LA RÉFORME DE LA CONSTITUTION AU CANADA

by André Tremblay
(Montréal: Les Éditions Thémis, 1995)

Reviewed by Gregory Tardi*

Despite the apparent aversion of a significant portion of Canada's political class and of its electorate to currently dealing with constitutional issues,[1] the constitutional debate is not only alive in this country, but thriving.

This polemic is fuelled first by necessity: the state of Canada's constitutional evolution is such that the most fundamental questions about the country's public life have not been resolved, and there is reason to question whether they may ever be. The debate is also driven by timing: we now seem to be in an intermission. On the one hand, the referendum of October 30, 1995 has been held, and as a result of the deadlock it produced,[2] there is an expectation that another one will be held in the not too distant future. On the other hand, the milestone of the fifteen-year review of the amending formula adopted as part of the constitutional review of 1982, originally scheduled to be convened no later than April 17, 1997, was looming on the horizon, although the federal government now claims that its obligation in this regard has been discharged. Equally importantly, public attention is drawn back to constitutional matters by litigation. In particular, the action started in the Quebec Superior Court by Guy Bertrand[3] and involving every government in Canada, is winding its way through the system. This case has now been overtaken by the federal government's reference on Quebec secession.[4] The outcome of these cases at various levels of the judiciary will have significant and, as yet, incalculable impacts on Canadian constitutional discourse.

It is into this environment that Andre Tremblay's book, entitled *La Réforme de la Constitution au Canada*,[5] was published recently. André Tremblay's credentials as both an academic and an advisor to governments on constitutional matters are well-established. He has been a professor at the Université de Montreal for a number of years and has already published on the topic[6] of the Constitution.

La Réforme de la Constitution au Canada is an extremely useful and timely scholarly work. A brief introduction orients the reader through the fundamental factors at work and explains the difficulties of constitutional reform inherent to today's Canadian situation. The main body of the book deals with the constitutional reforms process, sets out Quebec's position on the constitution and her demands for constitutional reforms, then covers the federal projects for renewal of the country's constitutional framework. The analytical text is accompanied by an extensive collection of constitutional documents, as well as the lists of cases and statutes which are usual in such tomes. Readers should bear in mind that this is not a book on constitutional law or politics in general, but specifically on constitutional reform. This distinction not only colours the content of the book but also increases its specialized interest.

It is probable that Professor Tremblay intended this book at least in part to be a university textbook. This is not an easy read: the text demands the extreme attention of the

---

* The views expressed are exclusively those of the reviewer.

1 P. Authier & P. Wells, "C-word drives Bouchard from meeting table" *The [Montreal] Gazette* (22 June 1996).

2 The results were 50.6% for the Yes and 49.4% for the No on a question that was generally interpreted as eventually leading to the separation of Quebec.

3 *Bertrand* v. *Quebec (A.G.)* (1996), 138 D.L.R. (4th) 481 (Que. S.C.).

4 *Reference Re Certain Questions Related to the Secession of Quebec*, Case No. 25506, Supreme Court of Canada.

5 (Montréal: Les Éditions Thémis, 1995).

6 *Droit Constitutionnel: Principes* (Montréal, Les Éditions Thémis, 1993).

reader as the lines of evolution in Canadian constitutional life are meticulously developed and related to each other. Beyond such a notice to the students who will no doubt pore over this book for years to come, members of a much broader potential audience should note the merits of this work. This is by no means a mere recital of constitutional projects over the past several decades. Through the wealth of facts, arguments, positions, and proposals that are set out in this book, the author accurately portrays the salient features and the grave difficulties of the permanent search for national consensus[7] through constitutionalism, in a country encompassing fundamentally divergent conceptions of its origins, of the relative weight in the body politic of its component elements, and of its socio-political destiny.

In Tremblay's perspective, the central theme of constitutional reform in Canada is the role of Quebec in the Canadian context and the way that role is expressed is through the relationship between Quebec and the federal level of government. The analysis based on this perspective is not ideological or tendentious, but rather an objective and realistic one.

While there is some reference to historical evolution, the book concentrates on the period since the initiation by Quebec of the Quiet Revolution.[8] The greatest attention is, rightly, focused on the patriation of 1982, on the Meech proposals of 1987-1990, and on the Charlottetown attempt at reform in 1991-92.

The first key to understanding Tremblay's view of Canada and its Constitution is that he sees Quebec as the force driving the constitutional reform agenda:[9]

> C'est le Québec qui fut le principal instigateur du mouvement de réforme. ... Depuis la fin de la deuxieme guerre mondiale, le Québec a remis en question l'organisation de la fédération canadienne et son fonctionnement. ... Depuis lors, le nationalisme québecois n'a cessé d'évoluer et de faire resortir un aspect incontestable: le Québec désire pour sa legislature, celle qu'il contrôle, plus de pouvoir afin d'avoir la maîtrise de son développement économique, social et culturel.

This assertion is in no way intended to minimize the gravity of other influences on our constitutional deliberations. Both the regional alienation of the western provinces and the desire of the First Nations for greater autonomy are prominently mentioned. The institutional reforms put forward by Ottawa itself are extensively examined. Tremblay establishes, however, that the stresses arising from Quebec's relations with Canada have involved greater stakes than other intra-Canadian conflicts. Consequently, many more ideas and schemes for the fundamental reform of the federation have percolated from that situation than from the others. A measured evaluation of the events of the last three and a half decades prove him right.

The even more significant finding of Tremblay's work is that despite the multitude of suggestions and plans for reform, the aspirations of Quebec for renewal of Canada in a way suitable to it have never been met:[10]

> Le présent chapitre fait ressortir que la plupart, sinon la totalité, des nombreuses revendications formulées par les governements québecois n'ont eu aucune suite et sont restées lettre morte. Le nombre même de ces revendications a sans doute eu un effet déterminant sur leur sort; leur multiplicité et leur diversité n'ont guère favorisé la discussion et l'acceptation par les partenaires

---

7 The qualifier "national" is used here in its English sense, as pertaining to the overall political unit, Canada.

8 That is, post-1960.

9 Tremblay, *supra* note 4 at 7.

10 Tremblay, *supra* note 4 at 106.

canadiens. De plus, elles reposaient sur des conceptions du fédéralisme canadien qui n'étaient pas partagées par les autres gouvernements.

This sombre view is reinforced by Tremblay's recounting of the fact that in the last fifty years, only two constitutional conferences, namely those of 1981[11] and 1983[12] resulted in constitutional amendments. In neither case was Quebec part of the consensus.[13]

Quebec's position as the force driving the agenda and her situation as the so-far unrequited partner and/or participant in Confederation lead the reader to the question of substance. How are we to characterize the aspirations which Quebec has reiterated since the beginning of the Quiet Revolution? In the light of recent history, but particularly after having read Tremblay's work, the usual form of the question, namely "What does Quebec want?" seems simplistic to the point of being banal. A more appropriate formulation would be "What vision of its constitutional future has Quebec evolved?" Indeed, an expanded version of this fundamental question may be "What vision of its constitutional future, in or with Canada, does Quebec hold?"

Notwithstanding the divergent political coloration of the various governments of Quebec since 1960, there is a characteristic of historical continuity to Quebec's demands and hence to her aspirations. On the basis of the political evolution of the last thirty-five years, these aspirations can best be expressed as follows:

- Quebec wants a substantive recognition of its specificity written into the Constitution, as a response both to the growth of nationalism and to Quebec's sudden socio-economic modernization in the 1960s into the quasi-homogeneous North American environment.

- Quebec wants a realignment of the division of powers among levels of government so that she can achieve not only greater control of her internal affairs than she has previously had, but also so that, at least in some cases, she can achieve greater control of her economic and social development than some of the other provinces wish for themselves.

- Quebec is set on insuring for herself a veto regarding Canada's constitutional initiatives. This is her view of her own role as a full and equal participant in the Canadian framework.

These demands reflect the traditional dichotomy in Canadian constitutional thinking between proponents of the equality of all provinces and those, mostly in Quebec, who espouse the doctrine of two founding nations. In Orwellian terms, the Quebec view can be summarized as being that for some purposes, all provinces are equal, but for other purposes, one province, namely Quebec, is more equal than others.

Tremblay traces the evolution of these aspirations, which have now become traditional, throughout the period that is the subject of the book's scrutiny. He details how each of them matured through position papers of Quebec governments, platforms of various political parties, reports of commissions of experts and amending formulas developed on an inter-governmental basis.

Despite the focus of governmental energies on constitutional reform over the last several decades, the inability of the rest of Canada to accede to Quebec's demands has resulted in multiple failures. Consequently, we now face continued rigidity in the mechanism for constitutional amendment, lack of compromise that could have led to substantive results in the form of commonly accepted constitutional reorganization of the country, and the political poison flowing from

[11] Constitutional conference of November 1-5, 1981, which led to the 1982 patriation reforms.

[12] Constitutional conference of March 15-16, 1983, which resulted in the adoption of s.35.1 of the *Constitution Act*.

[13] Tremblay, *supra* note 4 at 45.

Quebec's feeling of exclusion since the 1982 reforms.

Tremblay's book does not only state the difficulties which Canada's efforts at constitutional reform have produced. He also sketches several ways of cutting this Gordian knot of our national politics.

The unavoidable conclusion to which the reader is drawn in this book is that the remedy to Canada's constitutional debacles is greater flexibility in the amending formula and increased decentralization of the powers currently held by the federal authority. Yet this conclusion must be nuanced in its application. A problem inherent to the enumeration of legislative powers in sections 91 and 92 of the Constitution of 1867 is that the heads of jurisdiction named in these sections can only be amended pursuant to the general amending formula of section 38. Tremblay would clearly prefer that sections 91 and 92 be amenable to amendment according to the formula of section 43:[14]

> L'article 43 n'autorise pas, évidemment, l'utilisation de cette formule d'amendement pour modifier le partage des compétences législatives entre le Parlement fédéral et les provinces. Les articles 91 et 92 de la *Loi constitutionnelle de 1867* qui traitent de cette question sont d'application générale dans tout le Canada et ne peuvent donc se prêter a aucun arrangement constitutionnel de type bilatéral. Quand on veut modifier le partage, c'est à la formule générale d'amendement qu'il faut recourir, même si la modification ne concerne qu'une seule province.

If this amendment were to be made to the amending formula, those provinces, such as Quebec, which sought to acquire additional legislative powers could do so without tearing asunder Canada's constitutional fabric. Others, which would not desire those powers could leave them with Ottawa. The procedural result of such a scheme would be labelled flexibility. The substantive consequence could be known as asymmetrical federalism. To date, such a solution has not gained favour. Moreover, in the absence of another crisis, it would seem that First Ministers' discussions of amendments to the amending formula are now not to be envisaged.

What then, is the other option besides continued attempt at reform? In the epilogue, Tremblay squarely faces the prospect of separation. Although this part of the book was written with the scenario of the 1995 referendum in the future, the author's comments are still valid today, bearing in mind the possibility of another popular consultation in Quebec. This text shows clearly that Tremblay is a realist in the Quebec context. While he does not espouse a Yes vote, he leaves no doubt if such were the outcome, it would be a direct result of Quebec's inability to convince her interlocutors within Canada of the merits of her positions, ever since 1960. In this assessment also, he is correct.

The most noteworthy element of this analysis of the PQ's second demarche toward sovereignty is Tremblay's discussion of its legality. This line of argumentation is closely related to that being put forward by Guy Bertrand in his current suit.[15] The author concludes that Quebec is bound within the existing constitutional and legal framework and that if a statute purported to declare the province sovereign and separate from Canada, that outcome would have to be ratified by constitutional amendment using the rules currently in force. Given the unlikelihood of such a scenario, Tremblay qualifies the Quebec government's 1995 initiative as reckless.[16]

---

[14] Tremblay, *supra* note 4 at 85.

[15] See *supra* note 3.

[16] The French word used is "*téméraire*."

Given the impasse resulting from our inability so far to adopt constitutional amendments that satisfy Quebec's aspirations, where does the country go from here? Since the slim federalist result (one can not, in these circumstances, write of a victory) in the referendum of October 30, 1995, the federal government has adopted an entirely novel approach. Ottawa has had to recognize that its margin of manoeuvre is extremely limited. On one side it must continue to face a Quebec government with a sovereignist program, itself elected on the basis of a one point plurality in the popular vote.[17] On the other side, it must deal with the population of the other provinces, their governments and the media, the majority of them desiring a respite from further constitutional debates. In this political environment, the federal government has, in fact, sought a constitutional accommodation for Quebec mostly through unilateral legislative procedures that, in the formal sense of that expression, are not of a constitutional nature.

First, in order to satisfy Quebec's hope for a declaration of its distinctiveness, the federal government had the House of Commons adopt a resolution to that effect on December 11, 1996.[18]

Second, the realignment of powers between the levels of government is being attempted by the novel means of administrative arrangements.

Third, the federal government has tried to donate a veto whereby Quebec would be assured a permanent say in constitutional issues, by the unprecedented means of a simple federal statute, *An Act respecting constitutional amendments.*[19]

These steps along the path of constitutional evolution are too recent to be dealt with in Professor Tremblay's book. However, the debate on Bill C-110 of 1995, which eventually became the *Act respecting constitutional amendments*, did benefit from his involvement. During the proceedings of the Special Committee of the Senate on Bill C-110, on January 23, 1996, Tremblay testified extensively about this legislative initiative.

On that occasion, Tremblay addressed both the purely legal, as well as the political aspects of the bill. In an exchange with the Chairman of the Committee, Conservative Senator Noël Kinsella, he qualified the bill scathingly as a legal artifice or a constitutional froth. In greater detail, he gave the following legal reasoning:[20]

> Never in the history of the country has there been talk of a statutory veto right. ... A veto right guaranteed by a simple federal act, one that can be repealed or amended by a majority of parliamentarians, is not a veto right. It is a dubious veto right, a pale imitation at best.... Aside from these fundamental problems, I question the legality of the bill. The proposed legislation seeks to add new components to the amendment procedures already set out in the Constitution Act, 1982. This simple piece of legislation institutes in an indirect way a veto that should have been provided for in the Constitution. In its own way, the bill takes the lid off the whole constitutional issue ... I submit that the constitutionality of the bill is questionable, which adds little to this initiative's merits, if it has any at all.

Tremblay addressed the political aspects of C-110 separately, criticizing its timing, the fact that it would add a yet further layer of rigidity on the amendment formula devised in

[17] In the Quebec general election of September 12, 1994, the popular vote was Parti québécois: 44.7%, Quebec Liberal Party: 44.3%, with the remaining 11% going to the others, including the Action démocratique du Québec.

[18] Hansard (11 December 1995) 17537.

[19] S.C. 1996, c. 1, assented February 12, 1996.

[20] Proceedings of the Special Committee of the Senate on Bill C-110 (23 January 1996) at 2:8.

1982. Most importantly, he criticized the political aspect of the initiative on the ground that, once again, it was not a response to Quebec's aspirations:[21]

> Furthermore, the bill does not live up to Quebec's expectations. With your permission, I would like to touch on Quebec's position which may be somewhat relevant. The bill does not meet its expectations in that it does not deliver what Quebec has been asking for or demanding for decades. Need I remind you that what Quebec is demanding is in-depth constitutional reform. It wants its distinctiveness to be recognized in the Constitution as well as its role as a major partner in the Constitution or in the Canadian federation. Finally, it has always sought constitutional protection from amendments that could prove prejudicial to its higher interests. Quebec has never demanded or called for this type of technocratic approach to the problems of defining its intergovernmental relations with the rest of Canada. As far as the right of veto is concerned, Quebec has always wanted its veto to be guaranteed by the Constitution and exercised by the National Assembly.

This testimony could in effect have been the basis for chronologically the next chapter in Tremblay's book. Despite his advice to the country, Parliament did adopt this proposal.

The federal government does not share professor Tremblay's negative view of the constitutional validity of Act. The official view about it is that it is a *sui generis* adjunct to Part V of the *Constitution Act, 1982*. That status would not detract from its constitutional validity but would not ensure its constitutionalized nature either. There is agreement that it certainly does not fall into the ambit of the extended definition of the Constitution in subsection 52(2) of the *Constitution Act, 1982*. The *Act respecting constitutional amendments* is at the very least a statement of the federal position and of the federal intent in applying Part V. According to the expression attributed to Justice Minister Alan Rock, the Act is designed to bridge the gap between the federal promises made during the final week of the campaign leading up to the 1995 referendum and the ability of the federal government to achieve the entrenchment of the regional veto formula. Thus, while the unilateral federal nature of the Act may leave doubt as to its legal merit, the central government perceives it to be politically viable. It purports to donate a veto not only to Quebec which has traditionally wanted it, but, following the federal desire to treat other regions of the country equally, to those other regions as well.

In Canada's present political environment, it does not seem opportune to Ottawa to attempt a further round of constitutional reforms, nor even to try to amend the amending formula. The Constitution itself, however, dictates that the amending formula be reviewed by first ministers within fifteen years after its coming into force.[22] In order to discharge itself of that responsibility, the government of Canada added the issue of the constitutional amendment formula to the First Ministers' Conference which focused on economic and social issues on June 20-21, 1996. The fact that the amending formula was, as the media plainly recounted, not seriously discussed, should be no surprise upon reading the Prime Minister's plan for the event:[23]

> The best thing we can do is to remove the unproductive deadline to have a constitutional conference by April of next year.

---

21 Proceedings of the Special Committee of the Senate on Bill C-110 (23 January 1996) at 2:6. This testimony was originally given in French.

22 *Constitution Act, 1982*, s. 49.

23 Address by Prime Minister Jean Chrétien to the Ottawa-Carleton Economic Development Corporation and Le Regroupement des gens d'affaires, Ottawa (18 June 1996) at 3.

> Some people say that we have fulfilled our legal obligation as a result of the Meech and Charlottetown constitutional rounds, others say we have not. I don't want to leave it to guesswork. I want to make sure that we have fulfilled our obligation. So I will give First Ministers the opportunity to express themselves and get that obligation behind us. It is clear that some premiers don't want a substantive discussion on the amending formula at the meeting. That is fine with me. That discussion will come another time — when everyone wants it. That is better than putting the country through a sterile, pointless constitutional exercise now.

Given the apparent consensus of First Ministers to dispense with serious constitutional discussion at present, this treatment for reform of the amending formula was the only step the federal government could take in the direction of the goal it had set out for itself in the most recent Speech From the Throne:[24]

> Action has already been taken to recognize Quebec as a distinct society within Canada and to guarantee that no constitutional change affecting any major region of the country will take place without the consent of that region. The Government supports the entrenchment of these provisions in the Constitution.

In the present context, the issue of constitutional reform in Canada is by no means set aside. In sharp contrast to the mood of the electorate and to the superficial coverage of the media, further development of our constitutional structures and processes is very much ongoing, because that is one of the imperatives of the conduct of public affairs in this country. No country can live without the formulation of plans by government and the analytical contribution of academics. Every event forces us to envisage the next step. This is true even of those events, such as the 1995 referendum, the results and outcomes of which may not be immediately perceptible. In the sense that a Constitution is not merely the basic instrument of national organization, but also the expression of the people's political and legal aspirations, we should take the result of the referendum not as a signal for abandonment, but quite to the contrary, as an inducement to try again to accommodate the diverse views expressed in the Canadian population.

André Tremblay's book is a most worthwhile contribution in developing a national understanding of the attempts of our recent path to achieve a national consensus. Upon a thorough reading, it can also help us in devising newer ways of constitutional accommodation. Beyond the qualities of Professor Tremblay's writing as being timely, interesting and comprehensive, this book is to be recommended for a particular reason. La Réforme de la Constitution au Canada is written in an interdisciplinary style. Constitutionalism and constitutional reform are at the pinnacle of national public life and are, therefore, an inextricable blend of law, policy, and politics. In the book, as in the subject matter itself, the boundaries of each of these elements are blurred. They are woven throughout the text and render the book not only the preserve of students but also recommended for all others keen to understand in greater depth the evolution of this most difficult country to govern.

Gregory Tardi
Legal Services
Elections Canada

[24] Hansard (27 February 1996) 5.

THE MORAL FOUNDATIONS OF CANADIAN FEDERALISM: PARADOXES, ACHIEVEMENTS AND TRAGEDIES OF NATIONHOOD

by Samuel V. LaSelva
(Montreal: McGill-Queen's University Press, 1996) pp. xv, 264.

Reviewed by Garth Stevenson

Canadian Government has traditionally held little interest for political philosophers. But the mutual disinterest between these two fields of political science has been replaced over the last fifteen years by a significant degree of cross-fertilization. The advent of the *Canadian Charter of Rights and Freedoms* has contributed to this trend by directing attention to the interaction of law and politics, a natural field of mutual interest for institutionalists and philosophers. The interminable difficulty of squaring the circle between Quebec nationalism and Canadian federalism also has stimulated interest in the more philosophical aspects of politics. Finally, like most Canadian trends, this one has an American prototype. The intellectual origins of both the Declaration of Independence and the U.S. Constitution have been a well-cultivated field of study, particularly over the last thirty years. Somewhat more recently, a number of Canadian scholars have begun to explore the intellectual origins of the British North America Act and the implications that those origins may have for our present constitutional problems.

Samuel La Selva has been an important contributor to this literature in recent years, and it is gratifying to see in print a book-length collection of his work. *The Moral Foundations of Canadian Federalism* includes four chapters (of ten) that were previously published. The chapters are tied together by some common themes into a coherent book, but are also sufficiently self-contained to be read individually. Instructors seeking some fresh material for their reading lists on federalism, the Constitution, and related topics will appreciate most of these chapters.

Like many recent writers on Canadian politics, La Selva views Canada as fundamentally divided into three societies: Quebec, Aboriginal first nations, and (predominantly) English-speaking Canada. Although all three presumably existed, after a fashion, in 1867, the political settlement devised at that time has ceased to be viable under the impact of the new pluralism. The *Charter*, and the untidy process of "patriation" that surrounded its birth, have whetted appetites, including those of Aboriginals and the Québécois, for constitutional status and recognition while unleashing a seemingly endless cycle of claim and counterclaim by organized groups and subgroups. "Rights" have acquired a sinister set of implications that they lacked in the innocent days of *Roncarelli* and *Drybones*, while the Constitution has become a symbol-ridden battlefield rather than a set of rules for conducting the nation's business.

Although the Aboriginal question is the topic of one chapter in this book and is mentioned in several other chapters, La Selva rightly regards the Quebec versus Anglophone Canada confrontation as the only fundamental, and potentially life-threatening, problem of Canadian federalism. This reviewer entirely agrees. Sectionalism, multiculturalism, oppressed Aboriginal minorities, and conflicts over the definition of "rights" are obviously present in the United States and Australia, yet neither of those federations endures the perpetual atmosphere of crisis and impending doom that has now pervaded Canadian politics for more than thirty years. As Pierre Trudeau wrote long ago: "French and English are equal in Canada because each of these linguistic groups has the power to break the country."

La Selva is not among the pessimists who see the partition of Canada as a foregone conclusion. In fact, he argues that the elements of a solution can be found by

reexamining our shared history. Specifically, the moral foundations to which the title of the book refers may be found in the political thought of Sir George Etienne Cartier. Cartier is mentioned in all but two of the eleven chapters, and La Selva's book is perhaps the most extended and thoughtful discussion of his political ideas to appear in our generation.

Cartier is a somewhat neglected figure in Canadian history, in part because he died only six years after Confederation, in part because his political fortunes and reputation had reached a low point at the time of his death, and in part because he left few papers to be used by his biographers. No historian is ever likely to do for his reputation what Donald Creighton did for that of his ally, John A. Macdonald. If Canadians remember him at all it is as a somewhat crotchety Montreal bourgeois who denounced American democracy, was deeply involved in the Pacific scandal, and favoured placing Parliament in Ottawa because that remote location would keep it safe from the influence of public opinion.

That side of Cartier is certainly authentic: it is presented by Parks Canada to its visitors at Cartier's house on Notre Dame Street and has been well-documented by Brian Young in his brief but fascinating biography. Yet as La Selva reminds us, that was not the whole story. Whatever his faults, Cartier deserves as much credit for Confederation as anyone else, with the possible exception of Macdonald.

Despite his anti-Americanism, Cartier espoused federalism — an American invention — with far more enthusiasm than did most Anglophone Canadians, including Macdonald. Macdonald openly admitted his preference for a legislative union like that between England and Scotland in 1707. Anglophones in Montreal and the Eastern Townships dreaded the thought of a French-dominated provincial legislature. The Maritimers, judging by their contributions to the Quebec Conference, were more interested in the design of the Senate than they were in defining the scope of provincial jurisdiction. Even the Grits of Canada West tended to believe — until Oliver Mowat showed them the error of their ways — that the provinces should be little more than large municipalities. (One of the more intriguing might-have-beens of history is to imagine what Canada might have been like today had Mowat died in 1873 and Cartier survived into the twentieth century rather than vice-versa.)

Cartier had to steer a middle course between those French Canadians who feared any closer ties with the neighbouring colonies and those Anglophone Canadians who favoured a more centralized union than French Canada could possibly accept. On the other great issue of the day — relations between church and state — he also occupied the middle ground between the ultramontane *bleus* and the anti-clerical *rouges*. Most of the clergy followed Cartier in support of Confederation — an outcome that may now seem inevitable but was far from being so at the time — and it was only after his death that the ultramontanes took control of French Canadian conservatism, provoking a predictable reaction from militant Protestants. Meanwhile Cartier played a decisive part in bringing the West into Confederation as a counterweight to Liberal and Protestant Ontario, and in establishing the new bilingual province of Manitoba (or so he thought) with a Constitution based on that of Quebec.

There is no evidence to suggest that Cartier was an original political thinker in the same league as Madison, Hamilton or Jefferson, but he was among the first to recognize that federalism could be compatible with a British-style parliamentary monarchy. More significantly, he saw the potential for federalism as a means by which distinct nationalities could coexist within a single state. He did this by distinguishing between political nationality, meaning shared allegiance to the state and regime, and ethnic nationality, based on a common culture and way of life. Confederation meant the formation of a new political nationality, but not the disappearance of the French Canadian nationality. In fact, French Canadians were

persuaded to accept Confederation because they believed their language and culture would be more effectively protected under a parliamentary federation than under any alternative regime. To Eugene Forsey's question — "Canada: Two Nations or One?" — Cartier would have replied: "both."

La Selva believes that federal Canada can still be preserved if we rediscover the wisdom of Cartier and accept Quebec's right to be different and to define its relationship with Canada in a different way. He praises Charles Taylor's espousal of "deep diversity" but is critical, as Cartier would have been, of Taylor's support for the fashionable panacea of radical decentralization. A political nationality, more than an ethnic one, requires a central government with some power and some sense of purpose. Similarly, La Selva takes a cautiously moderate position on Aboriginal self-government, arguing that it is not a panacea and that Aboriginals must retain meaningful ties with the rest of Canada. He is critical of the *Charter of Rights and Freedoms* not because of the rights which it enshrines — he recognizes the moderating impact of section 1 — but because it implies that Canadians are a single sovereign people with a collective will.

Readers will also find here — under a new title — a chapter first published in 1983 on the subject of section 94 of the BNA Act. Unlike F.R. Scott, who viewed section 94 as evidence that federalism was considered little more than a temporary expedient, La Selva draws the opposite conclusion. If the consent of the common law provinces was required to harmonize the common law of property and civil rights, a veto for Quebec over other changes in the distribution of powers must logically have been intended.

Whether or not they agree with all of its conclusions, students of Canadian federalism will find this book a thoughtful and stimulating contribution to the literature. It combines the insights of history, philosophy and political science in a readable and attractive package.

Garth Stevenson
Department of Politics
Brock University

*A CHARTERPHOBIC RETHINKING OF THE CONSTITUTION**

RETHINKING THE CONSTITUTION: PERSPECTIVES ON CANADIAN CONSTITUTIONAL REFORM, INTERPRETATION, AND THEORY

by Anthony A. Peacock, ed. (Don Mills, Oxford University Press, 1996)

Reviewed by Ken Norman

In *Rethinking The Constitution*,[1] is to be found a mixed bag of essays, containing a baker's dozen, which argue that Canada has somehow recently managed to stand democracy on its head by abandoning formal "liberal constitutionalism" and "reason" itself.[2] Who is to blame for this nasty turn of events? It turns out that at the head of the list of the usual elite suspects are "materialist,"

* This term was coined by Sigurdson in "Left- and Right- Wing Charterphobia in Canada: A Critique of the Critics" (1993) 7-8 International Journal of Canadian Studies 96. For the purposes of this review I employ the term so as to embrace those who criticize judicial review under the *Charter* on functional grounds as well as ideological ones. For an example of the former, in *Rethinking* there are essays by Owen and Pepall arguing that the very nature of the adjudicatory process means that courts just are not up to the task of interpreting the *Charter*.

1 A. A. Peacock, ed., (Don Mills: Oxford University Press, 1996).

2 See Peacock's "Introduction" and his "Postscript" on the 1995 Quebec Referendum for a summary of this point.

"post-materialist" and "feminist" law teachers whose published voices are said to have dominated in this unhappy abandonment of the faith of "liberal constitutionalism."

The chief culprit who, perhaps unwittingly, got this dreadful ball rolling a generation ago was Pierre Trudeau. In a chapter entitled "Canada's Court Party," Knopff and Morton re-work an earlier piece in which they label Trudeau a "unifier" seized with the vain hope that the *Charter* would serve as "a 'counterweight' to the forces of decentralizing regionalism and provincialism."[3] The other contributors to *Rethinking* share with Knopff and Morton an absence of kind words for Trudeau's rights project save for Forbes.

In chapter 2, Forbes paints an objective picture of Trudeau's moral vision. He argues that Trudeau and his *Charter* Project ought to be seen as calling upon Canadians to lead the world by embarking on a noble experiment in liberal pluralism grounded in rights. By means of the *Charter*, Trudeau sought to do nothing less than provide Canadians, as models for the peoples of all countries, with a set of abstract values and rights which would function as ties to bind us despite our diversity. We "would have to learn to care and share universally, as true morality demands, and not just *en famille*, as comes more naturally."[4]

Martin, the chronically Charterphobic author of the first essay in *Rethinking*, has no time for any such nation-building rhetoric. Contrary to Forbes, Martin finds "scant intellectual or emotional direction" in the *Charter*.[5] Martin laments the loss of our collective identity as Canadians which, if you can imagine, Trudeau got well under way by simply changing the name of our written Constitution! By replacing the *British North America Act* with the *Constitution Act*, 1982, Trudeau and his minions[6] started in motion a process which has led Canadians to "understand ourselves only through American ideas."[7]

The mind boggles! American ideas do not prevail in Canadian rights talk.[8] They do not resonate in the language of the *Charter*. Nor do they hold sway in the analysis of the Supreme Court of Canada. What, one might well ask Martin, about the provisions of the *Charter* which speak to Aboriginal, language, equality multicultural and mobility rights? What about the legislative override clause, section 33?

How about the Supreme Court of Canada's reliance upon section 1 to justify laws restricting expression which is hateful[9] or pornographic[10]? I note that Stanley Fish in *There's No Such Thing As Free Speech ...*

3 "Canada's Court Party" at 65.

4 "Trudeau's Moral Vision" at 34.

5 "A Lament for British North America," c. 1. at 12.

6 The two cited by Martin are to be found on the bench of the Federal Court of Appeal these days. They are Mark MacGuigan, Trudeau's Minister of Justice, and Barry Strayer, who Martin advises is "generally regarded as having played the leading role in drafting the Canada Act, 1982 and its appendices" (*ibid.* at 4).

7 *Ibid.* at 11.

8 Take the current debate about tobacco advertising. A couple of years ago the Supreme Court found the *Tobacco Products Control Act* to be constitutionally impermissible due to overbreadth (see *RJR - MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199). Unlike the American Supreme Court, who would have talked exclusively about the concept of free speech as embodied in the First Amendment, the Canadian Supreme Court spent its time on s. 1. And, in the ensuing months the political debate has been about s. 1. In late November of 1996, the Federal Government launched a new law curbing tobacco advertising with an announcement by the Minister of Justice that: "The government has carefully tailored the legislation with the benefit of the Supreme Court's guidance, and I am confident it respects the Charter of Rights and Freedoms." See, *Globe and Mail* (2 December 1996) A3.

9 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

10 *R.* v. *Butler*, [1992] 1 S.C.R. 452.

and it's a good thing too[1] has recently complimented "Canadian thinking" with regard to limiting the expressive "rights" of hate mongers and pornographers.[12] According to Fish, this analysis by the Supreme Court of Canada places emphasis on "the principles that underwrite" Canadian society rather than on a reified "free speech" concept as done in American First Amendment doctrine.[13]

The first part of *Rethinking* concludes with an essay by Manfredi, "On the Virtues of a Limited Constitution: Why Canadians Were Right to Reject the Charlottetown Accord." Manfredi's argument is that the ball which Trudeau got rolling, leading to the last couple of abortive rounds of Canadian Constitutional reform, has shown the Trudeau project for what it really is. That is, as a mandate for illiberal attempts to fix political issues of cultural, social, and economic injustice by means of constitutional amendments. For Manfredi the darkest hour of this project was "the Charlottetown Folly" which saw Bob Rae's "unnecessary and pernicious" "social charter" notion come perilously close to fruition.[14]

A good deal of the thinking behind the "social charter" is the focus of Bakan and Schneiderman's *Social Justice and the Constitution: Perspective on a Social Union for Canada*.[15] Manfredi devotes some attention to the debates amongst "progressives" contained between the covers of this volume. In particular, he critiques Nedelsky and Scott's proposed Social Rights Council, an institutional alternative to justiciability, for requiring as a qualification for appointment to the Council that a candidate commit herself to the objectives of the Social Charter. Nedelsky and Scott used human rights tribunals as their model for the Social Rights Council. Manfredi sends his reader to a footnote citing Flanagan, Knopff and Archer's argument that human rights tribunals were biased in favour of the objectives of Human Rights Codes.[16] What all this means for Manfredi is that the New Democratic Party, via human rights tribunals and the Social Rights Council, will see their political agenda implemented by other than electoral means.

One gathers that what Nedelsky and Scott should have done was to have required candidates for the Social Rights Council "to be disinterested participants in the process of defining and allocating social rights."[17] Perhaps one might test this issue by looking at the role of the courts in Canada's criminal justice system. Should a candidate for judicial appointment stand down because she is committed to the objectives of the *Criminal Code*? Should our courts be peopled only with judges who are truly disinterested in the process of interpreting the *Criminal Code*?

Part II of *Rethinking* contains seven essays on constitutional interpretation. The first essay by Knopff and Morton, "Canada's Court Party," is a recycled version of their "The Supreme Court as the Vanguard of the Intelligentsia: The *Charter* Movement as Postmaterialist Politics."[18] The argument here is that this "elitist" Court Party, led by law professors, is deeply anti-democratic and, apparently, wanting to have its way with Canada's social policy with a little help from their friends on the Supreme Court of Canada. Whether any of the fond hopes of the

---

11 (New York, Oxford: Oxford University Press, 1994).

12 *Ibid.* at 104: "Canadian thinking about freedom of expression departs from the line usually taken in the United States in ways that bring that country very close to the *Arepagitica* as I have expounded it."

13 *Ibid.* at 105.

14 "On the Virtues of a Limited Constitution" at 54.

15 (Ottawa: Carleton University Press, 1992).

16 "On the Virtues of a Limited Constitution" at 54 referring to T. Flanagan, R. Knopff, and K. Archer, "Selection Bias in Human Rights Tribunals: An Exploratory Study" (1988) 31 Canadian Public Administration 483-500.

17 *Ibid.*

18 In J. Ajzenstat, ed., *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992).

Court Party have come to fruition is not addressed by Knopff and Morton.[19] They note that this question "must be reserved to another occasion."[20]

It might be noted that such a study will not require rocket science. The Court Party, as Knoppf and Morton conceive it, is committed to radical social transformation in the name of equality. What current evidence is there that the Supreme Court of Canada shares this agenda? The answer is that there is none. The *Equality Trilogy*[21] of 1995 leaves no doubt on this matter.

Chapter 5 consists of more of the same "Court Party" — like revelations. In "The Language of Rights and the Crisis of the Liberal Imagination," Watson decries the "revisionist jurisprudence" of the Supreme Court in its interpretations of the *Charter*. For Watson, "Canada is now under siege from interest groups that seek to constitutionalize political claims that they could not satisfy under the give and take of the political system."[22] Canada under siege by the disadvantaged. What a concept! My judgment is that we can sleep soundly in the citadel for as long as we care to.

Chapter 6, "Rights and Wrongs in the Canadian Charter," is authored by Selick who shares Watson's concerns about "interest groups." She argues that the only rights worthy of the name are negative rights. She house-cleans the *Charter* on this basis. Why she makes no mention of two largely "positive rights" portions of the *Charter*, the "Democratic Rights" of sections 3 and 4 and the "Legal Rights" of sections 8 through 14 remains a mystery. Perhaps, for Selick there are "good" and "bad" categories of positive rights.

For example, the first section in the "Legal Rights" portion of the *Charter* is section 7. Perhaps because it is in the "bad" category, it gets a good deal of critical attention from Selick. Of particular concern for Selick is the section 7 litigation which sees members of those pesky "interest groups" seeking to have it interpreted as containing positive rights. The welfare recipient Robert Finlay is a case in point. That his arguments did not prevail in the Supreme Court of Canada takes no wind from Selick's sails.[23] In a remarkable piece of nonsense Selick asserts:[24]

> Other cases making arguments similar to Mr. Finlay's and explicitly relying on section 7 of the *Charter* are still working their way through the courts. Their progress was temporarily hampered by the termination of the federal Court Challenges Program in 1992, which funded groups wishing to bring *Charter* challenges to court. However, the Chretien government reinstated the program in late 1994, earmarking $2.75 million per year for it.

Selick seems not to be the sort of person to allow the facts to stand in the way of an argument. But, for the record, the facts are that the federal Court Challenges Program has never had anything to do with section 7. The program had its genesis in 1978

---

19 "Canada's Court Party" at 87. In footnote 80, Knopff and Morton acknowledge that, in the first published version of this essay, "The Supreme Court as the Vanguard of the Intelligentsia" they "blurred" the difference between the Court Party's agenda and the Supreme Court's achievements. Though, it must be said that the clear implication of the first piece, to this reader, was that the Court Party was, indeed, having its way with the Supreme Court.

20 *Ibid.* at 80.

21 *Egan* v. *Canada*, [1995] 2 S.C.R. 513; *Miron* v. *Trudel*, [1995] 2 S.C.R. 418; and *Thibadeau* v. *Canada (Minister of National Revenue)*, [1995] 2 S.C.R. 627.

22 "The Language of Rights and the Crisis of the Liberal Imagination" at 89.

23 *Finlay* v. *Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080.

24 "Rights and Wrongs in the Canadian Charter" at 110.

dedicated solely to funding minority-language cases. With the advent of the equality provisions of the *Charter* in 1985, it was then expanded to deal with equality cases. It has never permitted funding of section 7 cases.[25]

In Chapter 7, "Strange Brew: Tocqueville, Rights, and the Technology of Equality," Peacock advances three critiques of "equal rights talk." First, he draws from Knopff's *Human Rights and Social Technology*[26] in contending that the "true" meaning of rights is abused by those who use equality rights to pursue a political agenda of redistributive justice. Second, to avoid this mess, with which we must now live in Canada given the Supreme Court's espousal of "substantive equality" in *Andrews*,[27] one must return to the "true" meaning of rights by assuming the existence of natural rights. Drawing from Glendon's *Rights Talk*,[28] Peacock argues that "Reason," not the expediency of the day, must serve as the foundation for rights. Third, in a section entitled "Tocqueville and the problem of tutelary democracy," Peacock argues that "substantive equality" amounts to Tocequeville's "depraved equality." For Tocequeville, democrats yearn for equality far more than for liberty. Of course, they will seek equality in liberty but if it doesn't come their way, the will still seek it in slavery![29] Peacock argues that Canadians have gone some ways down this dangerous path in our endless reliance on all branches of government to secure equality for all.

Chapters 8 and 9 by Pepall and Owen, respectively, analyze some Supreme Court of Canada cases which demonstrate, for them, that the Court is just not competent to perform the oracular tasks which it chooses to take on under the *Charter*. In Chapter 10 Reid proposes that a more democratic curb on the abuses of judicial review under the *Charter* would be referenda placed on ballots on the occasion of federal and provincial elections. This process would have the added advantage of providing the judges with a pretty good fix on just where to draw the "reasonable limits in a free and democratic society" line under section 1.[30]

Part III of *Rethinking* is entitled "Constitutional Theory." In Chapter 11 Cooper contends that Canada no longer has a soul. There is no body politic. Canadians have lost their way. Cooper cites the loss of our symbolic ties to Britain as being the main reason for this.[31] This argument assumes that once "we" were a sovereign people. Or, at least, we had the right stuff to become such. Where Francophones fit into this "we" is a puzzle which Cooper does not deign to solve for his reader. Chapter 12 by Darby and Emberley, pursues the thesis that Canadians have become lost and are wandering beneath a starless sky nearer and nearer to the abyss. The argument here is that liberal constitutionalism is no longer guided by theories of nature but is rather in the hands of the "political correctness" movement whose father, we are reminded, was Chairman Mao.[32] More of the same is served up in Chapter 13 by Martin. This piece has little to say about the Constitution. Though, I do

---

25 See K. Marshall, "Should the Court Challenges Program Be Terminated?: The Relevance of the Judicial Review Debate" (1995) 4 Windsor Review of Legal and Social Issues 157.

26 *Human Rights and Social Technology: The New War on Discrimination* (Ottawa: Carleton University Press, 1990).

27 [1989] 1 S.C.R. 143.

28 *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

29 "Strange Brew" at 139.

30 Reid's appetite for referenda might flow from his role as senior researcher for the parliamentary caucus of the Reform Party of Canada. See "Penumbras for the People: Placing Judicial Supremacy Under Popular Control" at 278.

31 See "'Political Correctness' and the Constitution: Nature and Convention Re-examined" at 228.

32 "Theoretical Perspectives on Constitutional Reform in Canada" at 246.

grant that it is mentioned at both ends of an essay about how the new orthodoxy of relativism, victimology, politicization, and cynicism has corrupted social science and public polity review in Canada.

Rethinking concludes with a postscript by Peacock on "The 1995 Quebec Referendum, Liberal Constitutionalism, and the Future of Canada." Peacock argues that, by practising "identity politics," Canada has removed one of the corner stones on which liberal constitutionalism was built in the first place. After all, the old "identity politics" of religious groups was what liberal constitutionalism sought mainly to overcome. The new "identity politics" of culture has led us to that ugly referendum night when Premier Parizeau saw fit to blame the PQ's loss on "money and the ethnic vote."[33] Peacock draws from George Grant's *Lament for a Nation* and Barbara Amiel in *The Wall Street Journal*, among others.[34] One almost expects a reference to *Lord of The Flies*!

In the end, *Rethinking* leaves the reader unsatisfied. Surely, what is called for is more than a backward look, through the lens of a particular set of democratic values condemning the positivization of rights in basic laws. The reader is offered critiques of rights from both the right and the left, but little vision. In the "rights free" democracies to which the authors aspire, no light is shed on just where the disadvantaged would stand. Manwaring has recently expressed similar frustration in reviewing Hutchinson's *Waiting For Coraf: A Critique of Law and Rights*.[35]

It is clear that contemporary political philosophers who favour rights do have a vision which include the disadvantaged. They view rights as enhancing the democratic project on their behalf. Dworkin's democracy under the rights thesis:[36]

> ... commands that no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall.

Rorty likewise argues for rights as instruments to build a civil society with space for all humans to flourish.[37] Unfortunately, neither Dworkin nor Rorty are challenged directly in *Rethinking*.[38]

Further, the prescription authored by Dworkin and Rorty seems to fit the practices of all those who are struggling against social injustices. Steiner and Alston note in their recent book, *International Human Rights in Context: Law, Politics, Morals*,[39] that "human rights ideals deeply inform both the practice and the theory of international law and politics" and refer to them as a "lens through which to see the world, a universal discourse, a subject in their own right as well as a vital component of many others, a potent rhetoric and aspiration."[40] The aspirational element is captured by Williams' contention that "the disenfranchised ... experience and express their disempowerment as nothing more or

---

33 "Postscript" at 274.

34 *Ibid.* at 275.

35 (Toronto: University of Toronto Press, 1995) as reviewed by J. A. Manwaring "Waiting for Democracy — Allan Hutchinson's Programme for Progressive Politics: A Review Essay" (1995) 27 Ottawa Law Rev. 375.

36 Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at 213.

37 Rorty, *Contingency, Solidarity and Irony* (Cambridge: Cambridge University Press, 1985) c. 3. This point is relied upon by Manwaring, *supra* note 34 at 388.

38 Dworkin is at least noticed once. In "Penumbras for the People: Placing Judicial Supremacy under Popular Control," Reid devotes a paragraph to Dworkin's "pro-judiciary" views contenting himself with sending his reader to Mandel's *The Charter of Rights and the Legalization of Politics* (Toronto: Thomson Educational Publishing, 1989) with the comment that "Mandel does not support them" (at 190).

39 (Oxford: Clarendon Press, 1996).

40 "Preface" *ibid.* at vi.

less than the denial of rights."[41] Other than a brief reference by Knopff and Morton to the disadvantaged as "Charter Canadians" (Alan Cairns' phrase) as a constituency within the nefarious "Court Party," *Rethinking* leaves one wondering what the authors' critique of "human rights talk" on the part of the world's disadvantaged peoples would sound like if they were sympathetically to address their plight.[42]

And, it might be noted that, these days, "human rights talk" is no longer just for minorities. It is being taken up by majorities as well. Some regard ought to have been paid by the authors in *Rethinking* to the current challenges in this world faced by new democratic regimes intent on building civil societies. One wonders how the authors of *Rethinking* would deal with the manifest fact that these emerging democracies, from those in the former Soviet system to South Africa, see constitutional bills of equal rights as vital tools in this endeavour, Tocqueville notwithstanding?[43]

The case of South Africa is especially relevant. Mandela has taken Trudeau's project of using entrenched rights to build a foundation for a new pluralist society in a deeply divided country a step further by adding justiciable social, economic, and cultural rights to a list of fundamental freedoms and rights which bears quite a resemblance to Canada's *Charter*. However, Devenish notes that it will take more than mere enactment of the final Constitution in Cape Town next spring:[44]

> For the Bill of Rights to be effectively implemented, a rights culture will have to be carefully nurtured by, among others, the Government of National Unity, the media, the churches and the legal profession.

In light of the essays in *Rethinking*, Devenish might well have added "the academy" to his list of South African fields which demand husbandry if a rights culture is to take root.

Ken Norman
College of Law
University of Saskatchewan

41 P. J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harv. Civil Rights-Civil Liberties Law Rev. 401 at 405. Manwaring, supra, note 34 at 380, makes a related point in his critique of Hutchinson's *Waiting for Coraf* asserting "this book does not address and grapple with the concrete experience of women, minorities, traditionally excluded groups or activists who work in the various movements for social change."

42 In "Strange Brew: Tocqueville, Rights and the Technology of Equality," Peacock speaks to the equality rights claims of the disenfranchised by adopting Tocqueville's dire warning in *Democracy in America*, that this sort of "equality" is the most formidable peril that the future holds for the democratic project.

43 See G. E. Devenish, "Human Rights in a Divided Society" in C. Gearty & Tomkins, *Understanding Human Rights* (London & New York: Mansell, 1996) c. 4 at 60.

44 *Ibid.* at 86.

EMERGING REPUBLICS AND COLLAPSING FEDERATIONS

A FEDERAL REPUBLIC: AUSTRALIA'S CONSTITUTIONAL SYSTEM OF GOVERNMENT

by Brian Galligan (Cambridge: Cambridge University Press, 1995)

Reviewed by John Goldring

Canada has recently experienced a significant constitutional crisis which could mean the end of its federal system — indeed, the end of its existence as a nation. This crisis is the end product of a history of regional and communal difference, leading to an exploitation of distance and difference by

demagogic politicians. Today it manifests itself in a communication failure of grand proportion, between regions and communities that are significantly different, united by geography and history rather than economy or culture. A form of federation is essential if the country is to survive.

Australia, the most comparable federation, had a real constitutional crisis twenty years ago, but has survived as a state which is unitary except in legal and constitutional respects. In recent years a "debate" about whether or not the nation should become a republic, rather than a monarchy, has been invented by politicians to divert attention from the real political issues — a declining economy, and an abandonment of national responsibility by politicians of all hues.

Brian Galligan has established himself as a political scientist with a sound understanding of the legal niceties of constitutional structures. His most recent work, *A Federal Republic: Australia's Constitutional System of Government*,[1] aims, he says, to change the ways Australians think about their Constitution. He certainly sets out to slaughter some sacred cows, but he has not convinced me to change the way I have thought about my Constitution for the twenty years I have been teaching about it. The book's cutting edge is honed by Galligan's broad knowledge of Australian (and Canadian — his Ph.D. is from the University of Toronto) politics, law, and history. However, for some years before Galligan took up his present position he did work in a centre for federalism, and the views he expresses now seem far stronger in favour of federalism than they did previously.

The result is provocative, but not convincing. It contains some excellent detail, woven into a fabric which becomes tangled in its attempt to establish a theory. That theory appears artificial and does not assist in explaining the difficulties of Australian federal politics and constitutional law.

Politics and constitutional law are two sides of the one coin, and neither is unaffected by personal values. I am a lawyer, rather than a political scientist, and have been a member of the Australian Labor Party (in this book cast largely in the role of villain) for over twenty years. I joined that party and still belong because I believe that "majoritarian democracy"— the recurrent boo-word in this book — with all its failings, is a better political system than anything else, certainly than anything Galligan argues for in this book.

My reading of history and politics is that federation is a structure of government adopted, not for any positive values or theoretical virtue (in my view it lacks either), but because it is the only acceptable compromise for each of the federating units. The main motivation for federating is not the establishment of checks and balances on power — that is an ex post facto justification — but rather because it ensures the preservation of institutions in which the "fathers" of federation had a vested interest, and to which they could return if federation did not yield for them the fruits they had hoped for. The delegates to the Constitutional conventions were, to a man — no women, of course — all prominent colonial politicians. The same was true of the fathers of American and Canadian federalism.

Today, the defenders of Australian federalism usually have a vested interest in the existing structures. They tend to be State politicians or public servants. Even businesses, which have good reason to favour federation because the States, being smaller, are more easily manipulated, now see the benefits of a national political structure to serve a national economy, rather than a series of small units, which tend to be more influenced by populism and may occasionally frustrate business on that score. Nevertheless, the conservative political groups, which tend

[1] (Cambridge: Cambridge University Press, 1995).

to be drawn from, sympathetic to, and subsidised by business/employers, are reluctant to appear too centralist: until things change they still need to wrest favours from State politicians and bureaucrats as well.

It is true that Australian voters on many occasions have rejected referendum proposals for constitutional changes which would increase the relative power of the Federal government, but they have rejected virtually every referendum proposal for constitutional change. Like the people of most Western democracies, they are cynical about government, and the century of Australian nationhood has been a century of relative prosperity for the majority of Australians.

The main contemporary justification for federation is totally pragmatic. Though a federal system is inefficient, costly, and frustrating for virtually all interest groups most of the time, it allows disparate and otherwise discordant groups to coexist.

A Federal Republic does present some new ways of looking at federalism, though the evidence presented does not support all Galligan's arguments. Galligan's thesis is that Australia is not a constitutional monarchy, but rather a federal republic in which the people are sovereign. With much of this — all but the 'federal' element — it is easy to agree. He is quite right to argue that, in practice and in legal terms, the monarch, in the person of the Queen of England or her successors, is quite irrelevant to Australian government. It is almost trite to point out that, since long before the Australia Acts of 1986 removed any legal doubts, any of the residual powers of the monarch in Australia would be exercised in the name of the Vice-regal representatives with, and normally in accordance with, the advice of the State or Commonwealth government involved. The same argument is now true of Canada.

Galligan is also on strong ground in arguing that in the Australian polity, at least at the Commonwealth level, the people are sovereign, since the people, electorally divided in a rather peculiar way, ultimately control the constitutional structure because of the requirement that they approve any changes by vote in a referendum. This argument is acceptable both to political and constitutional theorists, so long as "sovereignty" is not taken to refer to day-to-day exercises of political power. If a republic is a polity in which sovereignty resides in the people, then Australia clearly is a republic. The fact that the constitutional structure was approved by a majority of the voters (male voters — only in South Australia did women vote in the federation referendum) adds weight, as it always has, to the notion of popular political, if not necessarily legal, sovereignty in Australia. Galligan points out that in Canada, the founders did not want democracy, sought actively to exclude the people from the federation process, and succeeded in doing so until the 1980s, when the people solidly rejected the Charlottetown Accord which the political leaders had negotiated.

His argument is weakest in the insistence that the Australian republic is federal by design as well as by necessity. Galligan regards the fact that it is federal as having an almost supernatural or metaphysical influence on the nature of the polity.

Here the book's themes would have more application in Canada than to Australia. Australia is now a homogeneous, if multicultural, nation. More than seventy-five per cent of the population lives in cities and large towns. They speak the same language, watch the same television stations, movies and videos; they read newspapers controlled by the same media monopolies, shop in stores owned by the same national chains for products manufactured and processed by the same national producers. In virtually every area, markets are national or local, rather than State-based. Australians enjoy the same recreations: local brands of beer and ice-cream are things of the past. Except for football, where there is a sharp regional division between the North-East and the South-West, they enjoy the same sports and

recreation. Urban society is increasingly multicultural, and Aboriginal Australians, who are now recognised by law and by urban society, are an important, if numerically small, part. Their constitutional role, as yet, is less developed than that of their Canadian counterparts.

The divisions in Australia are between the city and the bush, between the rich and the poor, not regional, as they are in Canada. Galligan asserts several times that Australians identify with their States and look to State governments for the satisfaction of their political needs, but presents little evidence in support of these assertions.

In 1989, Bruce Hodgins and his colleagues asserted that in Australia, divisions traditionally have been based on class: in Canada they have been based on region.[2] That remains true, and is growing more so. Galligan notes Geoffrey Sawer's comment that federalism works best in a stable society of squares, rather than in a society with a volatile element. Galligan identifies Quebec, which is readily identifiable because of the obvious differences of language and culture, as the volatile element in Canada but the Maritimes and the Western provinces have their own volatility and distinct regional interests. Australia may not be as "square" as Canada, but there is no element corresponding to Quebec.

Many of Canada's constitutional difficulties flow from the exclusion of the people from the Constitution-making process. The 1982 arrangements for amendment of the Constitution, which appear to bring the people of the several provinces more directly into the Constitution-making process, are still a cause of resentment and bitterness in Quebec, because Québécois feel that the Constitution belongs only to English Canadians. A proportion of Anglophone Canadians distrusted the attempted compromises reached by the politicians at Meech Lake (which Québécois, generally, supported) and Charlottetown, and this continues to colour their attitudes. This makes federation more imperative.

Federation exists in Australia, and it works relatively well. Australians have made it work and, led by the High Court, have used it pragmatically. Although it appears on paper to be a far more decentralised federation than Canada, the expression of the respective legislative powers of the Commonwealth and State Governments as concurrent, rather than coordinate, has meant that there are no legislative gaps. If legislative action is necessary, it can be taken, though with difficulty. This is not always the case in Canada.

Canada was intended by its founders, especially Sir John A MacDonald, to be highly centralised: Australia was intended by its founders to be decentralised. Courts have played an essential role in this strange reversal and have been criticised for it. The Privy Council misinterpreted the Canadian Constitution, which included mutually exclusive lists of central and provincial powers, to ensure that legislative power was divided into watertight compartments — provinces could not encroach upon the rightful domain of the Centre, and vice versa. In Australia, there was an initial burst of enthusiasm and implication of constitutional myths as doctrine, by a majority of the first justices of the High Court, who had been active at the constitutional conventions. After twenty years, the High Court came to be constituted by lawyers steeped in the doctrines of equity and commercial law, accustomed to construing documents literally. Statutes and Constitutions were no different.

[2] B.W. Hodgins, J.S. Eddy, S.J., S.D. Grant, and J. Struthers, eds., *Federalism in Canada and Australia: Historical Perspectives, 1920-1988* (Peterborough: Frost Centre for Canadian Heritage and Development Studies, 1989).

In the *Engineers'* case,[3] Sir Isaac Isaacs, in the majority on this issue in the High Court for the first time, was able to fulfil the prophecies he had made at the constitutional conventions. As a delegate at the Constitutional conventions, he had unsuccessfully urged the delegates to draft the Constitution with precision because it would be interpreted by lawyers (a point Galligan expounds as well as has been done to date). As a judge, he acted precisely in the way that he had predicted a judge would act.

The consequence was an expansion of the scope of federal powers, at the expense of the States. This expansion was not without limits, but probably enabled Australia to survive without greater political disruption; central power has been essential to Australia's development and ability to cope with the pressures of modern social and economic pressures.

Canada is certainly a far more decentralised federation than Australia. Because of the strong regional differences, Canadian politics probably could not have survived the degree of centralization of power flowing from the Australian High Court's decisions, especially those agreeing to the centralization of income taxation, the broad and artificial construction of the term "excise" in section 90 in such a way as to preclude the States from imposing most taxes on commodities, and to the expansive scope of the conditions that may be attached by the Commonwealth to grants (transfer payments) to the States. The greatest obstacle to the effective working of the Australian system has been "vertical fiscal imbalance" — the fact that the Commonwealth raises the greatest proportion of revenue, but the States spend it.

Generally, however, the Australian States are content to act in the areas left to them, though they have recently become concerned with the use of the external affairs power to implement treaties. The Canadian provinces have always had far greater powers, but seem perennially less content. Nevertheless, the failure of Canadian polities to find a way of dealing appropriately with the growing internationalisation of affairs is a problem for Canada.

Galligan has contributed some highly original ideas on fiscal balance (increasingly critical since the High Court decision in *Ha* v. *NSW*),[4] where, as on the role of the Court, he is at his best. He is weakest in his interpretation of the intentions of the founders, the effect of the Australian Labor Party, and on the role of the Senate. This is also particularly important when comparing Australia with Canada.

The Australian Senate is chosen by the people, with the States and Territories as electorates, each State electing an equal number of senators by a proportional representation system, regardless of the relative populations of the States. Except in minor ways, the powers of the Senate and the House of Representatives are equal. This was the "bottom line" for the smaller colonies at the constitutional conventions. Without it, there would have been no federation. It is difficult to see how, in face of the evidence, Galligan argues that the Australian Senate should not be seen as a States' Chamber. Further, because it is not appointed, but elected by the people, it is "democratic." This, though literally true, seems to stretch the meaning of "democracy" unduly.

The Australian Labor Party (ALP) has traditionally been suspicious of the Australian Senate because of its anti-democratic (in the accepted sense, not Galligan's use of that expression) nature. It was intended as a body that would curb any excesses of power, favoured by the peoples of the more populous States, but resisted by the more conservative,

[3] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920), 28 C.L.R. 129.

[4] Unreported, 5 August 1997 (Aust. H.C.).

smaller States. Labor at first opposed federation, because it considered it a device to thwart the progressive legislation which the party had enacted after gaining government in some colonies. However, it soon found that federal legislation was a more potent tool for social change than the uneven State legislation, and its official policy soon reflected its desire to abolish the Senate. Only recently, as the Party has abandoned many of its former rather doctrinaire socialist policies, and become a far less politically radical organization, has its opposition to the Senate and the States diminished. Ironically, the Party itself has a federal structure, and from time to time produces charismatic State leaders and organizers who are more effective than their federal counterparts. Galligan capitalises on this irony. However, his portrayal of the ALP as a party which has distorted federal ideas is not supported by the evidence.

The Australian Senate is at least elected by the people. However, it rankles that Tasmania, with an population of about 350,000, elects twelve senators, as does New South Wales, with a population more than ten times as large. Galligan argues that, if we assume that representative democracy does not equate with majoritarian democracy, then the Senate should be seen as equally representative with the House of Representatives, though the electorate is divided differently. This appears to be twisting the meaning of words more even than economists are wont to do, and emulates Humpty Dumpty.

In Australia, the greatest travesties of democracy have resulted from an abandonment of equality of representation, such as the notorious occasion when the Country Party in Queensland was elected to office with only nineteen per cent of the popular vote — because some urban electorates contained up to five times the number of voters than rural electorates, in which the Country Party's strength lay. The late F.M. Daly M.P. was only half facetious when he described the electoral policy of the Country Party as "one sheep, one vote." Thus, to describe as "democratic" a senate with equal representation of the States in a nation like Australia, with a small number of States, each of which differs in population, is stretching the expression (true though it is that the Senators are chosen directly by the people of the States, as the Constitution requires).

The greatest problem of the Australian system has been the reconciliation of responsible government with federalism. Galligan acknowledges this, and makes some excellent points about the way in which the practical problems were resolved, though he resorts to a theoretical position which seems artificial and unreal when he suggests that this conflict was intended by the founders. If it is possible to divine the founders' intention, which seems unlikely, the best guess is that they were distrustful of democratic influences, especially the nascent Labor party, and deliberately constructed an unclear and confusing system to allow the lawyers an opportunity to frustrate democratic measures which might seem too radical.

The tension between representative government and federation was, until 1975, resolved through parliamentary convention, but in 1975 the lawyers triumphed, and most political scientists acknowledge this. The predominance of the lawyers was the cause of the crisis of 1975, when the Governor-General (a former Chief Justice of New South Wales) dismissed a government with a majority in the House of Representatives, because the Senate delayed its appropriation bills. In strictly legal terms, there was no doubt that this course was permissible, though it flew in the face of convention. It is therefore rather strange to find that Galligan asserts that Australian political scientists have largely ignored the Constitution. While I am not as familiar with the political science literature as Galligan, my impression is rather different. The Constitution and the federal system are central to much of the study of Australian politics, if not since the publication of

Geoffrey Sawer's seminal work on *Australian Federal Politics and Law*,[5] then at least since November 11, 1975.

Amendment of the Constitution has been a major difficulty in Canadian politics and law. As in Australia, for many years convention provided a pragmatic solution. In the early 1980s, Canadian Prime Minister Pierre Trudeau also departed from convention when he secured the amendment of the Canadian Constitution without the agreement of Quebec. That move lies at the heart of Canada's current difficulties. In both cases legal literalism has struck at the heart of the system.

In 1970, the differences between the Canadian provinces were deep, but not life-threatening. The assertion by demagogic Quebec politicians of a right to French language and culture has created a resistance in Anglophone Canada, exploited by equally demagogic politicians in the West and the Maritimes. Rather than reconciling differences between Canadians, the result of the rhetoric has been to drive the participants farther apart, so that the claims of the provinces for governmental powers grow, and drive the federation further apart. Perhaps the adherence by Canada to the NAFTA makes the whole question academic, because all of Canada may become, whether federated or divided, a mere appendage or series of appendages of the United States. But if Canada is to survive at all, the regional and cultural differences have been fanned by demagoguery into such an inferno that federation, and decentralised federation at that, seems the only way ahead. These differences do not exist, have never existed, and have no basis in Australia.

The Supreme Court of Canada has not had the same impact on politics as the High Court of Australia, though, until about 1940, the Privy Council probably had a greater influence on Canadian federalism than the High Court ever has had on the Australian counterpart. Galligan is at his best when dealing with the court and its influence.

Australia lacks an entrenched bill of rights corresponding to the *Canadian Charter of Rights and Freedoms*, but recent decisions of the High Court which "imply" certain rights from the text of the Constitution have been seen as an attempt to emulate a bill. Galligan asserts that these decisions are particularly important, and in this he is right, though their effect may not be as widespread as he claims. He seems to support the court's action, and this is consistent with his criticisms of the principle established in the *Engineers'* case, that the text of the Constitution is to be read as a legal document, free from any implications plucked by the judges from their knowledge of United States constitutional law when it suited them — as it did for the majority between 1904 and 1920. The late Justice Murphy, who criticised every attempt to keep the pre-*Engineers'* ghosts walking, did, quite inconsistently, attempt to make such implications. Until his death, he was alone. Ten years later his views, to some extent, have become those of the majority.

While there are dangers in majoritarian democracy, and although the High Court of Australia is surely the outstanding English-speaking judicial tribunal in the world during the current decade, democrats should have some concern about what a less enlightened judiciary might imply from the constitutional text into the body of constitutional law. One must ask, in the light of some recent Canadian decisions involving the *Charter*, if questions ought not also to be asked about the judicial technique of the Supreme Court of Canada.

The questions Galligan raises are good: the answers less satisfying. The interrelation of politics and constitutional law is important in both Canada and Australia, and while both

[5] 1901-1929, (Melbourne: Melbourne University Press, 1956); 1929-1949, (Melbourne: Melbourne University Press, 1963).

remain federal nations, these questions must be asked. My guess is that Canada as we know it will cease to exist as a federation, and that Australia will become a *de facto* unitary State before it formally becomes a republic. At the moment we have two federal constitutional monarchies, and we need to think seriously about how they operate. Galligan has provided some useful factual material and raised some interesting issues, even if some of his less plausible arguments fall flat, and he fails to achieve his objective of changing the way we think about the Constitution.

John Goldring
Commissioner, Law Reform
Commission of New South Wales
Professor of Law
University of Wollongong