futures are vigorously debated, and clarify the choices Canadians would confront. They would be important supplements to whatever ongoing constitution-making process had been put in place.

Some constitutional change would surely be necessary to accommodate the new cultural, linguistic, geographic, and economic circumstances and to signal the birth of a new country. The relative influence of the remaining regions and provinces would be altered. Central Canada as such would lose numerical power, while the relative weight of the other provinces would, by definition, be enhanced. But the most visible and problematic change would be the stronger relative presence of Ontario.

In general, all the constitutional clauses based on the existing regional and provincial divisions of Canada, including the amending formula, would have to be revisited. As I mentioned, explicit constitutional provisions dealing with official-language minorities would have to be reassessed, as the primary linguistic division of Canadian history would lose salience. Equalization would almost certainly be reexamined, particularly if constitutional revision were to move the new Canada in a decentralist direction. All constitutional provisions and high state policy that deal with Canada’s ethnic demography would have a different context in the absence of Quebec. The constitutional recognition of aboriginal peoples would take on new meaning without the stimulus, model, and rivalry of Quebec nationalism. Finally, the Charter, which has brought new players into constitutional politics and created a tension between the roles of governments and citizens in formal constitutional change, leaves Canadians with a contradiction at the heart of
Canada’s constitutional life that, inevitably, would find a place on the ROC’s constitutional reform agenda. All the proposals of recent decades, from Senate reform to aboriginal self-government to a defining preamble, would resurface alongside the new issues that Quebec’s departure would raise.

The difficulties, ambiguities, and uncertainties of the proposed transitional arrangement are not arguments for proceeding immediately to a quick reconstitution of Canada without Quebec. To do so would be a recipe for even greater instability and future dismay as Canadians find themselves having to cope with the consequences of hurried changes made in a crisis atmosphere. The task, after all, would not only be to make institutional choices, but to define a new people, one that would provide a positive answer to Peter Russell’s question: Can Canadians become a sovereign people?

Even given the three-to-five-year transition time I suggest, the ROC’s reconstitution would not be easy, unless the crisis generated irresistible pressures for a rapid compromise. The proliferation of actors and the various demands for change in recent constitutional discussions indicate the kinds of pent-up pressures Canada would experience as it reconstituted itself. These pressures would, in fact, become even more extreme, since Canadians would be aware that they were creating a new country, and that they could no longer assume constitutional continuity or that they had a living constitution. But this surely is an argument for developing a secure transitional framework, a shelter behind which Canadians, if necessary, could examine the alternative futures from which they would have to choose.

What next?
The transitional arrangement is, however, a means to an end. The provision of time and stability, the essential contexts of the reconstitution process, is the necessary first stage of Plan C. The second stage — how, precisely, to go about it — requires careful analysis and constitutional thinking that are far beyond the scope of this paper. Nevertheless, it seems germane at this point to offer a few hints — mostly general principles — toward forming the rest of Plan C.

The first of these is that, while the attempt to create a new Canada might involve the emergence of more than one democratic, well-ordered successor state if the will to continue together could not be sustained, the working assumption of the ROC’s constitutional search should be that Canadians would wish to continue as a united people, albeit with possibly major changes
in some of their institutions of government.

The second principle is that the task of founding a new people should start from the premise that the people are sovereign. There is no escaping the democratic imperative, given the ethic of citizen participation in constitutional matters that has mushroomed since the 1980 Quebec referendum and the stimulus of the 1982 Charter. The existence next door of an independent Quebec that had repeatedly sought, and finally gained, majority support for sovereignty would greatly reinforce this democratic message. It simply would not be possible for the ROC’s political elites to fashion new constitutional arrangements in closed-door sessions and then spring them, Meech-style, on an unprepared public. The new country’s citizens would not allow themselves to be treated as subjects, made to stand on the sidelines as their political masters worked out their future. The process of founding a new people would have to be a collaboration between governments and citizens.

Canada without Quebec would have to develop a new sense of self. Canadians would have to adjust to the wounding reality of a gaping hole in their middle. Although some psychological withdrawal from common citizenship has been under way on both sides for sometime, Quebec’s departure would nevertheless be traumatic. Canada’s ethnic demography would take on new meaning as immigrants and their descendants from nontraditional source countries constituted a larger percentage of the population. There would also likely be some language-driven population shifts as some anglophones in Quebec and some francophones in the ROC moved to areas where their linguistic community would be in the majority. More generally, the sense of beginning afresh might weaken the ‘Mayflower syndrome’ that distributes status based on time of arrival. On the other hand, aboriginal peoples likely would seize the opportunity of the opening up of the post–‘yes’ constitutional agenda to push their historical claims as First Nations with renewed vigor.

Canada without Quebec would confront a vast array of fundamental questions as 23 million people contemplated a future for which they would be ill-prepared. Such a crisis, however, would also be an opportunity for the surviving Canadian community to reconstitute itself in a very different world from that of the mid-nineteenth century Confederation. That world explains the British cast of the 1867 Constitution, ‘similar in principle to that of the United Kingdom’, formed when Britain was a world power, when Canada’s trade and immigration patterns linked it to the mother country. The choice
the governing elites of the British North American colonies made then was to differentiate themselves from the colossus to the south that was just emerging from civil war. If Quebec were to leave, Canadians would have to confront the removal of one of the key elements that distinguishes their identity from that of Americans, at a time when their economic and cultural embrace with the United States is tightening.

In part, the ROC’s reconstitution should be a response to globalization, to a world in which boundaries matter less and less, in which democratic peoples are increasingly multiethnic, and in which a widely diffused language of rights is common currency. One possible consolation is that, as Mancur Olson points out, societies with long, stable histories can become sclerotic as the interdependence of state and society constrains growth and fosters inefficiencies. He disputes the thesis that simply because ‘social institutions have survived for a long time, they must necessarily be useful to the society’. He argues that, ‘other things being equal, the most rapid growth will occur in societies that have lately experienced upheaval but are expected nonetheless to be stable for the foreseeable future’ (Olson 1982: 141, 165).

Of course, Canadians may well find, once they have settled down to their new existence, that they have neither fragmented further nor fundamentally changed the old constitutional framework. My assumption that significant changes would be both necessary and attainable would then become simply one more failed attempt to perceive the future. What Canadians would then inherit would have the advantage of inertia and incumbency. It might pass the performance test in the transition period with flying colors, and gain the support of those who wish to minimize the instability of massive constitutional change. Or perhaps the old framework would be seen as a compromise between competing visions of the ROC’s future. If that were the outcome, Canadians would still have reconstituted themselves, if only by deciding to remain as they are.

**Conclusion**

Despite the post-referendum emergence of Plan B, there is minimal likelihood that, before the next referendum, governments outside Quebec will have prepared themselves or their citizens for the reconstitution of the rest of Canada if the sovereigntists win. The work of think tanks, individual academics, and various public-minded organizations will no doubt have filled a small bookcase with their predictions and analyses. While the intellectual capital thus generated will be helpful, it should not be confused with the
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political process of constitution-making, a process that involves the whole society. Moreover, proposals such as a recent one by Keith Spicer (1996b) – to take the leadership role away from governments now and have both pre- and post-referendum proposals formulated and then voted on in a national referendum sanctioned by Ottawa – have thus far languished.

Not only would Canadians be unprepared for a future they did not seek, there would be no consensus as to whether Canada without Quebec would be more centralized or decentralized, united or fragmented, whether relations with a sovereign Quebec would be peaceful or hostile, or whether Quebec itself would be tranquil and socially cohesive or torn by violence stemming from the bitterness of secession. In brief, Canadians would not just be unprepared, they would be inescapably ignorant – and this would not be the normal ignorance that attends all futures, which is reduced by routine and inertia, but a more profound lack of even the most basic knowledge, when routine and inertia cannot be counted on. A ‘yes’ victory in Quebec, especially if followed by a UDI, would have the impact of a political earthquake in the rest of Canada. In my view, Canadians would react with fear, panic, anger, and a sense of profound crisis almost certainly dwarfing any hope or relief that might enjoy a furtive existence.

The uncertainty would be triggered both by the immediate need to strike a deal on certain inescapable issues with Quebec, when it would not even be clear as to who should bargain on our behalf, and by the longer-term question of whether a Canada without Quebec could survive. A well-conceived Plan B, outlining the terms of Quebec’s secession, if it were in place in time, could ready us for the first issue, but the issue of the ROC’s survival could not be resolved in advance. It would, however, be possible to improve the odds by establishing a stable, transitional constitutional arrangement.

We can neither predict nor control the future. All we can do is to try to so position ourselves that uncontrollable events do not leave us unable to respond if they occur. If Quebec were to leave, therefore, the appropriate response in the ROC would be to delay its reconstitution, to continue with the existing structure, to make a friend of time while a reduced Canada overcame the shock of breakup and undertook the introspection and public education that would be essential to the creation of a new political order north of the United States. Canadians know their current arrangements and how to work the system. They are comfortable with it. As an interim constitution, it would provide stability while Canadians forge a new identity,
an existential question that it would be folly to try to answer in panicky haste following Quebec’s exit.

The final section of this Commentary anticipates the subject of another – the completion of Plan C, taking advantage of the benefits the rest of Canada might extract from a reconstitution process into which it might be pushed unwillingly. My objective, however, has been more limited: to argue for the transitional use of the existing constitutional machinery as the first step of Plan C, to buy the time and security Canadians would need to decide their constitutional future. I make no claim that current arrangements would be appropriate for Canada without Quebec – the fact is that no one knows or can know, since there are just too many unknown variables. Nor do I insist that the new Canada should survive as a single people with a common government, although that is my strong preference. I argue only that, given the magnitude of the demands and the lack of preparation that the smaller Canada would confront, it would make sense to play for time – to give thought the chance to crystallize, and to give Canadians outside Quebec a chance to come to terms with a post–‘yes’ world.

To be successful, my proposal clearly requires the approval of governments. Its benefits would be maximized if enough relevant actors – governments, political parties, influential elites – were to agree on its desirability before the next Quebec referendum. While a formal, across-the-board agreement of governing authorities is implausible, a widely diffused understanding and sympathy for the idea that the constitutional status quo could be a viable interim arrangement would be an immense improvement over the unpredictability of Canada’s immediate future following Quebec’s possible separation that now prevails. Public support from private associations and from at least some governments and political parties would qualify as a great leap forward.
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Chapter 10
The Constitutional Treaty and the Question of Ratification: Unscrambling the Consequences and Identifying the Paradoxes

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Introduction
After the Convention and the IGC comes ratification of the Constitutional Treaty. In many respects, this is the most important and certainly the most difficult phase of the constitution-building process (Leinen 2004). Ratification of the Constitutional Treaty requires unanimity amongst the Member States under the clear terms of Article 48 TEU. The Constitutional Treaty will not enter into force if one or more Member States fail to ratify in accordance with their national constitutional requirements. Such flexibility as will exist for future amendments once the Constitutional Treaty has entered into force (Article IV-444 – the simplified revision procedure) cannot apply to the initial ratification. On the other hand, having agreed (June 2004) and signed (29 October 2004) the Constitutional Treaty the Member States are under an obligation under international law to seek ratification of the Treaty at the domestic level. Their obligations to their fellow High Contracting Parties under international law – not to mention their obligations under

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² Official Journal 2004 C 310/1.
Article 10 of the existing EC Treaty to show ‘loyalty’ to the EU as it stands – require them not to pretend simply that the Constitutional Treaty does not really exist.

Predictions made both during the constitution-building and negotiation processes and shortly thereafter that the ratification process would prove very difficult have turned out to be correct. It has undoubtedly led to an outpouring of media and other comment, and has become the focus of a number of EU-focused ‘blogs’ on the internet. A type of ‘phoney war’ has been fought in the first phases of the ratification process, as a number of Member States have gone through generally unproblematic parliamentary processes. Lithuania was the first, regarding it as an honour to trump the other more established Member States to head the list of ratifying states, with a parliamentary vote on 11 November 2004. It was followed shortly thereafter by parliamentary ratifications in Hungary (20 December 2004), Slovenia (1 February 2005) and most recently Italy (6 April 2005) and Greece (19 April 2005). Spain held a non-binding referendum on 20 February 2005; on a low turnout of 43.3 per cent, 76.7 per cent voted for the Constitution and 17.2 per cent voted against. In additional parliamentary ratification is required, but should not pose a problem.

But from early 2005 onwards the environment for ratification debate changed radically. The Spanish referendum was just the first of up to ten referendums which will be held on the Constitutional Treaty. To have 40 per cent of the national ratifications of a Treaty linked to or dependent upon a referendum is a novelty for the EU. When it was first announced that a (binding)

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1. This was despite the optimism generated by a July 2004 Eurobarometer survey on attitudes to the Constitution, which indicated a majority against only in the United Kingdom: www.europa.eu.int/comm/public_opinion/archives/eb/eb61_en.htm. See Crossick 2004: 7.
2. For full and detailed analyses, see Maurer et al. 2005 and Kurpas et al. 2005.
3. Information taken from the Federal Trust EU Constitution Newsletter, published monthly and available at www.fedtrust.co.uk and containing both factual information and analysis. Additional ‘ratification watches’ are provided by the University of Zaragoza, Spain/ CIDEL Project (http://www.unizar.es/ euroconstitucion/Treaties/ Treaty_Const_Rat.htm), the European Commission (http://europa.eu.int/futurum/referendum_en.htm) and COSAC (the Committee of national parliamentary committees on European Affairs) (http://www.cosac.org/en/info/ratification/ratification/), which concentrate on factual information regarding the evolving processes, and by EPIN (European Policy Institutes Network: http://www.epin.org/index.php) which provides country reports and studies on the state of various ratification debates.
The Constitutional Treaty and the Question of Ratification

A referendum would be held in France, it was not widely anticipated that this referendum – which will be held on 29 May 2005 – would prove particularly difficult to win for those campaigning for a ‘yes’ vote. After the internal vote within the French socialist party in December 2004, which went in favour of the party as a whole supporting ratification, all the main parties in France were officially in favour of the Constitutional Treaty. Until March 2005, public opinion surveys also tended to point in the same direction. However, from March 2005 onwards, numerous polls were issued by the newspapers indicating a hardening of opinion against the Constitutional Treaty, and a dropping away of support. Some of that is attributable to the vagaries of internal politics, and relationships with the major parties, such as the Social Parties, the UMP, and the RFR, where there are individuals jostling for position in future Presidential Elections. Some of it is also attributable to the wider environment of European politics with real fears expressed within French public opinion about the possibility of Turkey joining the Union in the not so distant future and deep seated objections to what is seen as the neo-liberal services directive, intended largely to enshrine within Union legislation the home country control principles which have long been applied in case law by the Court of Justice. This in turn is a reflection of a wider angst about the nature of the national economies of ‘old’ Europe and the ongoing challenges of enlargement, including economic liberalisation and the strength of the euro (Wolf 2005; Kaletsky 2004). At the time of writing (April 2005), the likely result of the French referendum was still uncertain, with the French said to be ‘in the mood’ to say ‘no’ (Duval Smith 2005). One thing was already clear, namely that the very close result of 1992, when the French electorate voted in favour of the Treaty of Maastricht in a referendum by a margin of less than one per cent seemed likely to be repeated, was probably the best which those campaigning in favour could expect to achieve.

Shortly after the French, the Dutch will vote on 1 June 2005 in a non-binding referendum. In the Netherlands, the main mood has been that of apathy, with a growing element of euro-scepticism stemming from the fact that, per head, the Netherlands remains the largest net contributor to the EU budget (Browne 2005). The referendum may be cancelled if the French vote...

1 For a detailed analysis, see Wagner 2005.
2 These and other media discussions of the ratification issue are archived on the website of the UK Vote No campaign: http://www.vote-no.com/home/home.aspx.
Even if France and the Netherlands vote yes, further obstacles to ratification lie in the Danish referendum, to be held on 27 September 2005, and the Polish, Czech and UK referendums, likely to be held in 2006 – assuming the Constitutional Treaty has not been abandoned by that time (Hamilton 2005). In both the Czech Republic and Poland, the ratification debate is closely linked to the weaknesses of the current governments, and consequently to the prospects of the various parties in national elections. In both cases, the general public ‘mood’ is more in favour of ratification than is the case within most political parties, so that ratification through a referendum would be more likely to succeed than parliamentary ratification, where there might also be difficulties stemming from the requirements of enhanced parliamentary majorities. Consequently, it would be wrong to state as a universal proposition that it is referendums – and the exercise of direct democracy – which pose the main challenge to ratification of the Constitutional Treaty, and that parliamentary ratifications – involving the exercise of indirect representative democracy – will always offer a smoother path to ratification.

Although the European Parliament has called for a consolidated and coordinated approach to ratification (European Parliament 2004), in practice each of the ratification processes is largely a national issue, contextualised in different ways by European issues and especially the complex relationships between each Member State, its partners and the EU institutions. The European Commission – although it has adopted a policy in favour of ratification – in practice is heavily constrained in relation to how it may intervene in national debates (Wallström 2005). In many Member States a clear ‘keep out’ instruction has been given to the Commission. Thus it has been limited to actions such as maintaining a website on the Constitutional Treaty on the Europa web server, distributing free copies of the Constitution where so requested, and linking up with civil society.

Ratification will be drawn out at least up to the Constitutional Treaty’s own deadline of November 2006, and possibly well beyond, especially if one or more Member States hold(s) more than one referendum. In that case, the question will arise as to the timing of the next Enlargement of the EU, likely to involve Romania, Bulgaria and perhaps Croatia. Should they accede on

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10 ‘Dutch may cancel referendum if France votes no’, EU Observer, 6 April 2005.
12 Article IV-447(2).
13 In fact, Bulgaria, Romania and Turkey signed the Final Act of the Intergovernmental Conference, as its representatives had participated in the Convention (on the same basis as the other accession countries), and in the IGC as observers.
the basis of the Nice settlement, and sign and ratify the Constitutional Treaty later? Or should accession be delayed until the Constitutional Treaty comes into force, so that the accession treaties are formulated and the national accession referendums themselves are conducted on the basis of the Constitutional Treaty?

In a number of respects, the Convention and the IGC foresaw the risk that the Constitutional Treaty may not be ratified at the national level, and responded accordingly. There are a number of high profile examples where national representatives were able to exert pressure for specific changes to the text of the Constitutional Treaty. One such is the so-called ‘cultural exception’, requiring unanimity in the Council of Ministers for the approval of agreements with third countries in the field of trade in cultural and audiovisual services where these risk prejudicing the Union’s cultural and linguistic diversity.\footnote{See now Article III-315(4)(a) of the Constitutional Treaty.} This was debated right at the end of the Convention’s deliberations on Part III of the Constitutional Treaty, and French Government representative Pascale Andréani along with other French members of the Convention such as Hubert Haenel, Pierre Lequiller (national parliament) and William Abitbol (European Parliament) all pointed out ‘the future Constitution would stand little chance of being ratified in France if it did not contain such provisions’ (i.e. providing for unanimous voting).\footnote{See summary at http://www.europa-web.de/europa/03euinf/08VERFAS/CONVA_EC/backgrou.htm.} More generally, the announcement by British Prime Minister Tony Blair on 20 April 2004 that there would be a ratification referendum in the United Kingdom (UK)\footnote{See statement by Prime Minister Tony Blair to the House of Commons, 20 April 2004, ‘Let the People have the final say’, available on www.fco.gov.uk.} allowed the UK to argue throughout the endgame of the IGC that its so-called ‘red lines’ must be fully respected, because it would be likely to prove much more difficult for the UK to ratify the Constitution via referendum than via a vote in Parliament.\footnote{In many respects, the IGC produced a text with the appearance of a political compromise, and this is related in many respects not only to the question of agreement, but also that of ratification. However, some of the more subtle concessions to the UK, e.g. in respect of alterations to the detail of the opt out from certain policies relating to Freedom, Security and Justice, are clearly not aimed at a popular ‘referendum audience’, but rather at the political and governmental elite. For more examples, see Editorial, (2004) 41 Common Market Law Review 899.}

The public and collective response of the Member States to the scenario of possible non-ratification is contained in Declaration No. 30 appended to the Constitutional Treaty:
The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

Since it has already become practice for the European Council to debate questions arising from ratification difficulties, it is hard to see what this adds to the existing scenario, other than to institutionalise the role of the European Council,\(^1\) and to signal that all have been aware, throughout the process of reform, of the possibility of non-ratification by one or more Member States. No one could claim to be surprised if this eventuality transpires.

It is worth commenting that the question of ratification could provide some clues as to the related question of whether the envisaged future arrangements for the EU based on the Constitutional Treaty represent a ‘treaty’ or ‘constitution’. It is clear that at best the current process of transformation and reform might produce a mixed arrangement for the EU, with elements of constitutionalism in the classic sense combined with a framework which continues to rely upon international law. *Pace* the Commission’s attempts to imagine some other more flexible scenario for ratification of the Constitutional Treaty in the Penelope contribution (European Commission 2002; see generally Lamoureux 2004: 28-30), justified by the argument that the Constitutional Treaty is effectively a refounding of the European Union, it is hard to see how the current constitutional settlement for the EU, rooted as it is in international law, could be altered otherwise than as a result of the common consent of the Member States. That is not to say that all the Member States would necessarily have to be involved in any future constitutional settlement. It is perfectly possible under both international and national law to envisage a scenario in which the Member States decide unanimously for the future to divide up into two or more groups, or for ratification of a future treaty to be associated with the voluntary withdrawal of a dissenting Member State, thus removing the impediment to ratification by the remaining Member States. All such arrangements would need to be fitted to the national constitutional settlements of the various Member States. This article addresses a number of issues raised by the ratification debate, with a view to clarifying some questions about what might happen if the Constitutional Treaty is not ratified in one or more Member State and to illuminating the paradoxes which are emerging precisely because this rather

\(^1\) This text is also institutionalised as part of the future amendment procedure for the Constitutional Treaty in Article IV-443(4).
‘non-constitutional’ Constitutional Treaty is being subjected to referendum tests in such a large number of Member States.

The process of ratification in brief – and specifically in the UK

In broad terms, ratification in the Member States will involve some sort of parliamentary process and may involve a binding or advisory referendum (Hussain 2005). In some of the Member States organised as federations there is additional input from the regional or state level. In some cases a referendum is constitutionally required for ratification, but in the majority it is a matter of political choice, as in the case of the UK and France. Only in Ireland and Denmark, however, have referendums on treaties amending the EC and EU Treaties been the norm, rather than the exception. Germany contemplated a referendum for some time, but required first the adoption of the necessary constitutional arrangements to allow a nationwide referendum to take place which did not occur. In some Member States, the changes brought about by the Constitutional Treaty – for example in the area of defence policy and cooperation – may require prior amendments to the national constitutions. This is the case with France, where the Conseil Constitutionnel expressed its views in November 2004. Interestingly enough, the Conseil Constitutionnel did not take the view that the enshrining of the supremacy principle in the Constitutional Treaty required an amendment to the French Constitution, focusing instead on the continuing international and treaty-based nature of the Union.

Strictly speaking in the UK, ratification of an international treaty requires merely an executive act on the part of the Foreign Secretary, acting on behalf of the Crown, in exercise of the Royal Prerogative. However, the so-called Ponsonby Rule since the 1920s has effectively required that a treaty subject to ratification be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament the opportunity to debate such a treaty. In practice, ratification of treaties such as the Constitutional Treaty requires an Act of Parliament (an act amending the original European Communities Act 1972), because of the domestic and budgetary effects of such amending treaties. This also extends to accession treaties, which also

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22 See for more details House of Commons 2004.
require an Act of Parliament. The UK will hold a national referendum only after completion of the parliamentary process to adopt the European Union Bill which passed its second reading in the House of Commons on 9 February 2005. However, with the announcement of a general election to be held on 5 May 2005, this Bill was lost, and will be reintroduced by the new government in the new Parliament. The Bill made formal provision for the ratification of the Constitutional Treaty, including its effects in national law, and would in that respect constitute a further ‘European Communities (Amendment) Act’, albeit with a different title. It would also ‘require’ a referendum to be held, and make provision for the proposed question. This was to be found in Clause 6(2) of the Bill and is worded as follows:

Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?

However, since parliamentary sovereignty would continue to apply, it would be conceivable that the European Union Act itself could be repealed by a further Act of Parliament, if the referendum results in a no vote, with the UK reverting to the conventional parliamentary system for ratifying EU treaties which the UK has used hitherto. This would be quite probably political suicide for the government in question. Moreover, it could even be unconstitutional under an evolving constitutional convention relating to referendums and constitutional change. In the context of the evolution of constitutional reform in the UK since the election of the government of Tony Blair in May 1997, which has involved a number of referendums on new constitutional arrangements and governance mechanisms such as devolution there may be emerging a new constitutional convention which reduces the opportunity for politicians to use referendums as political play things. In particular, it would appear that a convention is gradually emerging that a structural change to the UK constitutional settlement – e.g. devolved institutions in Scotland and Wales – agreed by referendum would not be reversed without a further referendum. This could also apply to the ratification of the Constitutional Treaty if it is regarded as structural change.

Provided the entire Constitutional Treaty project has not already foundered by that time, the referendum is likely to be held in the first half of 2006 – after an anticipated General Election (probably May 2005), after the end of the UK Presidency (second half of 2005), and before the beginning of the World Cup Finals in June 2006. Given the passions sometimes bordering on jingoism to which such sporting events give rise, it would probably be best to

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23 For informed political comment on the UK referendum, see Menon (2004: 27) and Hughes 2005.
avoid holding a referendum during that time. At the time of the signing ceremony for the Constitutional Treaty in Rome on 29 October 2004, the Foreign Secretary Jack Straw intimated that March 2006 was the most likely date. Nothing will be decided until well after the General Election held on 5 May 2005, which was expected – at the time of writing – to produce a third term for the Labour Government, perhaps on a reduced majority.

The circumstances in which the holding of a referendum was announced in April 2004 by Prime Minister Tony Blair gave rise at the time to much media comment. There was no debate in Cabinet about the proposal before it was announced in Parliament. It would appear to have been a tactical and highly partisan move on the part of Blair with a view to the performance of his party in both the European Elections of 2004, and indeed the General Election of 2005 which was already being eagerly anticipated, and to remove a tactical weapon regarding the role of plebiscitary democracy from his political opponents. It undermined the immediate possibilities for a cross-party consensus of pro-EU elements which could be capable of leading a successful referendum campaign.

The referendum will be governed by the terms of the Political Parties, Referendums and Elections Act 2000, and regulated by the Electoral Commission. This will be the first occasion on which the Electoral Commission has managed the arrangements – including campaign spending limits – for a nationwide referendum. It is interesting that there is expected to be a General Election before the referendum is held. The votes received by each of the parties will be instrumental in determining what amounts they may spend on campaigning on the referendum. This is especially interesting for the United Kingdom Independence Party (UKIP), which is the only high profile explicitly anti-EU party in the UK. UKIP is very successful at raising funds for the specific objective of campaigning against the EU and now the Constitution. The ceilings on spending will be matters of acute interest to UKIP and are clearly linked to its expressed desire to maximise its vote in the General Election and ostensibly to be seen as a powerful mainstream political force, even though it stands little chance of winning many or any seats in the Westminster Parliament on the current first past the post electoral system. However, those ceilings only apply during the so-called referendum period, which is a period which will be designated for formal campaigning, during which time public funds are also available. Until that time, campaign groups with private means are free to spend as much or as little as they wish.

24 In a widely publicised move, the organisers of the Vote No campaign funded an anti-Constitution advertisement to be shown in cinemas before showings of a popular new film released on the same day as the Constitutional Treaty was signed (29 October 2004).
Ratification and non-ratification: law, politics and history

Non-ratification of the Constitutional Treaty would raise questions of both law and politics. Ratification is a legal process and a legal requirement, governed by aspects of international law, EU law and national law. However, such legal questions cannot conceivably be viewed in isolation from the political conditions in which they are raised.

It is possible to respond to the challenges raised by the upcoming ratification debates in the Member States purely pragmatically. From a pro-Constitution perspective, these debates raise strategic and tactical challenges about the optimum approach to campaigning, and appropriate responses to parliamentary or referendum decisions against ratification. What should happen next if Member State A does not ratify? Should a repeat referendum/parliamentary vote be held? What response should the European Council make, in accordance with the role which has been institutionalised for it by Declaration No. 30? These are issues which raise questions at both the national and the European levels, and especially in respect of the interaction – such as there is – between the two levels. In addition, however, there are questions of (constitutional) principle which are raised by the issue of ratification as a whole, the role of referendums, the question of popular sovereignty and the implications for constitutional politics of the types of pragmatic response hinted at above.

The French referendum campaign has already unleashed a maelstrom of commentary about whether or not rejection in the ratification referendum would be a disaster for France, for its fellow Member States and for the European Union as a whole (Dullien 2005). It has been suggested that a referendum defeat for the Constitutional Treaty could be ‘the making’ of the Union, since it will force politicians to concentrate on much more pressing economic questions, rather than the essential sideline issue of constitutional and institutional structures (Maddox 2005). Depending upon the political viewpoint, this could mean a stronger neo-liberal turn, or the reassertion of social democratic values and resistance to Anglo-Saxon capitalism. 25 Others plainly campaign for a no vote precisely because their hostility to the Constitutional Treaty is linked to a hostility to European integration altogether or to the EU as it stands. 26 For the UK, the calculus is different to

25 See the leftwing campaign of the Centre for a Social Europe: http://www.socialeurope.org.uk/index.htm.
26 See details on the website of the European No campaign: http://www.europenocampaign.com/.
It is widely assumed that a failure on the part of France to ratify the Treaty would lead to the abandonment of the Constitutional Treaty, and the historical analysis of ‘ratification troubles’ which follows suggests that this would indeed be the case. However, commentators in the UK have also begun to work on the scenario of what happens if the UK votes no, perhaps in the very last referendum, when all the other twenty four Member States have already ratified (Stephens 3005; Grant 2005a, 2005b). Will the UK find itself effectively excluded from the Union by its fellow Member States, even if – legally speaking – such a situation would be very hard to foist upon a Member State unwilling to leave. Commentators detect at the present time little enthusiasm amongst the most strategically important of the UK’s European partners, such as France and Germany, to force the UK out of the Union even in the event that it is the only Member State not to ratify. Consequently, accommodation of the UK’s preferences will require the Union to change, especially if it is apparent that the UK has little appetite to change itself. This is the scenario of a ‘messy core’, where various forms of flexibility are developed above and beyond what already exist to accommodate the UK’s preferences (Grant 2005b: 54-7; Donnelly and Rüb 2005). In a first public expression by a public body about the consequences of non-ratification, the European Scrutiny Committee of the House of Commons, in a Report published in March 2005, concluded that while failure by the UK to ratify (assuming all the other Member States had ratified) would not lead to its exclusion from the Union, but would lead to a crisis in the UK’s relations with fellow Member States which would have unpredictable consequences (House of Commons 2005).

It is important first to examine some examples from history regarding ‘ratification troubles’.

The first instance of a ratification crisis resulting from non-approval was the case of the European Defence Community in 1954, and the refusal of the French Assemblée nationale to approve the Treaty. In that case, the Treaty initiative was abandoned, even though the French stood out alone against the proposal. European integration efforts were re-focussed on functional and economic questions, and the result was the Treaty of Rome in 1957 establishing the European Economic Community. Only in the 1990s did political integration really return to the forefront of debate, when Germany insisted on having an IGC on political union alongside the (Maastricht) IGC on economic and monetary union. It took even longer for the Member States to return, constructively, to the question of defence – now translated
by means of word-shift from ‘defence’ into ‘security and defence’.

The more recent examples belong, precisely, to the era of intensified political union. Thus the second and third instances of ratification crises concern the cases of Denmark (Treaty of Maastricht 1992) and Ireland (Treaty of Nice 2002). In both cases, second referendums were held and the Treaty was finally ratified and entered into force, after a meeting of the European Council had made appropriate soothing noises and allowed the adoption of strictly non-binding declaratory measures intended to make the Treaty more palatable to the electorate.

It is worth mentioning a fourth ‘quasicrisis’ regarding ratification. It is clear that had the UK not been permitted an ‘opt-out’ from the amended provisions on social policy which were introduced by the Treaty of Maastricht, an opt-out which took the form of the Social Policy Protocol and the Social Policy Agreement, then Prime Minister John Major would probably not have been able to secure ratification of the Treaty in the national parliament without the express support of the Labour opposition. He would have faced even more deepseated opposition to the Treaty from within his own euro-sceptic Conservative Party in Parliament than was already the case, and he would have fatally damaged his own political authority within his party. As it was, Major secured the concession in 1991, (surprisingly) won a further general election in 1992, and remained in office until 1997.

Some interesting hypotheses could be elaborated on the basis of these rather thin data:

- In view of the apparently increasingly frequency with which Treaties face ratification difficulties in the era of political integration, it can be hypothesised that political rather than economic questions appear to raise greater sensitivities in national political institutions and national electorates. In other words, these political questions raise fundamental issues about the legitimacy of the EU as an integration project, and the extent to which it is broadly accepted within the Member States. As an aside, it should be noted that anecdotal evidence suggests that members of the European Movement who campaigned for a ‘yes’ vote in the 1975 UK Referendum on membership of the EEC were encouraged to stress the economic rather than the political aspects of membership. The consequences of that (slightly misleading) emphasis can definitely be felt in the UK debate at the present time.
- Second, a closely related point is that the reasons why ratification fails will
affect the consequences of non-ratification, especially as regards the reactions of both the partner Member States and of the European Council as a collective entity. It is not easy, of course, to know why citizens vote a particular way in a referendum, but at least in the context of parliamentary ratification it is possible to discern from the parliamentary debate what issues particularly animated individual members of parliament.

- Third, the size of the Member State matters (France and the UK are big; Ireland and Denmark are small, or at least would be regarded as small in the context of an EU of 12 or 15, even though the question of relative scale has been altered somewhat by the 2004 Enlargement).
- Fourth, the age (in EU terms) of the Member State matters (France was a member of the original founding club of six Member States; the UK Ireland and Denmark acceded in 1972).
- Fifth, absent an intervening general election and change of government, parliamentary rejection (or even threatened parliamentary rejection) is more final than popular/referendum rejection. It is worth noting that in the case of Ireland, turnout on the second referendum was much higher than for the first. The no vote remained relatively constant through the Amsterdam referendum and the two Nice referendums, but the yes vote fluctuated sharply.
- Sixth, the effects of non-ratification may differ depending upon whether or not it concerned a new start (the EDC and – arguably – for the future the Constitutional Treaty), or an amendment to an existing set of arrangements, as with the Treaties of Maastricht and Nice.
- Finally, steps taken pre-contractually – i.e. during negotiation – to avoid future ratification difficulties are clearly to be preferred to steps taken after a parliamentary or referendum defeat to placate national sensitivities. In some cases, the latter can cast much longer shadows than the former. That is certainly the case if one compares the long term effects of the Danish ‘issue’ with citizenship and with Schengen, which has given rise to very complex opt-out provisions which will persist even in the era of the Constitutional Treaty. In the case of the UK, ratification difficulties were anticipated pre-contractually, and what turned out to be a temporary solution to a political question was worked out. Since 1997, when the new UK government immediately ‘accepted’ the Maastricht ‘social chapter’, a political decision which was codified by the subsequent amendments in the Treaty of Amsterdam, the UK appears to have broadly resolved itself to the current state of qualified majority voting in the social policy area while resisting any additional developments. However, this would doubtless be an issue raised by any future Conservative Government in the UK.
Two other variables which the cases as set out here do not address concern the question of when the rejection occurs (early or late in the increasingly drawn out process of ratification which now involves 25 Member States) and what the effects may be of multiple rejection. In the case of Maastricht, the French referendum was extremely close (barely 51 per cent in favour), and the Germans experienced a number of legal difficulties with ratification associated with a certain famous Constitutional Court case.\(^\text{27}\) However, it remains the case that the Danish rejection of Maastricht and the Irish rejection of Nice were singular events. This may not of course be the situation with the Constitutional Treaty, as substantial doubts also hang over whether a number of other Member States along with the UK, will ratify.

**Options in the event of non-ratification**

Working out which option(s) might be taken in the event of non-ratification by one or more Member States will be affected by these principal variables (Rossi 2004a; Philippart 2003). A number of possible scenarios will now be explored in more detail:

- A second (or even third…) attempt at ratification is made within the state(s) in question.
- The Constitutional Treaty is dropped, and the current Treaties are retained for the foreseeable future.
- Various steps are taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment, and to take advantage of or develop further possibilities for flexibility within the framework of the Union.
- An IGC is convened (with or without a Convention preceding it), and attempts are made to change the Constitutional Treaty to achieve a situation in which the Treaty would be more likely to be ratified at national level, or attempts to negotiate a wholly new Treaty.
- A related possibility would be the convening of a restricted IGC to introduce amendments specifically to Article 48 TEU, in order to facilitate the actual entry into force of the Constitutional Treaty.
- The non-ratifying Member State(s) voluntarily leave(s) the EU and the Constitutional Treaty enters into force as between the remaining Member States. This could be facilitated if an IGC were convened for the purposes of introducing a withdrawal clause.
- Those Member States which have ratified the Constitutional Treaty agree to enter into a new Treaty without the non-ratifying state(s).

\(^\text{27}\) In English: Brunner [1994] 1 CMLR 57.
Further attempts at ratification

Should non-ratification by a given Member State be regarded as a final statement, or would it be possible to try again to obtain ratification on the basis of a legally unaltered, but politically ‘improved’ or ‘sensitised’ text? Such ‘improvements’ would normally involve the adoption of political resolutions by the European Council in the context of its Conclusions, or the addition of a Declaration on the part of the Member State which specifically draws attention to particular difficulties which might have emerged during the ratification process. They can also help to focus the debate in the second referendum: many referendums do not focus on the question at issue, but represent an opportunity to deliver a message of discontent to national politicians. To that extent they could be said to be a rather perverted exercise in direct democracy. The hypotheses elaborated above may help to guide reactions, on the basis of past experience.

It is interesting to focus on the type of issues this might raise in the UK. If the rejection does indeed come from the UK – a big state – and involves a resounding no vote on the basis of a reasonably high voter turnout, this will have very significant consequences for the EU. It is hard to see what inducements or soothing noises on the part of the European Council to improve the Constitutional Treaty could feasibly be offered to the UK electorate to persuade it to change its mind. Any government might well construe putting the Constitutional Treaty to a popular vote for a second time as an act of political suicide. One possibility might be if such a government felt that the risk of putting the Treaty to referendum for a second time was outweighed by the potential political costs to the UK of being ‘left behind’, as the only Member State not to ratify. Here the choices might be those of withdrawal or facing up to the reality of a so-called pioneer group of Member States going ahead without the UK. In other words, it would be necessary to premise the referendum on a stark choice between being inside or outside the European Union. Essentially the question would have to be different – i.e. ‘in’ or ‘out’ – even if it remained formally the same (Constitution – yes or no). However, that scenario would not be conceivable if the underlying question of the UK’s membership of the EU had in essence been the primary terrain of debate first time round. In other words, it could only work if the terms of the debate had been more limited in the first referendum, offering an opportunity to widen the debate in a second referendum.

28 In the case of Denmark, the so-called Edinburgh Declaration (http://euo.dk/fakta_en/denmark/edinburgh/) and in the case of Ireland, the so-called Seville Declaration see http://www.ireland.com/newspaper/special/2002/seville/
It seems likely that all parties to a UK referendum debate will be quickly
drawn into discussing the wider question of the UK’s membership during the
campaign, despite the official positions of the three largest parties (Labour,
Conservative and Liberal Democrat), which seek to separate the question of
the Constitution from the question of membership. The ‘third way’
suggested by Sir Stephen Wall, former advisor UK Permanent Representative
and former Head of the European Secretariat in the Cabinet Office in
Downing Street, is to focus on Europe as a bridge between the superpower,
the United States, and ‘a dangerous, complex world’, with ‘extreme poverty,
grave threats to our global environment, conflict and terrorism’ (Wall 2004).
However, this is unlikely to provide an attractive alternative to the simpler
question of ‘EU – yes or no?’ especially in the stark terms in which this is
often posed by the tabloid newspapers. All of this would rule out a second
referendum, if the larger questions had already been canvassed before and
ruled upon by the electorate. Furthermore, although ratification could still
strictly speaking proceed just on the basis of parliamentary ratification (on the
basis of a further Act of Parliament repealing the earlier Act establishing the
referendum), taking that option in the event of a referendum ‘no’ would also
be political suicide for any governing party.

One conceivable scenario which would demand that the UK takes a much
closer look at its own position within the European Union would be where
the different parts of the now devolved UK voted very divergently in the
referendum. What if England votes strongly no, and Scotland, Wales and
Northern Ireland vote yes, and even strongly yes? At the very least this will
provoke some form of internal constitutional crisis that the existing
devolution arrangements, which do not focus particularly effectively on the
resolution of disputes between the component parts of the UK, would be ill-
equipped to deal with. It could be interesting, for example, to see how the
Conservative Party could finesse its possibly contradictory policies in this
area: on the one hand, it is firmly in favour of preserving the Union (of
England, Scotland, Wales and Northern Ireland), but it opposes the
Constitution. If this position places additional stresses upon the UK’s internal
constitutional settlement in so far as it highlights differences in views between
the different component parts of the UK and thus encourages the view, for
example, that Scotland would better off on its own within the European
Union, the predominantly English-dominated Conservative Party may find
itself under pressure from Scottish elements within the party to minimise any
damage that this position may do to the (domestic) Union.

However, experience from the past has indicated that there may be
circumstances in which a second referendum may work positively in the
sense of offering a legitimacy surplus because levels of awareness and understanding about the EU are thereby raised as a consequence of the resulting debate. In Ireland, the Government focused in a positive way upon the issues raised by the Treaty of Nice and Enlargement in the context of the second referendum campaign, whereas the first referendum campaign was dominated by domestic issues (Laffan 2001) and the apparently omnipresent dissatisfaction with national governments and politicians which again played itself out in June 2004 in the European Elections. A National Forum for Europe attempted to foster constructive conditions for informed debate. Those who argued against the Treaty were faced with difficult questions about the implications of a ‘no’ vote for Enlargement and also for likely future perceptions of Ireland in the new Member States. On the other hand, the pressure of being seen to ‘hold up’ the ratification of a Treaty approved by every other Member State had some negative effects, with the electorate in some ways seeing itself as held to ransom. In terms of EU law and politics, however, the Irish case on Nice has not had negative effects, unlike the Danish rejection of referendum which has cast a considerable shadow over later negotiations based on a Danish claim for exceptionalism, and excessive bilateral sensitisation with regard to certain domestic concerns.

Should the Constitutional Treaty be dropped?
Non-ratification by one or more Member States may result in the Constitutional Treaty as a whole being dropped, so that the current Treaties are retained in force for the foreseeable future. The abandonment of the work of the Convention and the IGC obviously has a number of costs, including reputational costs for those who have invested time and effort to turn the vague concerns of the Declaration on the Future of the Union appended to the Treaty of Nice and the questions raised by the Laeken Declaration into a concrete output which is seen – at least in elite political circles – as an acceptable compromise between the various interests concerned, and certainly a practical improvement on what exists at present. Only time will show whether the EU is truly unworkable under the Nice arrangements, especially since many of these, including the revised arrangements of qualified majority voting, have only entered into force in November 2004. Of course, the current round of enlargements is not yet complete, with Bulgaria, Romania and probably Croatia yet to be

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29 See the section on Nice in Laffan 2003.
30 Website: http://www.forumoneurope.ie/.
31 For a strongly positive evaluation see Brown 2004.
32 This may be one reason why the Danish Government already stated in advance during 2004 that there would only one referendum on the Constitutional Treaty, and that the alternative to approval must be withdrawal.
accommodated into the structures. However, these three candidate states are unlikely to be the ‘straws which break the camel’s back’ in terms of the workability of the Nice arrangements, and consequently it should already be possible by early 2005 to have some clearer sense of how enlargement under Nice is actually working and will work in the event of enlargement from 25 to 28. On the other hand, the question of Turkey, its possible accession and the impact of this upon how the EU works and what the EU should be understood as being raises huge questions which perhaps even the Constitutional Treaty does not address. Consequently, it is pointless to hold this particular eventuality up as a reason to argue why it is imperative not to abandon what might be termed the achievements of the Constitutional Treaty in favour of settling for what we know and what we have, namely the settlement based on the Treaty of Nice. Overall, politicians may conclude that it is better to continue with the existing arrangements, and perhaps to seek some incremental developments at a later stage, than to try to unravel the complex legal relationships with a single Member State which has difficulties with the Constitutional Treaty.

Politically, if just one Member State fails to ratify the Constitutional Treaty, its dropping by all the others does not seem the most likely option, although the response is bound to depend upon which Member State is saying ‘no’. It goes without saying that there is a difference between France and the UK, on the one hand, and – say – Malta or Estonia on the other.

Introduction of elements of the Constitutional Treaty
In conjunction with the formal abandonment of the Constitutional Treaty, it would be possible for various steps to be taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment. In addition, of course, there may well be incremental constitutional changes to the existing Treaty structure effected by the Court of Justice in the future as there have been in the past, especially judgments which gradually chip away at the stark ‘pillar’ structure separating the arrangements for Common Foreign and Security Policy and Cooperation in Police and Judicial Cooperation in Criminal Matters on the one hand, and the rest comprising the so-called first pillar. There are numerous examples from the present and from the past of the anticipatory bringing into effect of innovations contained in new Treaties in advance of ratification. These include the Employment Policy Title of the Treaty of Amsterdam, which was implemented through various European Council ‘processes’ from the mid 1990s onwards, well in advance of the entry into force of the Treaty in 1999. More recently, in 2004, the Member States were already taking steps to put into effect the innovations of the Constitutional Treaty, in particular through the decision to create a Defence
Agency with a view to looking at common defence procurement (Council of the European Union 2004), even before the Constitutional Treaty was signed, never mind ratified. This type of approach is possible because not everything that is in the Constitutional Treaty requires Treaty amendment to bring into force. A whole raft of procedural possibilities are raised here.

In the first place, the possibilities offered by Article 308 EC – now popularly called the flexibility clause – could be explored as a legal base for certain institutional or policy innovations. This could be used, for example, for the energy title. Second, some innovations could be given a ‘soft’ legal base and introduced by political action alone without formal institutionalisation, or via inter-institutional agreements which have had an impact even in relation to so-called ‘big issues’ such as the budget.

Third, innovations could be introduced by means of collective action of the Member States outwith the scope of the EU Treaties, although such action, if it involved an international treaty, would also require ratification at the national level before it came into force (De Witte 2000). It is also subject to the general provisions governing EU law, such as conformity with the Treaties. Schengen – as a laboratory for further integration in relation to the removal of frontiers and borderfree travel – is the best example of the long term pursuit of integration objectives under international law. As is well known, Schengen eventually became part of the Treaties, by virtue of the Treaty of Amsterdam, but still without the participation of the UK and Ireland, and with special arrangements for Denmark. This development occurred, not least because the evolution of Schengen, and aspects such as the Schengen Information System, raised many doubts as to its compatibility with the framework of the EU Treaties. Long term flexibility through a combination of international law, opt-outs and then eventual reintegration into the Treaties is clearly a conceivable option for the EU which mirrors the past.

Fourth, the framework for enhanced cooperation under the EU Treaties, as it applies post Amsterdam and post Nice, could be explored as a means to bring certain innovations into force for the Member States willing to make changes. This procedure has never been used, and continues to be hedged around by procedural and substantive safeguards (see Shaw 2003). Sometimes the use of enhanced cooperation has been threatened by the majority of Member States in order to obtain agreement on the part of reluctant Member States to measures which require a unanimous vote (e.g. in the case of Italy and the European Arrest Warrant in late 2001). It will be interesting during the latter part of 2004 and early 2005 to see whether preliminary studies
amongst a working group of Member States in favour of creating a common base for corporate taxation (a move opposed by the UK, Ireland, Slovenia, Estonia and Malta) will result in the first practical application of the enhanced cooperation provisions (Castles 2004). From this, more evidence can be gleaned about the usability of the provisions in the event of non-ratification, for example for the title on energy if unanimity cannot be achieved under Article 308.

Finally, non-ratification may focus the minds of political actors on their own political responsibility for improving EU governance. Thus action could be taken at national level to institutionalise a stronger role for national Parliaments, in order to assuage some of the democracy and participation concerns which the Constitutional Treaty has brought to wider attention. It is not fundamentally the responsibility of the EU that within the national constitutional systems many of the European affairs committees of the national parliaments do not function as well as they should do. Many of the concerns about subsidiarity raised in the context of the Convention could be met by a combination of such national action and greater political responsibility and self-discipline on the part of the EU institutions with regard to the question of subsidiarity and the exercise of shared competences. These are the types of changes which clearly do not require treaty amendment or constitutional change to formalise.

None of these mechanisms can be used to change the existing legal bases or procedural arrangements for decision-making under the EU Treaties, such as changing from unanimity to qualified majority voting in the Council of Ministers (except by the alternative means of using enhanced cooperation), enhancing the role of the European Parliament, or changing the basis of qualified majority voting to the dual majority system. Since the Constitutional Treaty is relatively little concerned with the policy scope of European Union, but much more with institutional arrangements and what might be termed the rearrangement of the legal and institutional deckchairs with a view to achieving something which is more pleasing to the eye, flexible interpretation of existing competences or the use of enhanced cooperation will be to little or no avail. Enhanced cooperation is of little assistance, in any event, in the field of CFSP, and is explicitly ruled out under Nice in relation to matters having defence and security implications. Here, the Member States would have to look outside the confines of the EU to find collective solutions to their concerns about security and defence, and the potential role of the EU in the military arena.33

33 For further speculation on the ‘hard core’ and the ‘messy core’, see Grant 2005b.
A new or reconvened IGC?
Non-ratification may result in the convening of a new IGC, which may or may not be accompanied by a preceding Convention. This IGC could attempt to make changes to the Constitutional Treaty which would be more likely to be ratified at national level, or alternatively to negotiate a brand new Treaty. However, it is not apparent why such a further trip around the circuit of negotiation and amendment would be any more successful or popularly acceptable than has been the case with the current one. Indeed, as increasing numbers of commentators suggest, the real malaise is less about what the EU is or is doing, and much more about governments and politicians more generally. Reconvening the IGC may therefore be futile without addressing the underlying causes of discontent and distrust of politicians.

Another purpose for reconvening an IGC could be that it might help to simplify the legal situation. While the Foreign Ministers during the IGC might have vehemently rejected the idea of changing the amendments procedures within the Constitutional Treaty to facilitate future entry into force of amendments other than in relation to a very limited category of cases, it may be that the Member States could take a very different view in the context of an IGC specifically on Article 48 TEU, specifically intended to resolve a crisis. There is no reason, of course, should such an IGC be convened, an amending Treaty be agreed and signed and unanimous ratification thereof by the Member States be effected, that any reconvened IGC on the Constitutional Treaty would necessarily change the clauses of Part IV on future amendment procedures. In other words, the solution of a majority vote for entry into force could be taken as a one-off solution to an existing impasse relating to the entry into force of the Constitutional Treaty alone. The question would still arise, even if this option were taken, however, of what steps any Member State which still did not ratify the Constitutional Treaty would take. Should it stay and accept a Constitutional Treaty to which its domestic consent has not been given, perhaps in the hope that the domestic electorate may gradually come to see the desirability of the Constitutional Treaty? Or would it leave?

Voice or exit?
The ratification of the EU treaties differs sharply in terms of realpolitik, if not law, from the ratification of other international treaties. While the

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\[^34\] Compare De Witte 2004, who is more optimistic on this point.

\[^35\] In the (admittedly unlikely) event of this occurring, in a (dualist) state such as the UK, it would still be necessary to introduce domestic legislation to give domestic effect to the Constitutional Treaty, unless it could be argued that the Treaty was covered by earlier domestic legislation, such as the European Communities Act 1972 in the case of the UK.
requirement of unanimity is not unknown before a Treaty may enter into force, it is not so common. Furthermore, the systems of interdependence built up over fifty years of experimentation and experience with European integration mean that the putative ratification by any given Member State of an amending (or refounding) Treaty in the context of a unanimity requirement could never have been seen as a 'take it or leave it' situation. The decision of one parliament or national electorate clearly affects the freedom of action of other contracting states in ways which are more intense than under what the Court of Justice characterised in *Costa v ENEL* as 'ordinary international treaties'. The suggestion has therefore been made that this is could be a 'take it or leave' situation for Member States.

The non-ratifying Member State(s) may choose voluntarily to leave the EU. The UK Referendum of 1975 over membership was not strictly speaking a referendum over ratification, but it would be relevant to the case in point in so far as it seemed clear from the debate at the time that no serious objections could be made if the UK, as a sovereign state, had decided to withdraw from what were then the European Communities. Since that Referendum resulted in a 'yes' vote, the EU has little experience with secession or withdrawal (Greenland’s withdrawal was *sui generis*, not least because it was not the withdrawal of a state, but of a sovereign territory of a Member State), and indeed it has often been argued that the decision to include a withdrawal clause (Article I-60) in the Constitutional Treaty is an important innovation which offers additional legitimation to the EU, because it makes it clear that the EU is ultimately a voluntary association between sovereign states.

As things stand, absent a reconvened IGC with the objective of introducing a withdrawal clause in the TEU in order to give a more elegant solution to problems which might arise with ratification, withdrawal would involve a combination of national law, EU law, and international law, not to mention a lengthy negotiation period, and would itself require an international treaty to give effect to any political declarations of intent. Withdrawal could not be a unilateral act, without negative legal consequences arising at all levels for the withdrawing state. In particular, individuals affected by a unilateral secession in relation to the rights which they enjoy under EU – or more precisely EC law – could presumably seek judicial protection in national courts, which could bring about a constitutional crisis involving a conflict between the courts on the one hand, and the executive and legislature on the other. The UK judges might have indicated they would always follow Parliament in the past. This may no longer be the assured result in the era of the Human

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36 Case 6/64 [1964] ECR 585 at 593.
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Rights Act 1998. What would happen to the withdrawing state is also unclear, since it might try to enter into an arrangement akin to the European Economic Area, again requiring the intervention of international treaties. In any event, successful withdrawal certainly opens the way with relatively few formalities for the Constitutional Treaty to enter into force as between the remaining Member States. On the other hand, if it is a big state which withdraws, this will weaken the EU in many different ways, not only in relation to economic weight within the global economy, but also in relation to its bargaining power in bilateral and multilateral international fora, such as transatlantic relations and the World Trade Organization. The withdrawal of a big state could fundamentally change the dynamic of the integration process, which has been premised ever since the first decision of the original Six to proceed towards enlargement in the early 1960s on the logic of accession processes rather than the logic of withdrawal processes.

Increasingly complex legal scenarios would arise if voluntary withdrawal did not precede steps being taken by those Member States which have ratified the Constitutional Treaty to agree to enter into a new Treaty without the non-ratifying state(s). This may occur if the state is unwilling to withdraw and insists on standing firmly on its accrued rights and obligations based on the foundation of the existing Treaties as amended. It is conceivable that two unions could subsist in parallel, under the Vienna Convention on the Law of Treaties. Both sources of law would be binding on the participants. However, their co-existence as co-equal unions under international law, each comprising a binding legal order and adjudicatory system headed by a Court of Justice with more or less identical powers, would undoubtedly make it difficult for any Member State involved in both unions not to transgress the rule systems of the two unions at different times. Some institutional arrangements would come into obvious conflict, such as the proposal to introduce a Minister of Foreign Affairs or to introduce a long term European Council President.

It is also possible that the effective refounding of the European Union by the willing Member States and the political abandonment of the old EU would result, in effect, in de facto acceptance by all parties of a new state of affairs. In other words, all those who are wishing to go further could withdraw from the European Union leaving only those states which have not ratified the Constitutional Treaty. However, unless this mass withdrawal could be found compatible with both EU law and international law this would amount to an effective break with the law-bound past of the European Union, which has

37 For more details see Rossi 2004b; for legal analysis see Tossata and Greco 2004.
proceeded by always placing a premium on ‘integration through law’.\textsuperscript{38} Indeed many would argue that this would amount to expulsion of the non-content(s), and this would raise questions of law, especially under international law. It does not seem a desirable approach to the resolution of difficulties which would be brought about because one or more Member State had failed to give its consent to the new Constitutional Treaty coming into force, and there are formidable political and legal obstacles to be overcome before it could be put in place.

Conclusions

Here is not the place to consider the question of how representative democracy in the form of parliamentary ratification\textsuperscript{39} shapes up against an act of direct democracy in the form of a referendum approving or disapproving the Constitutional Treaty. Clearly it is wrong that supporting the use of a referendum as a means of ratifying the Constitutional Treaty is treated in some Member States as code for opposing the Constitutional Treaty. In many respects a referendum, with its associated campaigns for and against the question put to the electorate could be a highly desirable development from the legitimacy point of view for the European Union.\textsuperscript{40} This would be the case especially if the debate in some way bridged the divide between the separate demoi of the Member States, as issues ‘leaked’ from one national public sphere to another. In practice, this does happen in some cases, although some Member States are very resistant to the idea of outside interference in their national ratification debates. Were this to happen more frequently, it could be the beginnings of the recognition of a concept of popular sovereignty in the EU, even without the European referendum campaigned for by some members of the Convention which might operate as the trigger for an incipient common European political demos (see European Convention 2003).

But it cannot be doubted that all of the above scenarios, which to a greater or lesser extent are conceivable or likely, and which have been treated here so far as possible in an objective way, raise interesting questions of principle for

\textsuperscript{38} See Pernice 2003 and 2004:14, quoting extensively from Walter Hallstein on a ‘community of law’.

\textsuperscript{39} Parliamentary ratification assumes that issues of European integration are one of the campaign issues on which national parties take a position, allowing the electorate to make choices in the context of general elections, which leave political responsibility for questions such as ratification with the legislation (as well as leaving negotiation and signature with the executive).

\textsuperscript{40} On the ways in which popular sovereignty interacts with democracy in the context of constitutional change, see Chambers 2004.
the EU. The final resolution of any ratification crisis will involve a measure of risk assessment, and it is to be hoped that political reactions will be informed by previous experience. There remains uncertainty at the present time as to what the treaty basis of European Union will be in the future (Constitution or Nice), whether it will or will not be faced with a substantial crise existentielle in the event of ratification difficulties, and what its membership configuration might be in five or ten years time. Some have questioned whether non-ratification of the Constitutional Treaty could be a form of negative constitutional moment for the EU, placing in question even the ‘old’ bits and pieces constitutional framework which operates at the present time. The question of ‘treaty or constitution’ was alluded to at the beginning. In truth the answer to this question both at present and in the near future is probably both mixed and contingent, since the EU displays in some respects a multitude of faces at different times and in different fields of its activity. This would not be fundamentally changed by the Constitutional Treaty despite its formal abandonment of the Maastricht pillar system, and its creation of legal personality for the EU as a whole. In some respects in both its internal and external dealings the EU continues to be treated by others and indeed to act as an international organisation. In other respects, especially with regard to some of the implications of European integration for citizens and residents of the Member States, it has at least a quasi-constitutional force and effect. These aspects would be reinforced greatly by the formal adoption of the Charter of Fundamental Rights as a constitutive and binding element of the EU legal order, notwithstanding the restrictive effects of the so-called horizontal clauses. Ironically, the very fact that the Constitutional Treaty will be the subject of referendums in so many Member States does reinforce its constitutional character, since it is hard to imagine why something which is essentially merely an international arrangement between sovereign states ought otherwise to involve the invocation of so many acts of popular sovereignty.
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