



Where Should the Majority Rule?
Reflections on Non-Territorial
Provinces and Other
Constitutional Proposals

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WHERE SHOULD THE MAJORITY RULE? REFLECTIONS ON NON-TERRITORIAL PROVINCES AND OTHER CONSTITUTIONAL PROPOSALS

David J. Elkins*

Throughout much of Canada's history, we have tended to view provincial boundaries as a salve for social conflict. Yet, certain minority social groups continue to feel threatened by, and vulnerable to, the strength of territorial majorities. David Elkins proposes that we think creatively about provinces. He advances an argument in favour of provincial status for two large non-territorial minority social communities: aboriginal peoples and francophones outside of Québec. These two non-territorial provinces, First Peoples and La Francophonie, could work in tandem with existing provinces, taking on responsibilities suited to promote their non-territorial interests. Other powers could be shared with, or continued to be delivered by, existing provinces.

Non-territorial provinces should be seen as flexible instruments designed primarily to make these traditionally threatened communities feel they have their own unthreatening space within federalism. Non-territorial provinces could serve as an enduring reminder to all Canadians of these collective aspects of ourselves.

Tout au long de l'histoire du Canada, nous avons eu en grande partie tendance à considérer les limites provinciales comme un remède aux conflits sociaux. Pourtant, certaines minorités sociales continuent à se sentir vulnérables et à vivre la force des majorités territoriales comme une menace. David Elkins nous invite à penser aux provinces de façon créative. Il propose d'accorder un statut provincial à deux grandes collectivités minoritaires non territoriales: les autochtones et les francophones hors Québec. Ces deux provinces non territoriales — les Premiers Peuples* et la Francophonie — pourraient travailler de concert avec les provinces existantes et assumer les responsabilités qui reflètent leurs intérêts non territoriaux. Dans d'autres secteurs, le pouvoir pourrait être partagé ou continuer à s'exercer comme par le passé.

Ces provinces non territoriales devraient être perçues comme des instruments flexibles, conçues essentiellement pour ménager un espace rassurant au sein du fédéralisme à ces communautés traditionnellement menacées. Elles serviraient à rappeler les divers aspects collectifs de notre pays à tous les Canadiens.

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WHERE SHOULD THE MAJORITY RULE? REFLECTIONS ON NON-TERRITORIAL PROVINCES AND OTHER CONSTITUTIONAL PROPOSALS

David J. Elkins

Common to many of the federal government's 28 proposals for constitutional change are at least two implicit assumptions.¹ First, activity in regard to institutional changes will usually be undertaken by governments, not by individuals, groups, or other organizations. Second, whenever government action is a requirement, affected groups which do not have control of a provincial government will receive less attention or be less able to block actions by a national majority.

If one does not have provincial status, as aboriginals do not, or if one does have it but believes that current provincial powers are inappropriate, as Québec does, then one feels threatened by majoritarian institutional arrangements. Thus, the federal proposals can be evaluated from the perspective of who deserves their own province and what powers these provinces need. Of course, some of the federal government's proposals — such as the Canada clause, Senate advice on appointments to boards and agencies, and more free votes in the House of Commons, among others — do not concern provinces or require provincial government action. But the most contentious issues do seem to involve these aspects. And, most of the recommendations of the Allaire Report by the Québec Liberal Party explicitly focus on provincial jurisdictions and governmental institutions.²

¹ Government of Canada, *Shaping Canada's Future Together: Proposals* (1991).

² Rapport du Comité constitutionnel du Parti libéral du Québec, *Un Québec libre de ses choix* (28 janvier 1991).

Thus, I propose to consider two hypothetical new provinces of a non-territorial sort as an avenue towards uncovering some implications of proposed constitutional changes. These two provinces are also interesting in their own right, I believe, because they would answer many of the needs of two minority groups whose ways of life are most threatened in Canada — aboriginals and French-speakers outside of Québec.

LIBERTY AGAINST GOVERNMENT AND LIBERTY THROUGH GOVERNMENT

Observe that some groups can be protected sufficiently by the Charter of Rights and Freedoms or by Human Rights Codes. One thinks here of religious freedoms, and of rights against discrimination for groups like the disabled, women, gays and lesbians, and the elderly. One can debate whether our present provisions are adequate, but the broader point is that these types of groups or individuals may be satisfied with non-discrimination and affirmative action guarantees.

Other minorities — especially those encompassing a "way of life" — may require active government assistance or, indeed, even control of their own government. Québécois certainly believe this, whether the government in question is that of a province or a nation. Indeed, the origins of Confederation lie, in part, with the belief that provincial legislatures would reflect local majorities (Catholic or Protestant, French or English) whereas matters of common concern to all groups would be dealt with in Ottawa. In recent years, aboriginals too have come increasingly to the conclusion that their needs can be met only by some form of self-government. I will deal with both of these concerns. Of course, such minorities do not eschew rights and freedoms, but they feel these protections are not sufficient even if they are necessary.

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This faith in government has a long and honourable history in Canada. Herschel Hardin characterizes it as the "public enterprise" culture.³ Frank Scott expounded a related perspective.⁴ He showed how "liberty against government" had been, historically, the great battleground of the American and French Revolutions. He believed, however, that such liberty was sometimes not enough, and that Canadians in particular had come to see that "liberty through government" had some positive attractions.

Although Scott's distinction between the two types of liberty is important, both types signify a lack of trust. In one case, you do not trust government and wish to entrench protections against government actions. In the other case, you trust one government and wish to strengthen its hand against another government which represents a larger majority within which you are less powerful. The kinds of entrenched provisions differ, therefore, between the two types of liberties; and the current constitutional debate revolves, I argue, more around how to use government to protect one's way of life, although some aspects of the Charter are also implicated. As Christian Dufour has stated the issue: "In North America, where law has replaced war, constitutional rules represent the ultimate power."⁵

³ Herschel Hardin, *A Nation Unaware: The Canadian Economic Culture* (Vancouver: J.J. Douglas, 1974).

⁴ Frank R. Scott, "Expanding Concepts of Human Rights," in his *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) especially pp. 357-58.

⁵ Christian Dufour, *The Canadian Challenge/Le Défi Québécois* (Halifax, N.S. and Lantzville, B.C.: The Institute for Research on Public Policy and Oolichan Books, 1990).

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I have explained elsewhere that the Charter itself contains some aspects of "liberty through government."⁶ These include, most conspicuously, the notwithstanding clause (section 33) and the provision in section 1 that various rights and freedoms may be balanced or limited where benefits can be shown to be "demonstrably justified in a free and democratic society." These provisions — like the two types of liberty themselves — can and do come in conflict with other rights and cause much debate. They also make plain that even rights and freedoms are to some degree at the mercy of "liberty through government." Thus, it is all the more necessary that minority groups who feel threatened by broader majorities have access to governments sympathetic to their interests and point of view.⁷ How this might work in regard to two significant minorities will be the focus of this essay.

NON-TERRITORIAL MINORITIES

All large minorities are non-territorial. The exceptions (such

⁶ David J. Elkins, "Facing Our Destiny: Rights and Canadian Distinctiveness" *Canadian Journal of Political Science*, 22 (Dec. 1989) 699-716.

⁷ One of the major advantages of provincial status is the ability to invoke the "notwithstanding clause" to shelter some aspects of a distinct society, even if that is distasteful to other groups. It is ironic that Quebec as a province can invoke the notwithstanding clause although it does not have the official status of a "distinct society"; ironic because aboriginals lack provincial status, even though they have the protection of section 25, which states in part: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ..."

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as some Hutterite communities in the Prairies) are so few or small that they fail to qualify this generalization to any serious degree. By non-territorial, I mean that the minority cannot be given its own exclusive territory without movement of people on a scale we would regard as dictatorial and insensitive. Non-territoriality comes in at least two forms in the case of cultural minorities: some members of the minority do not reside in the territory and so do not benefit from being part of the majority there, and some members of other culture-groups do reside in the territory and are thus "permanent" minorities there. The former problem questions the assumption of contiguity, while the latter problem challenges the assumption of continuity of territory. As we shall see, some non-territorial arrangements may also challenge our assumption that provinces should have exclusive control of a territory and its residents.

NON-TERRITORIAL PROVINCES?

Rather than continue at an abstract level, we can make the discussion more concrete and perhaps more provocative by examining two kinds of non-territorial provinces. The first type would consist of francophones where they live outside of Québec, and the second would consist of aboriginals across the country south of 60°. (Parenthetically, I should note that an Inuit or Dene province in the Territories, such as Nunavut, would probably be a territorial one not unlike the existing provinces. That is why I focus on aboriginals other than Inuit or Dene, and on territory within existing provinces.)

For certain purposes, both types of non-territorial provinces are quite similar since both violate one or more of the territorial assumptions of exclusivity, contiguity, or continuity. It is worth discussing them separately, however, because they violate different assumptions, pose different kinds of challenges to our

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thinking about federalism, and may require different forms of administration.

The francophone province which I hypothesize might be called "La Francophonie" to distinguish it from Québec.⁸ It would consist of all francophones outside of Québec wherever they might reside in Canada. How we identify francophones is a separate issue that can be set aside for now. Any consistent criteria will yield the same general result: almost all francophones outside of Québec will turn out to live in Ontario and New Brunswick, with scattered pockets elsewhere. I assume that, whatever the criteria for being a francophone, one is free to reside in La Francophonie or not, as is the case with existing provinces.

La Francophonie would need very special powers, not exactly like those of a territorially-based province. Hence, one value of speculating about this province derives from the need to shift our focus from an exclusive concern with federal and provincial jurisdictions. Instead — or in addition — we must consider which powers can only be administered by territorial governments or agencies and which services could be delivered by institutions without a territorial base. Without going into detail, consider a few examples. Education is not inherently territorial, although we tend to think first of neighbourhood schools. Yet one must recall that territorial provinces have parallel school systems, whether private and public, or Catholic and non-sectarian. Thus, the two systems violate the assumption of exclusive use of territory. Furthermore, many school children do not physically attend school together but are

⁸ The name is not important, and some will object to La Francophonie because it is the name of an international organization of French-language countries. But we need a shorthand way of referring to these new provinces.

taught by correspondence combined with various telecommunications media (telephone, fax, radio, TV). At the post-secondary level, non-residential and thus non-territorial colleges and universities are more and more common, or at least a higher and higher proportion of students are not local residents or never even visit the campus. Some universities (such as Athabasca University) specialize in "distance education" and in fact have relatively few residential students.

Taxes can be classified as direct or indirect and also as territorial or not. For example, retail sales taxes are probably inherently territorial; that is, everyone in that area will be charged the same tax. Fairness as well as practicality may require that each customer in a store be charged the same tax, rather than a tax rate determined by their province of residence. Of course, where purchase involves mail or electronic shopping, the tax rate may be set as it is now by province of residence. Thus, as the electronic revolution progresses, we may want to reconsider whether VAT, GST, and retail sales-type taxes need be linked to sales territory. Income taxes, on the hand, are not territorial, or at least not to the same degree. One can have, as we do now, different tax rates or exemptions or credits for categories of people defined in non-territorial ways, such as elderly, retired, students, the disabled, or type of family structure.

If education can be delivered by a non-territorial province, as I believe it can, then the concern at present with services "where numbers warrant" becomes superfluous. Instead the question is what kind of education should be provided for which kinds of people wherever they reside. When provided from one or more central offices, the numbers will always "warrant" the provision of services. Furthermore, there may be economies of scale because one does not need to replicate certain facilities or administrative structures in small local enclaves.

One can expect that La Francophonie will find itself behaving in some ways more like a national government than a provincial one. Such a province will face the same degree of regional diversity that the federal government in Ottawa currently confronts. Regional disparities and regional perspectives become critical in governing and managing such a province even though it is not regional (territorial) itself. One of those details — hours of operation of polling stations in an election — might result in pressure on the federal government to consider uniform hours in its elections.

Distances and regionally specific situations might lead this new province to constitute itself as a federal system. For example, Acadia might conveniently be one unit, the Ottawa Valley and the concentration of francophones in eastern Ontario might form another, and the west (including northern Ontario?) could become a third unit. Of course, La Francophonie would have only one Premier, even though it consisted of several self-governing units.⁹

The second type of non-territorial province could be called First Peoples.¹⁰ Its basis would probably not be individual, as

⁹ To make La Francophonie more politically palatable to some groups, one might hypothesize a third province, "Anglophonia", which would consist of the English-speaking communities of Quebec. It is not my purpose to oppose or to advocate such a province, since it would add nothing to the speculations about territoriality and fear of the majority which motivated this essay. I wish, however, to thank Stefan Dupré for urging that I consider such a province.

¹⁰ Again there may be objections to the name, others preferring First Nations. Aside from the contentiousness of that name, there are concerns about whether Canada can "contain" many nations. In any event, I have chosen a name for ease of reference as well as for its other qualities.

with La Francophonie, but more likely land based without assuming exclusivity, contiguity and continuity. If the base were existing reserves or if it were the results of current comprehensive land claims, the result would be similar in type, although different in area. Neither basis assumes a single contiguous territory. There are currently more than 2000 reserves among over 60⁰ bands, grouped historically into 40-50 nations. Nor would First Peoples necessarily be continuous since there might well be enclaves of non-aboriginal settlement within at least some of the larger parts of this province. And, certainly reserves today form "islands" within each province.

Although the reserves are exclusively for aboriginals at the present time, they probably should not be so restricted after the creation of First Peoples.¹¹ Furthermore, land claims settlements may result in shared, non-exclusive use of territory, just as the Cree and Inuit of northern Québec have fishing, hunting, and trapping rights outside their reserves in areas where Québec has areas of jurisdiction.

Like Canada and like La Francophonie, First Peoples would be very diverse in language, cultures, economic situations, and affluence. It would therefore have a government which felt the pressures of national diversity currently felt by Ottawa. Indeed, First Peoples might be organized as a federation of aboriginal nations with quite varied local structures of governance.

Unlike La Francophone, its powers might be defined differently because of the peculiar combination of territorial and

¹¹ Quite apart from the reasons of mobility, the new province should not be exclusively restricted because of the difficulties of deciding who is an aboriginal. Section 35(2) of the Charter clearly defines aboriginal as including Inuit, Indians, and Métis, but the problem is who are Indians and, especially, who are Métis?

non-territorial aspects. For example, as far as taxes were concerned, property taxes as a base for education would be feasible, and income taxes could be highly varied, as they are in Canada, because of varied personal circumstances. Education would be mostly territorially based, because it would reflect language needs which happen generally to be bounded territorially. Haida would be the language of instruction in the Queen Charlotte Islands, Cree in some other places, and so on. How education was delivered might thus be extremely different from the agencies in La Francophonie. That flexibility seems to me one of the most attractive features of having different kinds of provinces.

Since some reserves are relatively affluent and others very poor, equalization within First People would be arranged as they saw fit. Existing provinces shift resources (or not) among their regions and municipalities, just as the federal government transfers resources among provinces.

It should be admitted that the small size of many reserves and bands would very likely mean that some services might be shared with existing provinces in which they are now embedded. These services might include police, fire, and water; perhaps garbage collection and disposal; and for the smaller units, specialized health care facilities. I am assuming that primary health care and most family welfare services would be entirely in the control of the province of First Peoples or its local governmental arms.

We should not, however, get hung up here on the exact details of which services would be provided by whom. The broad point is that some services would undoubtedly need to be shared — for reasons of cost or efficiency — between First Peoples and existing provinces. Such concurrent powers — or perhaps more precisely jointly administrated jurisdictions — will be mentioned below in another perspective.

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I have suggested that we often use territorial organizations to deal with social problems. Would creation of First Peoples as a province for aboriginals constitute a step forward socially or would it be a form of apartheid? For one thing, I have postulated that La Francophonie and First Peoples would allow the same voluntary mobility we now presume for existing territorial provinces. Each person can choose where to live, whether in a territorial province or in a non-territorial association. My guess is that most aboriginals now living on reserves would remain and many who now live in towns and cities would return to the reserves. But not all of them.¹² I also imagine that some non-aboriginals might prefer to live in First Peoples. To complete the circle, let me add that migration in and out would undoubtedly also occur, as it does in most existing provinces. Such openness and mobility in Québec has not so far resulted in an entirely French province, and not all francophones want to live in Québec, which is why I have hypothesized La Francophonie. Why would we expect a significantly different equilibrium for First Peoples? If a similar pattern arose, we need not fear that First Peoples would become an emblem of apartheid.

If wholly homogeneous provinces are not desirable and are unlikely to occur anyway, need we be concerned about a province which is predominantly aboriginal, or for that matter predominantly French? The short answer is "no". We do not

¹² One of the difficult practical questions which cannot be addressed in an essay of this type concerns urban aboriginals. Should they be thought of as residents of First Peoples even if they choose to live off-reserve in urban areas? Since Métis have no reserves (except in Alberta), should one set aside Crown lands for them, even if they live in urban areas? I do not neglect these issues because they are not important but precisely because they are too important for a brief and off-hand exposition.

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worry about the evil effects of overwhelmingly English provinces, so why worry about these other forms of distinctiveness? Perhaps we should worry about how English some provinces are, but until we do, we need not worry how aboriginal First Peoples might be. The longer answer brings us back to the central focus of my speculations. The purpose of speculating about — or advocating — non-territorial provinces for aboriginals or francophones concerns the perceived need to give threatened minorities their own place to be a majority, to have a government that speaks on their behalf, and thereby to remind all Canadians of these aspects of ourselves.

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There would be real obstacles to creating First Peoples and La Francophonie. For example, would aboriginals want to be united in one unit? Would municipal and regional and tribal forms of government within their province adequately reflect the cultural diversity they experience? Would aboriginals (who now pay no taxes on reserves) be willing to collect taxes in exchange for control of their portion of them? Likewise, would francophones in B.C. or Newfoundland welcome a non-territorial province in which they would be just as much of a numerical minority as they are now in their territorial homes? Would Québécois want to share responsibility for the francophone diaspora?

Many people will worry about the cost of new provinces and how these costs could be financed without undue burdens. For one thing, all of the individuals who might live in La Francophonie or First Peoples receive benefits at the present time which are paid for out of tax dollars. They do so as residents of existing provinces or as wards of the Department of Indian Affairs. Thus, basic services like education and health care need not entail new expenditures, although since

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up-grading of services would be one justification for the creation of these provinces, some additional expenses might be incurred. Second, the budget of Indian Affairs could be turned over almost entirely to First Peoples since the federal government would no longer have responsibility for "Indians, and land reserved for the Indians" (subsection 91(24) of the *Constitution Act, 1867*). That budget currently exceeds \$5 billion.¹³ Third, if I am correct that these new arrangements may result in reduction of social tensions, a more effective political environment, and enhanced well-being, then one should see productivity gains which would help generate additional national wealth. These gains would flow from better education and fewer social pathologies among the two groups affected, especially aboriginals who are currently the least well-off of any large group in Canada.

A different kind of objection should also be acknowledged. Why should provinces be created just for these two groups? Why not for other large minorities who may wish to preserve or promote a distinctive way of life? Indeed, if there were a national debate, perhaps we would conclude that many additional provinces were desirable.

For myself, aboriginals and francophones are the groups which deserve special consideration for a related reason. For aboriginals and the French, Canada was, in different ways, imposed on them: by conquest in one case, by deceit and spread of settlement in the other. All other groups have come to Canada "after the fact" as it were, instead of having Canada imposed upon them.

¹³ Since I have postulated that Inuit would not be part of First Peoples, some fraction of the budget of Indian Affairs would be set aside for them, at least until Nunavut becomes a province.

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In passing, I should note that concerns about a Triple-E Senate are not based on the same kinds of arguments as for aboriginal or francophone rights or provinces. For one thing, pressure for it comes mainly from groups (like Westerners) who control several provinces and are thus represented. Thus, I am less concerned about western demands for disproportionate representation in a reformed Senate. Furthermore, if partisanship is as strong in it as in the present Senate, it would do nothing to further the interests of peripheral regions. There may be reasonable grounds for a Triple-E Senate, but they are different from those which justify these two new provinces.

Without wishing to minimize or neglect those challenges, I do want to assert that some type of non-territorial provinces along these lines would have many benefits relevant to current constitutional proposals.

Some benefits are obvious:

- these provinces could participate directly in an elected Senate,
- and in the proposed Council of the Federation if it is established,
- they could take advantage of proposed opportunities for provincial participation in broadcasting,
- First Peoples would solve in a stroke the general issue of aboriginal self-government and especially of letting aboriginals themselves work out the details of those arrangements in their own areas of sovereign provincial responsibility, and
- First Peoples and La Francophonie would also provide exact parallels to other provinces as an avenue to

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participate in future constitutional deliberations, an important demand by aboriginals in particular.

Some of the potential benefits are not so obvious, and some may not even depend on the actual creation of these provinces. As I have already stated, they are hypotheses which may give us some new perspectives on the current proposals and help us to be more exact about what the problem is so that we do not invent solutions to the wrong problem. Consider the issue of compromise between majorities and minorities.

Alternate versions of La Francophonie have been mentioned. In any of them, existing provinces outside of Québec would have fewer or no responsibilities for francophones. No doubt many provincial politicians and residents would welcome that possibility. Likewise, an aboriginal province would relieve existing provinces (and the federal government) of their responsibility for these groups who live amongst them. Again, one could expect that many people would prefer that outcome. But would this make it too easy for the majority populations in most provinces to ignore these groups and what they have meant to Canadian history and development? Perhaps we all need to be reminded that our distinctiveness as Canadians and as a very visible country on the world stage depends in good part on the preservation of French-language communities and on the treatment of aboriginal groups and cultures. Would these provinces solve the problem of aboriginal or francophone fear of the majority culture by making it too easy to forget that there will always be minorities somewhere?

Let me offer a few reasons why this concern should be kept to a minimum. For one, these provinces would be able to remind us all of these groups, issues, and problems. After all, they would have Premiers at the table whenever First Ministers meet or whenever constitutional changes are raised. They

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would elect Members of Parliament and Senators. Second, these would be substantial provinces. Depending on voluntary membership, we cannot be certain of the number of residents in each; but there are well over a million aboriginals as potential residents of First Peoples and almost a million francophones outside of Québec. Currently, only Ontario, Québec, B.C., and Alberta have populations over one million, so these could be provinces average or above average in size. They would command attention from the media and from other governments. Third, self-government is a good, a value that we cherish as Canadians. That is why we sought it for Canada in the nineteenth century and why we welcomed the Statute of Westminster over 60 years ago. This is not the time to say it is good for Canada or Québec or the West, but not for aboriginals or francophones.

A fourth consideration concerns distinctiveness of the provinces. La Francophonie would probably exercise fewer jurisdictions than some provinces because its focus would be on language and culture. First Peoples likely would share territorial use with existing provinces — as aboriginal peoples do now — because of hunting, fishing, and trapping rights founded on land claims settlements and court decisions. Because Québec would no longer be the only predominantly French province, it could exercise in a more focused way its regional, territorial responsibilities, whereas at present those responsibilities are ensnared and confused with its linguistic and cultural defense of French in a sea of English.¹⁴

¹⁴ Dufour, *supra*, note 5 at 138-39. One should also note that Quebec and La Francophonie would each have an ally in the other regarding the preservation and promotion of French. In First Minister's conferences and in constitutional amendments, as well as in the Senate and elsewhere, they would amount to two out of twelve, whereas Quebec is now one out of ten. Indeed, in defending distinctive ways of

All of these and other examples should make it easier for us to understand why it is not absolutely necessary for all provinces to have exactly the same powers. Even if we chose to give all of them the same list of jurisdictions, we would no doubt find differential use of those heads of power.

Both First Peoples and La Francophonie would feel pressures to consider regional and other diversities within their own province. These sensitivities might make such provinces less parochial than existing provinces. If so, that should contribute to a greater sensitivity to federal government constraints in responding to any one province or point of view. It could also create flexibility in building coalitions of provinces, thus making these provinces feel less isolated, less like minorities nationally.

These hypothesized provinces, therefore, help to highlight features now lacking in our institutions. Besides giving some groups their own province where they are a local majority, one is also reminded to seek ways to include local minorities in wider winning coalitions.

Finally, consider the advantages of shared jurisdictions, concurrent responsibilities, and joint administration. Agriculture and immigration have been concurrent federal and provincial jurisdictions for a considerable period. They work well. The Canada Health Plan, while hardly perfect, has provided on a cooperative basis a very high level of service to most

life, there would be grounds for anticipating that Quebec, La Francophonie, First Peoples, and Nunavut (if it were changed from a Territory to a province) would often be allied, thereby amounting to almost a third of the actors at important stages in political controversies.

Canadians even though the federal government's participation is not defined in the constitution. The Allaire Commission, on behalf of the Québec Liberal Party, recommended in 1991 that many powers now held exclusively by either the federal or provincial governments become concurrent ones (albeit with provincial paramountcy). Likewise, almost all jurisdictions in the Australian federal system are held jointly by the state and Commonwealth governments. In other words, there are good reasons to believe that working together can be accomplished and that joint jurisdiction need not cause any more, and perhaps less, conflict than exclusive jurisdictions.

Neither La Francophonie nor First Peoples would have exactly the same powers as existing provinces, as I have remarked above. Furthermore, the existing provinces would have some jurisdictions reduced or removed, as they were shifted to these new provinces, and there might be joint provision of health and other services. Thus, many people in Canada might find that they derived important services and benefits from two provinces — one territorial and one non-territorial — just as they would also derive other benefits and services from the federal government. This could serve to reduce the "we-they" quality of federal-provincial and inter-provincial relations. It would also stimulate thinking about cooperative endeavours and about administrative arrangements which avoid duplication of services, such as inter-delegation of powers and revenue sharing. Thus, I predict that these non-territorial units might constitute institutions which foster cooperation and complementarity rather than confrontation, exclusion, or isolation. That alone would make them worthy of consideration. But even if they nudged us and our leaders in that direction, there would still be some residual fear of the majority.

The underlying fear of the majority reveals a lack of trust. Why should a minority with a coherent way of life trust the

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majority to respect and tolerate the minority? This is one of the great unresolved questions of political theory and of political practice. How much of one's autonomy should one be expected to give up in order to be accepted in this political community?

Through a long and circuitous route, many Canadians have come to trust only those protections entrenched in the constitution, whether they constitute liberty from government or liberty through government. We need not dwell on the reasons, but we might remind ourselves that that is not necessarily a bad thing. If entrenchment as provinces did in fact lead these groups to feel more secure and to be more secure, that would be a major achievement.

TERRITORY AND SOCIAL BOUNDARIES

For at least 150 years, Canada has wrestled with the political implications of overlapping social distributions across its territory. Upper Canada was almost totally Protestant and English, but Lower Canada was a mixture of English and French, Protestant and Catholic. After Lord Durham's famous report to the British government, Upper and Lower Canada were joined in one United Province of Canada. By bringing together the English of both areas, it was felt that the assimilation of the French was only a matter of time because of the rapidly expanding English population of Upper Canada. And, in fact, by 1851 the majority of the population of the Canadas was for the first time English instead of French.

Assimilation, however, did not occur and "dual ministries" in the legislature worked only under special circumstances. Hence, throughout the 1850s, Canada proposed various federal schemes — on its own or with the other colonies of British North America — as a solution to its own inner dilemma.

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The achievement of this "wider union" in 1867 was heralded as satisfying several goals — military defence, debt management, railroad construction, but perhaps most of all the alleviation of territorial fights between Protestant and Catholic, English and French. The Fathers of Confederation believed that tensions could be managed or eliminated by allowing provincial legislatures and governments to administer matters of local concern. That is, ethnic, religious, and linguistic conflict could be quelled by territorial division of protagonists.

People move, however, and political boundaries have failed to separate English and French. Yet assimilation of one by the other could not be accomplished either. And so began the peculiar puzzle that has been central to Canadian history: we have been tempted to solve by geographic or territorial boundaries a conflict between social groups. At no point has it been possible to draw provincial or even most municipal boundaries so that Protestant and Catholic, English and French had exclusive control of their own territory. Yet the "fit" between social and political boundaries was frequently close enough to tempt Canadians to try to deal with one set of boundaries as a surrogate for the other. By enshrining provinces as territorial units with powers appropriate to the protection of local social customs and ways of life, we ensured that a non-territorial problem (ethnic conflict, as we would say today) was handled by territorial governments.

One solution to this conundrum has never been tried: to relocate populations of French and English so that social and political boundaries coincide. Forceful removal of thousands — or today, millions — of citizens is unthinkable in light of our liberal traditions and democratic rights. Of course, many English-speaking Canadians have chosen to leave Québec because they viewed its redefined role as champion of French-speaking Québécois rather than of all Québécois, and some French-speakers have migrated to Québec from

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elsewhere in Canada. But we cannot assume that all of these problems could be solved by voluntary migration. And that would still leave untouched aboriginal self-government.

At the present, we face again the need to think creatively about our institutions and about protection of rights and ways of life. Since the creative use of territory has not provided a permanent solution to our social problems, perhaps the next step in our political evolution should be to question our single-minded reliance on territorial governments and institutions. To do this, I have proposed two hypothetical provinces which are non-territorial in somewhat different ways. Whether or not these are practical possibilities, they should help us to gain some leverage on institutional changes put forward in the constitutional debate.

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