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Professor Massey discusses the theoretical benefits of decentralized federalism and proposes constitutional changes to obtain those benefits and to respond to the disparate aspirations of the Canadian polity. He proposes that the provinces and federal government share concurrent authority over most powers, with provincial legislation paramount in cases of conflict. He suggests an empowered Senate, partially selected by the provinces and partially appointed by the federal government, aboriginal self-government, and territorial Senate representation. Finally, Massey proposes altering the constitutional amending formula to enhance public participation and facilitate amendment where unanimity is not critical.

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I. INTRODUCTION

Nations are not, like caribou, beavers or eagles, natural phenomena; nations are social and political inventions, the products of particular historical and cultural circumstances. The invention of the Canadian nation is an unfinished work, so it should come as no surprise to remark that the constitution, which "[i]n its largest sense ... makes fundamental and authoritative statements about who Canadians are as a people,"1 is equally unfinished. The direction of its development after the demise of the Meech Lake Accord will have a profound and lasting impact on the national identity of Canada. It is critically important that visions of the constitutional future be fully explored.

This article attempts to sketch out such a vision. That is a tall order for anyone and a bit presumptuous of a single person to take on the task without invitation. It is even cheekier for an American to do so, since part of the Canadian national identity is

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1 A. Cairns, "Ritual, Taboo, and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style" (1990) 54 Sask. L. Rev. 121 at 122.
bound up in being something other than an American. There are, however, some advantages to the outsider's perspective, since the outsider is spared much of the personal agony of the current turmoil produced by the deep linguistic and cultural divisions within Canada.²

Meech Lake began as the "Quebec Round" of constitutional negotiation, with a single ambition of reconciling Quebec to the Constitution Act, 1982.³ But through the process of executive federalism taken to an extreme, the Premiers could not resist turning the negotiations into the "Provincial Round." Flushed with the desire to reach agreement, the Prime Minister failed to stem those divergent parochial interests. In the event, these decisions may have been major mistakes, but I have no wish to dissect the corpse of Meech Lake. Rather, the point of the observation is that post-Meech Lake constitutional solutions that successfully respond to Quebec must also respond to the regional and cultural aspirations which turned Meech Lake from the Quebec round to the provincial round.

Constitutional developments in the aftermath of the death of Meech Lake have moved at a steady, if not breathtaking, pace. The Allaire Report and the recommendations of the Belanger-Campeau Commission make plain that Quebec demands a substantial renegotiation of the Constitution, devolving enormous power upon Quebec as the price for remaining within confederation.⁴ Prime Minister Mulroney's reaction to these demands admits the necessity of constitutional modification devolving additional authority upon

² I confess I am not entirely an outsider and so cannot claim complete dispassion. I spend as much of each year as possible living in a bucolic part of British Columbia. As a result, my five year old daughter thinks the 4th of July is called "America Day," but finds it a pallid imitation of the real item: Canada Day. She is unaware of the existence of Fête du St. Jean Baptiste, and B.C. Day is just the August weekend all the tourists arrive. Perhaps this is symbolic of the evolving national identity of Canada, but it is more likely symbolic of my mixed status as both outsider and quasi-Western Canadian.


all provinces, yet contends that the amount of such devolution, necessary or desirable, is considerably less than that demanded by Quebec.\(^5\) Public opinion polls suggest that unprecedented numbers of Quebecers support some form of increased Quebec autonomy.\(^6\) It does not seem to overstate the case to contend that Canada faces a constitutional Hobson's choice: devolution or disunion. In this article, I hope to accomplish two objectives: provide a theoretical justification for a decentralized federal union and make a set of concrete proposals concerning constitutional change which compromise the desires of ardent centralists, Quebec, Western Canada and other regional interests, and indigenous peoples. There is, of course, little reason to think that my proposal will prove any more appealing or efficacious than any of the competing suggestions. Nevertheless, I offer it in the modest hope that the greater the number of proposals which seek to preserve confederation, the more likely that some formula can be found which will in fact do so. I do not conceal my bias; I do not wish to see Quebec and Canada living in separate houses. Of course, should all efforts fail and Quebec depart confederation, an entirely different set of constitutional problems will emerge. I make little sustained effort in this article to deal with those speculative matters, but proceed on the assumption that it is desirable to forge a lasting union of Canada and Quebec.

At risk of oversimplification, it might be claimed that the Canadian Constitution incorporates three basic principles: parliamentary government, federalism, and, since 1982, a judicially

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\(^6\) See C. Wood, "A Nation on the Brink" Maclean's (7 January 1991) 18. According to a Maclean's/Decima public opinion poll, 78 per cent of Quebecers preferred one of the following options: political and economic independence for all provinces (11 per cent), political independence for all provinces within a customs union (27 per cent), special powers for Quebec alone within confederation (22 per cent), and enhanced powers for all provinces within confederation (18 per cent). By contrast, while 67 per cent of Canadians outside Quebec preferred one of these options, the breakdown within the options was quite different: political and economic independence for all provinces (5 per cent), political independence for all provinces within a customs union (14 per cent), special powers for Quebec alone within confederation (3 per cent), and enhanced powers for all provinces within confederation (41 per cent). Compare D. Kilgour, Inside Outer Canada (Edmonton: Lone Pine Publishing, 1990) at 198.
enforceable and legally paramount *Charter of Rights and Freedoms*. Each of these constitutional jewels has a number of facets. Parliamentary government is characterized by pronounced party discipline (much stronger than in the non-parliamentary American system), supremacy of the legislative judgment, and a fusion of executive and legislative powers. The advent of the *Charter* has stimulated consciousness of individual rights, augmented the role of judicial review, and, by transferring from the legislature to the judiciary issues concerning the appropriate balance between individual and communal welfare, contributed to the politicization of legal culture in Canada. Canadian federalism is a complex and highly organic mosaic responding simultaneously to a host of concerns: the accommodation of French and English, the balancing of regional and national interests, the reconciliation of the contradictions inherent in parliamentary government and the *Charter*, the desire for efficient and democratically responsive governments, and the manner in which regional concerns are manifested in the central government.

Canadian federalism began as a vision of a strong central government with only certain limited and enumerated powers ceded to the provinces. Within a short period of time, the Judicial Committee of the Privy Council began to interpret this federal scheme in a fashion that virtually reversed the initial presumption that the central government possessed all residual power remaining

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7 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. It is, of course, true that from the beginning of confederation the power of judicial review was exercised by the Judicial Committee of the Privy Council and later by the Supreme Court of Canada. This power, while focused upon the allocation of power between the central government and the provincial government under the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, also served to limit the ability of governments to invoke fundamental human rights. See *Reference Re Alberta Statutes*, [1938] 2 S.C.R. 100.


after the limited cession of authority to the provinces. Moreover, it may well be that, as Simeon and Robinson contend, the "federal form" of Canada has always followed the "state function." Thus, Canadian federalism has as often concerned the relative primacy of national and provincial communities as it has the conflicting claims of various ethnic communities. In the mediation of these disputes, Canadian federalism acquired a heavy flavouring of executive federalism — accommodation by and between intergovernmental elites — that in the wake of Meech Lake is undergoing more sustained attack than perhaps at any other previous time.

All of these aspects of Canadian constitutionalism are, in greater or lesser measure, currently in flux. The failure of the Meech Lake Accord was partly a failure of process. The Accord was conceived in the womb of executive federalism, but its stillborn delivery has resulted in considerable misgivings about the efficacy of executive federalism in the process of constitutional amendment. The Meech Lake Accord was also partly a failure of substance, revealing that Canada was simultaneously riven with doubts about an increasingly decentralized future and concerned that the Accord failed adequately to recognize the multiplicity of Canadian culture. Clyde Wells spoke for the centre and Elijah Harper spoke for the ignored periphery; their point of union was opposition to Meech Lake.

The plasticity of the current constitutional situation is further enhanced by social, cultural, demographic, and political changes that are undeniable. Forty per cent of Canadians are neither of British nor French ancestry. Canadian cities, where over three-fourths of the population resides, are increasingly multicultural. The rest of Canada resides in an "old style" pattern of monoethnicity. With the

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advent of the Free Trade Agreement (and the possibility of a North American customs union encompassing Mexico as well), trade is increasingly in a north-south vector. When tariff barriers are fully eliminated, economic logic will displace national passion, for it makes economic sense for goods and services to travel the shorter route north and south than for their equivalents to move from Ontario to British Columbia. The inevitable result is the increasing economic separation of each part of Canada from its fellow partners in confederation. Canada's national debt, amassed in part to provide for national social services, now imposes a severe fiscal restraint which promises to cripple the federal government's role in the future delivery of such services. Thirty six cents from every dollar of federal tax revenue now goes to service the national debt. With that inexorable fiscal demand comes shrinking opportunity for the federal government to make any real commitment to national social services.

At the same time, constitutional patriation has altered the political fabric in ways still being noticed. The Charter has brought a greater commitment, on the part of both citizens and political institutions, to the individual and collective rights it guarantees. However, because the Charter is judicially enforceable, there has been a perceptible shift of focus and authority toward the judiciary and away from the legislative branch of government. This marginalization of the legislative process may be partly responsible for a larger shift of attitude toward institutions, for there seems to be more open questioning of the legitimacy of executive federalism, party discipline, and, of course, the Senate. It may be that, through a process only dimly perceived as yet, patriation of the Constitution has fulfilled Peter Leslie's warning delivered before the Meech Lake process began: "The constitution is a genie in a corked bottle. Before uncorking it, one must be sure the genie will not grow to unpredictable proportions, or become unmanageable."\textsuperscript{13}

Thus, it appears that there exist some significant structural forces pushing the Canadian federal system toward greater decentralization. Before proposing tangible alterations, however, it

\textsuperscript{13} P. Leslie, Rebuilding the Relationship: Quebec and Its Confederation Partners (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1987) at 33.
would be prudent to develop the theoretical case for decentralized federalism. Only by understanding what a decentralized federal union can — and cannot — accomplish will we have any sound basis for proposing change to the centre of that union.

II. THE FEDERALIST IDEAL AND HUMAN AUTONOMY

The federalist ideal — a central government responsible for issues of common national concern and regional governments responsible for the issues which touch the daily fabric of the people's lives — brims with new promise in today's world. Never in recent history have so many governments been pressured by so many people for the right to govern themselves in smaller units. The Soviet Union's constituent republics, including Russia, have begun to declare themselves legally autonomous. Quebec, of course, threatens to sever most, if not all, its political ties with the remainder of Canada. Yugoslavia is racked by conflict between its constituent ethnic groups and appears to be on the verge of collapse as a unified state.

While many of these examples are tinged with assertions of ethnic identity, there is another thread which runs through the modern renascence of the federalist ideal. People want greater control over their own lives. They are discovering that such a simple desire is not easily obtainable from a central government asserting political power over vast territories or multiple ethnic groups, each with differing conceptions of the "good life." The result is the contemporary clamor for local or regional autonomy, whether in the Soviet Union, Yugoslavia, or Quebec.

It is not surprising that these demands should be made, for there exist compelling reasons to think that decentralized regimes of government better serve the cause of human liberty. To understand the case for the federalist ideal as the optimal agent by which human liberty can be realized, it is first necessary that we agree upon the attributes of human liberty.

Liberty is not exclusively a lack of governmental interference. Kuwait's lack of sufficient armed forces to deter or repel Iraqi invasion surely did not operate to increase the level of human liberty enjoyed by Kuwaitis. Nor would people suffering from
cancer as a result of unregulated dumping of toxic wastes in municipal water supplies think that governmental abstention was of net benefit to their liberties. One aspect of human liberty is the right to participate in a democratic decision-making process: the right to make decisions about how the society should organize itself in order to deliver results thought to be congenial to a majority of its members.

This is surely an inadequate description of human liberty, however, for some matters are thought to be so fundamental to individual dignity that they must be taken completely out of the majoritarian process. These issues, whether they consist of freedom of speech or conscience, the presumption of innocence, or freedom from arbitrary arrest and imprisonment, are treated as matters with respect to which democracy itself cannot be trusted. The Canadian Charter of Rights and Freedoms, of course, stands as the principal exposition of this desire to insulate fundamental rights from the vagaries of the legislative majority. In theory, the federalist ideal has little to say about these matters, for federalism is primarily a device for the allocation of democratic decision-making power among government units. Fundamental human rights are regarded as properly exempt from that power, wherever exercised, because they are so important to human welfare that they transcend authority derived from the act of political union. Since these rights are theoretically incapable of invasion by any government, it is necessary to prevent local or regional governments, as well as national governments, from encroaching upon these fundamental rights.

The Charter does not, of course, adhere to such a doctrinaire approach; by the "notwithstanding clause," both Parliament and the provincial legislatures are permitted to override a major portion of the guaranteed individual rights. The Charter restricted the permissible scope of provincial action, but through the notwithstanding clause it preserved some measure of the former authority possessed by the provinces. Thus, while theory might suggest that fundamental human rights are altogether outside the ken of federalism, in fact, the Canadian federal order preserves a considerable degree of regional choice in deciding precisely which human rights are so fundamental that they may not be infringed by
legislative majorities. This power is controversial and its exercise is politically risky, but it exists as a part of the federal terrain.

Related to the fundamental rights conception of human liberty is the notion that there remains, even within the sphere of legitimate democratic action, a core aspirational principle which should operate to temper the action of the democratic polity. That principle is simply to retain the most freedom of individual choice compatible with the legitimate needs of the community. Unlike fundamental rights, these rights lack a societal consensus that the particular right in question is so important that it transcends the power of governments. In short, the difference is that between the right to drive an automobile and the right to be free of governmental discrimination on the basis of race. Thus, the portion of human liberty which inheres in the democratic process carries with it a tempering and tension producing corollary principle, the ideal of preservation of individual choice.

The claim that decentralized regimes better serve the cause of human liberty requires a demonstration of the manner in which these aspects of human liberty are advanced by the federalist ideal. I will attempt to do so by first describing the benefits of decentralization in connection with the liberties afforded by a democratic process; then, by developing the contention that local governmental units can aid the preservation of fundamental, and politically transcendent, human liberties; and briefly by surveying some of the contemporary applications of these themes.

A. Decentralization and the Democratic Political Process

There are three major ways in which autonomous smaller units of government can improve the liberty inherent in a democratic political process. They are better able to effectuate the interests and welfare preferences of the people. Their existence is indispensable to protection of optimal individual choice within the legitimate zone of authority of the democratic political process. Finally, they are calculated to preserve the spirit of democracy: the ideal that democratic governments do not operate upon people in an exogenous fashion, but are more akin to a cooperative association which claims the fealty of its members on the basis of
mutual obligation and benefit. A detailed examination is necessary to substantiate these claims.

1. The interests and welfare preferences of the people

This argument is founded on three assumptions about human behavior within a large scale political system. First, social preferences will vary from region to region, reflecting cultural diversity born of ethnicity, isolation, historical accident, or some combination of other factors. The second is more equivocal, for it cuts both for and against the federalist ideal of decentralization. It is essentially the economic problem of externalities transferred to the political realm: people, through their representatives, will seek to obtain benefits, the cost of which will be borne by other people outside the benefited jurisdiction. This phenomenon requires an optimal political unit, large enough to prevent small political units from capturing benefits at the expense of their neighbors, but small enough to prevent factional alliances from plundering one part of the polity for the benefit of another. The third assumption relates to the first: smaller units of government will compete among themselves to attract desirable inhabitants and create desirable conditions of life. The innovations, thus spurred, benefit the aspect of human liberty seeking to foster optimal individual choice with respect to one’s short course through life.

a) Regional preferences

If preferences do differ between regions, a straightforward, utilitarian calculation easily demonstrates the value of decentralized units of government. Assume a national polity of 200 people, of which 105 prefer mandatory seat-belt laws and the remaining 95 are opposed. Majority rule on this issue will please 105 people and displease 95. But suppose that in Region One, 75 people favor mandatory seat-belt laws and 25 are opposed; while, in Region Two, only 35 people favor such laws and the remaining 65 people are opposed. If the two regions are permitted to act autonomously, Region One will adopt a mandatory seat-belt law and Region Two
will not. Now, 140 people will be pleased with the outcome of the political process, only 60 people will be disappointed. Absent an extraordinary judgment of the polity that freedom from mandatory seat-belt laws is so fundamental as to transcend the democratic process, or the presence of externally imposed costs associated with the policies independently adopted by these hypothetical regions, the utility-maximizing outcome described seems clearly desirable.

b) The problem of externalities\(^\text{14}\)

Unfortunately, the possibility, indeed the probability, of externalities cannot be overlooked. Small units of government will be tempted to adopt policies that produce benefits for their constituents paid for by residents of other jurisdictions. Similarly, large scale units of government will be susceptible to factional alliances arranged to capture the machinery of government in order to deliver benefits to the faction’s members, the costs of which will be borne by citizens not affiliated with the dominant faction. Moreover, small units of government will not incur some costs, like national defence, because their benefit is sufficiently dissipated over the entire polity that it makes little economic sense for a single jurisdiction to incur all of the costs of provision of a benefit which will be freely enjoyed by others. Thus, there is clearly reason to tinker with the jurisdictional authority of political units, making the boundaries of such authority congruent with the full costs and benefits of the decisions made by the political unit. Dissonance results in externalities, and politicians shrewdly exploit these opportunities to capture “free” benefits by imposing their costs on others. It is a form of political arbitrage which, unlike economic arbitrage, serves less to achieve market equilibrium than to distort and pervert both allocations of public resources and the democratic process itself.

For example, assume a local municipality consisting of one hundred renters, fifty resident landlords and fifty non-resident landlords. Assuming the municipality perceives benefits to be

\[^\text{14}\text{ This problem is discussed extensively in R.A. Posner, Economic Analysis of Law, 3d ed. (Boston: Little, Brown, 1986) at 600.}\]
derived from rent control, it is likely to impose rent controls ostensibly benefitting the in-place renters to the detriment of a minority of resident landlords and a group of unrepresented non-resident landlords. However, the external costs of the regulation do not stop there. Presuming that rent control was motivated by rising rents, the product of excess demand for residential accommodation in the municipality, the institution of rent controls will induce renters to remain in place, thus directing their would-be replacements (able and willing to outbid the in-place renters for scarce accommodations) to adjacent communities, where rents will be bid up to the detriment of in-place renters in those communities (and, of course, to the benefit of landlords in those adjacent communities). In this instance, the unit of decision is too small. The decision to impose rent controls is reached by a polity which will not bear the full costs or benefits associated with that decision.

The problem is not confined to small units of government. A national government is no less susceptible to political "rent-seeking." National regulations often operate to dispense favors to one region at the expense of another. In the United States, environmental laws which permit midwestern utilities to burn relatively cheap coal which produces acid rain in the northeast (and, of course, Canada) deliver benefits to Appalachian coal miners and midwestern utility customers at the expense of northeastern and Canadian users of surface water. The point becomes even sharper when one turns from regulation to spending. From the standpoint of provinces and local communities, the national treasury has all the attributes of a common pool resource, like a fishery. If local projects, like San Francisco's cable car system, can be built with federal funds, all municipalities will scramble to appropriate as much of the common pool as possible. Never mind that these local projects might not be undertaken if local residents were required to pay for them, since, from the local perspective, they are virtually free.15 Thus, just like the Atlantic cod fishery and, in all likelihood,
the North Pacific salmon fishery, rapacious depletion of the common pool inevitably exhausts the resource. Empty nets are the symptom of exhaustion of the common fishery pool; pervasive, gigantic, and unsustainable budget deficits are the symptom of exhaustion of the common national treasury pool. Since the costs of exhaustion of the resource will ultimately be borne by the entire polity, residents of each locality would be better off if they could agree in advance to confine the authority of the national government to matters of indubitably national consequence. It is an irony of American constitutional history that, at the moment of constitutional union, Americans thought they did just that, while after two centuries of constitutional interpretation, Americans have discovered that the national taxing and spending powers have been converted into a common pool open to over-exploitation by all.

The federalist ideal offers no simple resolution of the externality problem. The most that can be safely said is that the problem requires us to assess carefully the jurisdictional authority of the governments composing the federal ideal, with a view toward achieving the optimal congruence of authority, that is, with the full impact of the benefits and burdens flowing from decisions rendered within that authority. The externality problem suggests strongly that neither a unitary government nor a loose confederation with no central authority is appropriate. Rather, the optimal structure is a mixed system, combining a central government with plenary authority over issues which deliver benefits and burdens nationally and regional units sized and empowered to deliver benefits and burdens which fall with regional impact.

c) Regional innovation and competition

A unitary national government is a political monopoly, while the federalist ideal is, if not perfectly competitive, at least an arrangement that permits units of government both to experiment with different approaches to common problems and to craft unique solutions to unique problems of the local polity. If, as I have suggested, regions of the whole have differing preferences, it is likely that such regional units of government will innovate to deliver outcomes most suitable to their constituents. Moreover, the very act
of decentralization creates an incentive to the regional units of
government to adopt those policies most widely preferred. If
political choices influence economic vigour, which operates to
produce sufficient public income to reduce the pro rata cost of
government, individual fortunes within a polity will be enhanced by
political choices which encourage economic activity. This, in turn,
may attract new taxpayers to the locality, thus spreading the fixed
costs of government over a larger pool. By each of these
phenomena, the per capita cost of government may decrease.

There is, of course, no reason why a regional polity need opt
for policies which foster economic growth. A region may prefer
policies inimical to growth, adopted in order to foster the perceived
benefits of stasis. The benefit to human liberty is that people have
a choice of regime, unlike the unitary national government which
operates to deprive them of any such choice.

There are surely some costs associated with regional
innovation and competition, but upon examination they may be seen
as yet another example of the familiar problem of externalities. To
use an American example, state statutes designed to shield
corporations from unwanted takeovers may be simply attempts to
capture the local benefits of employment or corporate charity, while
imposing the costs of such benefits on shareholders or consumers
residing elsewhere. Similarly, the American practice of permitting
individual states to control their tort law, without the possibility of
review by the United States Supreme Court, may have resulted in
rules designed to capture financial benefits for injured in-state
plaintiffs. These benefits would, however, be at the expense of out-
of-state corporate defendants (whether product manufacturers or
liability insurers), their largely out-of-state shareholders (in the form
of lower returns), and out-of-state customers of the corporate
defendants (in the form of higher product costs). To the extent
these externalities appear, it is a signal of a flaw in the jurisdictional
allocation. Accordingly, devices ought to be built into the federalist
ideal to permit correction of such failings when, and if, they are
detected.
2. Smaller units of government are better protectors
of individual liberty of choice

This contention is quite counter-intuitive to Americans who
came of political age when American states engaged in official racial
discrimination, tolerated "private" acts of violent assault and murder
upon African-Americans, and indulged generally in a myriad of
repressive measures inimical to human liberty. It would probably
also be counter-intuitive to persons like Pierre Trudeau, who came
of age in the repressive atmosphere of Maurice Duplessis's Union
Nationale government of Quebec. These experiences suggest that
James Madison was correct when he argued that the chief danger
to individual liberty was factional, majoritarian tyranny and that small
units of government posed the greatest opportunity for the tyrants
of faction to seize control. Madison, however, overlooked the
danger of factional control of the national legislative process.
Indeed, one of the central lessons of our time is that Parliament or
Congress, like a provincial or state legislature, may be captured by
skillful, influential, interest groups seeking to serve their narrow
ends. While it is important not to minimize the dangers of factional
abuse of fundamental human liberties within regional governments,
it is equally important to remember that such abuse may be visited
as well upon the nation as a whole.

Given the possibility of national factional tyranny, there are
at least three reasons why small units of government preserve a
greater measure of individual liberty of choice than would a
consolidated, unitary scheme of government.

a) Mobility and choice

A unitary central government necessarily operates to establish
legal rules of uniform applicability throughout the nation. If these
rules are harsh and oppressive, there is little opportunity for escape.
International migration is, of course, a possibility, but the hurdles

which must be overcome are of considerable magnitude. For most people, international mobility is more theoretical than actual. In a society formed on the principle of the federalist ideal, harsh and oppressive measures adopted by one region can be more easily evaded by movement to a more congenial region. Thus, for example, for a good portion of the twentieth century African-Americans emigrated from the states of the old Confederacy to other parts of the United States in search of better economic opportunities and freedom from the repression of Jim Crow regimes. More recently, American homosexuals have flocked to New York, San Francisco, Washington, and other metropolitan areas where official and unofficial toleration of diverse sexual habits is considerably more pronounced than in, say, rural Arkansas.

Moreover, there are wide variations in that which is regarded as harsh and oppressive. Municipalities like Berkeley and Santa Monica, California have adopted socialist regimes, centering on extreme forms of rent control, that are presumably regarded as beneficial to a majority of their residents. Putting aside the troublesome question of the externalities associated with such regimes, residents who regard Berkeley socialism as distasteful are free to remove themselves or their capital from the jurisdiction. A majority of Massachusetts residents may regard high levels of taxation as a boon; those who do not are free to leave. Indeed, part of the economic growth experienced by southern New Hampshire has resulted from the arrival of former Massachusetts residents seeking a lower rate of taxation.

Removal is not, however, always an easy or pleasant matter. People have a web of relationships, including jobs, families, schools, and personal associations with place, making movement difficult. Accordingly, we cannot expect mobility to be the answer to every oppressive scheme concocted by local or regional governments. It is important to remember that fundamental human rights ought to transcend the legitimate powers of any government, regional or central. If governments do not transgress the fundamental norms, however, regional autonomy will produce considerably more opportunity for individual choice than permitted in a centralized regime.

Perhaps one of the surest indicators that regional autonomy operates to preserve choice is the hostility exhibited to this idea by
the academic champions of utopian "communitarian" regimes. Professor Linda Hirshman, for example, in the course of extolling the communitarian ideal as an organizing principle for the United States, declares her preference for accomplishing this ideal through the central government because "the goal ... will be weakened if citizens can escape by moving to another location in the polity." 17

b) Controlling governmental power exerted to further the interest of the governors rather than the governed

Politicians are prone to at least two forms of political exploitation. I have discussed previously the tendency of politicians to exploit one segment of society for the benefit of other segments. Politicians also tend toward profoundly self-interested behavior; without some checking device, they will begin to appropriate the apparatus of government for their personal self-interested ends. This problem, recognized by Madison in the fifty-first Federalist Paper, is more easily controlled by a government with strong popular controls. Madison assumed that those controls would be stronger in smaller units of government. 18 Two centuries later, American constitutional scholars continue to agree with Madison on this point. 19

If state or provincial officials can pervert their offices to serve their individual ends, it may be that American states or Canadian provinces are simply too large a unit of government. There is nothing inherently correct about American states or Canadian provinces as the optimal unit size of government. Indeed, depending on the issue in question, it may be appropriate to deliver authority to very small regions (for example, watersheds) or to

17 L.R. Hirshman, "The Virtue of Liberality in American Communal Life" (1990) 88 Mich. L. Rev. 983 at 1027 (citations omitted).


municipalities. Even if provinces remain the principal unit of decentralized government, it is still relatively more likely that the self-aggrandizing provincial official will be scrutinized by the people than the self-aggrandizing national official.

c) **Diverse centres of power act as mutual checking devices**

In defending the American federal republic proposed by the 1787 Convention, Madison contended that "a double security arises to the rights of the people" because "the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."\(^{20}\) The result is that "[t]he different governments will control each other; at the same time that each will be controlled by itself."\(^{21}\) For Madison's contention to hold, it is necessary both that the regional governments possess sufficient independent authority to adopt policies which may not be overridden by the national government and that the national government have a separate zone of authority in which its judgment is supreme. We have seen that recognition and control of externalities is one useful device which may be employed to survey the boundary between these two fields. It is essential, however, that the boundary be maintained.

One of the major failings of contemporary American constitutional law is its inability to devise a mechanism that preserves a boundary line, accomplishing the Madisonian aspiration. The national legislative power to regulate commerce has become a bloated caricature of its original self, having been transformed into a grant of virtually plenary authority to regulate any aspect of life which has the slimmest of plausible connections to commerce "among the several States."\(^{22}\) Whenever Congress chooses to exercise that power with sufficient broadness of application, it

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\(^{20}\) J. Madison, "Number LI" in The Federalist, supra, note 16 at 266.

\(^{21}\) Ibid.

\(^{22}\) U.S. CONST., art. I, s. 8, cl. 3.
displaces any contrary state legislation or constitutional norms. As a result, the states' freedom to adopt policies independent of the national government exists as an act of congressional grace. Consequently, the states no longer perform the role envisioned by Madison — checking the power of the national government — but are reduced to mere courtiers and supplicants in the palace of national government.

This condition is, of course, defended by those who argue that the national political process itself — a Congress consisting entirely of state representatives — is a sufficient check. The problem with this argument is that it presumes that legislators in the national government retain their character as regional representatives, when, in fact, their employer in more than name is the national government. It is asking a bit much of the lions to exercise voluntary restraint in eating the Christian; what is needed is a strong fence to separate the two.

When that dividing line is properly maintained, regional governments will act in a fashion which checks the central government. To take but one contemporary example: a number of American states have begun to offer public school students a wide range of choice with respect to the school they attend. These plans have generated controversy and attracted a great deal of opposition from portions of the polity who perceive them as a threat to their interests. If, in pursuit of its commerce power, Congress were to prescribe a national curriculum and mandate a single national rule by which students were to be assigned to a public school, there would be no possibility of a regional check on what may very well be an utterly misguided policy. It is this sort of check — one closely related to the preservation of individual choice by reason of


governmental innovation and personal mobility — which must be preserved if the cause of human liberty is to be advanced.

In contrast to the United States, Canada has maintained far more vigorously the line between federal and provincial authority. Parliament's power to exercise virtually plenary authority over any aspect of national life is far more circumscribed. The problem in Canada is not the centripetal force of Ottawa, but rather managing the political centrifuge by keeping the regions in the federal orbit. The late Senator Eugene Forsey brilliantly captured the Canadian problem when he ridiculed decentralization as having the potential to turn the national anthem into a refrain of "O, Canada, beloved referee, of customs dues, and fiscal policy."

3. Smaller units of government are more likely to preserve the spirit of democracy

The democratic ideal is of a polity that works together, fashioning a communal destiny. The government which results is not a remote and foreign enterprise, but the expression of an interested and involved citizenry. In this ideal, governments claim the fealty of the governed, not by fear of force, but on the basis of mutual obligation and benefit. Smaller units of government are better suited to the preservation of these ideals for three related reasons.

a) Voluntary compliance with the obligations of law

As the size of the unit of government decreases, the incidence of voluntary compliance with law will increase. As governing communities become smaller, there is a sense of greater participation in the process by which legal norms are established, resulting in less political alienation. As well, when the unit of government is small enough, the social opprobrium attached to revealed non-compliance will be higher. In a small community, it is much more difficult to evade detection as a norm-breaker. The risk

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of social stigmatization, and its cost to the law-breaker, is higher than in larger communities.

By contrast, in large communities, the optimal strategy of each individual is to violate the law while all others observe it. When every person follows this course of conduct, all citizens are worse off. The truth of this contention can be observed daily in any large metropolitan area, as drivers speed through traffic lights winking from yellow to red, in the hopes that other citizens are not emulating them. Occasionally, another driver, anticipating a green traffic signal, will collide with the first driver, thus proving to them both that pursuit of an individual strategy when confronted with the "prisoner's dilemma" minimizes utility outcomes. The social pressures of the small community, and the sense of belonging it engenders, provide powerful incentives for a strategy of cooperation which overcomes the utility costs resulting from individual strategies.26

Of course, these conditions may only be obtained fully in very small communities. Yet, there is no reason to think that the phenomena of political alienation and social detection and stigmatization are sharply discontinuous at some magic moment of governmental unit size. It is far more likely that the structural stimuli to a cooperative, rather than individual, strategy towards observance of law decrease in some rough proportion to the increasing size of the governmental unit.

b) Voluntary compliance with the duties of representation

Voluntary compliance with law by the governed is but one half of the equation. As governmental unit size decreases, the voluntary sense of duty toward the governed will be felt more strongly by their representatives. When communication between the governed and the governors occurs primarily through the glass eyes of television camera and screen, it is absurd to pretend that the

representatives are "well informed as to the circumstances of the people, ... [able] to sympathize ... [or] communicate with them." 27 Moreover, national legislators are necessarily required to remove themselves geographically to the nation's capital. The removal destroys the natural attachment representatives might otherwise feel for the lives of their constituents, for they no longer experience life in Alberta, but rather, a vastly different life in Ottawa. Representatives begin to substitute their preferences, formed in part by their experiences of the national capital, for those of their constituents. Moreover, even if they sincerely desire to do otherwise, the removal (culturally, geographically, and structurally, through such insulating devices as political staff) poses considerable problems of information transmission from the governed to the governor. 28

These structural problems are less evident as the size of the relevant governmental unit shrinks. Once again, there is no reason to suppose that there is some threshold marking the line between governments possessing these flaws and those happily free of them. The structural problems are likely to diminish as the unit size of government decreases.

c) Civic virtue and small communities

The ideal of a community in which political actors are motivated primarily to accomplish that which is best for the entire community, rather than individual goals, is an ideal which permeated the thought of the American founding generation 29 and persists to the present. 30 There are, however, significant differences


28 The greater the removal of representatives from constituents, "the more noise is introduced into the process by the individual bureaucrats who have their own preference functions and by the problems of information transmission." See G. Tullock, "Federalism: Problems of Scale" (1969) 6 Public Choice 19 at 25.


between eighteenth and twentieth century visions of the civically virtuous community. The modern version flirts with authoritarianism as a device to compel a reluctant and persistently individualistic polity to put the clergy's vision of community welfare ahead of diverse individual notions of welfare.\footnote{31} The eighteenth century version was one which relied upon the structural attributes of small communities, rather than authoritarian edicts, to produce the common good.

For individuals to act for the common welfare rather than in pursuit of individual advantage, they must have a strongly felt stake in the community. Their sense of that stake will increase if they actively participate in the resolution of issues of public consequence. The familiar, and now largely lost, town meeting is the paradigmatic device, increasing every citizen's stake in the community by soliciting extensive participation of ordinary citizens in policy formulation. In a small community, voters have an incentive to monitor and vote for candidates for elective office, because "small groups ... may very well be able to provide themselves with a collective good because of the attraction of the collective good to the individual members."\footnote{32} By contrast, once the community has become quite large, in theory, no single member has sufficient motivation to monitor representatives or vote for candidates for office because the significance of the individual action declines dramatically with the size of the political unit. The temptation to become a "free rider" becomes almost rational.\footnote{33}

Moreover, the sense of stake in the small community is not one rooted entirely in the process of decision-making; it is also created by a sense of kinship, the same emotions one feels for ...
family. Just as a person can be expected to sacrifice individual interests for the sake of loved ones, so may individuals feel some less powerful version of that emotion with respect to the small community, but almost none of it with respect to a national community of virtual strangers. Civic virtue is thus born from within, rather than artificially imposed from without. The germ is a governmental structure that fosters this endogenous form of civic virtue.

B. Fundamental Rights and the Federalist Ideal

As previously noted, no government, whatever its size, has legitimate authority to trench upon those human liberties which are sufficiently fundamental to be, in theory, beyond governmental control. However, in a society that defines such rights in a political fashion, rather than accepting some ostensibly extrinsic definition (such as divine inspiration), the federalist ideal may have some role in the process of locating and preserving fundamental rights.

Fundamental rights are regarded as fundamental because a consensus of the polity congeals around a particular right. Freedom from human slavery is plainly fundamental, but in the United States of 1850 no such political (as distinguished from a moral) conclusion could have been made. The right to vote regardless of one’s gender is similarly fundamental, but was not so regarded in nineteenth century America or Canada. The process by which rights become fundamental — the formation of national consensus — is one which furthers the cause of human liberty by the participation of the regional units of the federalist ideal.

There are at least two ways in which regional preferences can affect this process. First, fundamental rights can be identified only by a process requiring assent by a super-majority of the constituent regions. The United States Constitution mimics this form in its requirement that congressionally proposed constitutional amendments be ratified by three-fourths of the state legislatures.\(^{34}\) The Constitution Act, 1982 does the same by its amending formulae,

\(^{34}\) U.S. Const. art. V.
requiring either unanimity of the provinces\textsuperscript{35} or the assent of two-thirds of the provinces comprising 50 per cent of the population.\textsuperscript{36} Second, each region can be left free to determine for itself those rights which are fundamental. This is the pattern followed by the Charter, which permits any provincial legislature to override the fundamental rights guaranteed by the Charter.\textsuperscript{37} It is not intuitively obvious which solution is the more protective of fundamental human rights.

To explore this vexing question, I propose to use the obvious contemporary example. About half of the American polity regards the right of a woman to terminate an unwanted pregnancy as fundamental and beyond legitimate abrogation by the democratic process. The other half regards this right as subject to abrogation, totally or in part, depending on a variety of circumstances. The initial response of the American system to this condition was, of course, the constitutional judgment of\textit{Roe v. Wade}\textsuperscript{38} that the right was fundamental for the first trimester of pregnancy, but progressively less so thereafter. That judgment is one which trumps regional preferences and can be overridden only by a change of heart (or personnel) of the United States Supreme Court or by a coalition of regional preferences sufficiently strong to identify a national consensus. Since no national consensus exists, it is unsurprising that no such coalition has emerged. In Canada, by

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\textsuperscript{35} Supra, note 3, s. 41.
\textsuperscript{36} Ibid. s. 38(1).
\textsuperscript{37} Supra, note 7, s. 33. Of course, the provision also vests a similar power in Canada's Parliament. Only Quebec and Saskatchewan have exercised the provincial power. Quebec has employed this provision as a tactical weapon in its ongoing linguistic, cultural, and political struggle with the remainder of Canada. See\textit{An Act Respecting the Constitution Act, S.Q. 1982, c. 21} (repealing all Quebec legislation and immediately re-enacting the same with the addition of a notwithstanding declaration in each statute). The validity of this action under the\textit{Charter} was upheld in\textit{Ford v. A.G. Quebec, [1988] 2 S.C.R. 712, 54 D.L.R. 577}. Saskatchewan used the power on one occasion to obtain leverage in a labour dispute with public employees. See\textit{The SGEU Dispute Settlement Act, S.S. 1984-85-86, c. 111}. See also Mandel,\textit{supra}, note 8 at 77 and R. Tasse, "Application of the Canadian Charter of Rights and Freedoms" in G.A. Beaudoin & E. Ratushny, eds,\textit{The Charter of Rights and Freedoms, 2d ed.} (Toronto: Carswell, 1989) 65 at 107-8.
\textsuperscript{38} 410 U.S. 113 (1978) [hereinafter\textit{Roe}].
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contrast, a Roe-like decision under the Canadian Charter could be freely overridden by a province. One’s conclusion about the net benefit to human liberty of these contrasting arrangements is apt to depend on one’s view of the underlying substantive issue. But if I am correct in the contention that fundamental rights become so by virtue of national coalescence around them, there can be little principled opposition to the idea of regional autonomy with respect to rights which have yet to achieve fundamental status. Indeed, the United States Supreme Court’s most recent position with respect to the status of the abortion right is to permit states an increasing amount of regulatory latitude, a position which bears certain rough similarities to the Canadian provincial override power.

Once a national consensus has been reached, should a single region with a markedly different preference be able to make its dissent stick? If it may not, what principle, apart from sheer force, dictates that the dissenting region be required to continue in the national orbit? If the United States agrees that the abortion right is fundamental, but Louisiana is the sole dissenter, why is Louisiana not entitled to secede and establish itself as an independent polity? Americans have little difficulty applauding such unilateral regional decisions when undertaken by Lithuanians, but would likely balk at Louisiana’s hypothesized secession. One way of avoiding the extreme trauma of secession is the provision of mechanisms like

None exists. The closest Canadian parallel is R. v. Morgentaler, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [hereinafter Morgentaler], which invalidated section 251 of Canada’s Criminal Code, R.S.C. 1970, c. C-34, restricting abortions, as a violation of the Charter’s section 7 guarantee of "security of the person." See Charter, supra, note 7. Unlike Roe, Morgentaler did not purport to define the circumstances in which abortions could not be regulated. Thus, the opportunity was presented for further legislation on the subject, which may or may not comport with the guarantees of section 7. The House of Commons enacted a restrictive abortion law which was denied Senate approval and thus was not subjected to judicial scrutiny under the Charter. See B. Wallace, "Back to Square 1: The Senate Rejects New Abortion Legislation" Maclean’s (11 February 1991) 15. The Supreme Court of Canada has determined, however, that a fetus is not a person within the meaning of section 7. See Daigle v. Tremblay, [1989] 2 S.C.R. 530.


For an elaboration upon this theme in a variety of constitutional contexts, see, generally, Massey, supra, note 10.
Canada's, which permit dissident regions to maintain their independent sense of fundamental human liberties. Yet, to guard against abuses, it is important to insist that an overwhelming majority of the entire regional polity act affirmatively by an open and honest plebiscite to manifest their dissenting intention.

Rights become fundamental through a political process and not by divine proclamation. Thus, for reasons similar to those applicable to the remainder of the democratic decision-making process, a large measure of regional autonomy with respect to the identification of fundamental rights is preferable. Stricter limits upon such regional autonomy are appropriate, however, to protect against the possibility of a region visiting harsh and invidious treatment upon a powerless minority. Unfortunately, no limit will be perfect. Some regional oppression will still be conceivable, but squelching all possibility of regional oppression will be at the cost of denying regions the opportunity to manifest reasonable dissenting preferences.

C. **Worldwide Devolution: "[T]he Centre Cannot Hold"** 42

The modern world is filled with actual and potential applications of this theory. In general, both contemporary demands for, or the existence of, decentralized regimes stem from decidedly different regional preferences (particularly marked by linguistic, cultural, or religious differences), pronounced problems of externalities, or some combination of both.

1. Regional preferences based on linguistic, cultural, or religious differences

   Switzerland is foremost among the established and successful decentralized regimes that have reached that condition because of these regional variations. The Swiss federation of cantons leaves a high degree of autonomy within each canton and, significantly,

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makes no attempt to dictate a national consensus on matters of religion or language. A resident of Zurich, for example, has no right to insist upon French as the language of instruction for schoolchildren. That is available in Geneva, and removal to Geneva is the available solution. By contrast, Canada has embedded its linguistic war within its constitution by a limited guarantee of French as an instructional language in English Canada and of English as an instructional language in Quebec.\(^4\) The result (though not for this reason alone) in Canada is a seemingly endless friction over language and cultural identity. For all its decentralization in other respects, Canada is insufficiently decentralized on matters of language. Recognizing linguistic hegemony within regions is probably a necessity to the maintenance of a multi-lingual federal union.

Of course, there is always the possibility that linguistic and cultural differences will prove so divisive as to make maintenance of a multi-lingual federal union impossible. The imminent fission of Yugoslavia into Croatia, Serbia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro is an example of a blend of diverse linguistic and cultural heritages simply too corrosive to endure. The danger of official Canadian recognition of French linguistic hegemony in Quebec and English hegemony almost everywhere else, lies in the possibility that these two linguistically separate Canadas will, like tectonic plates, drift farther and farther apart. When tectonic plates drift, they produce destructive earthquakes and volcanic eruptions. The product of linguistic and cultural drift is less determinate, probably less dramatic, but possibly no less final.

Religious differences have proven to be considerably more volatile and divisive. Thus, Israel's intractable problem with the Intifada is partially the product of its unwillingness to provide an autonomous region for Palestinians. Israeli decentralization alone would not cure the many ailments of the Middle East, but would at least have a salutary effect on the most immediate Israeli domestic problem: persistent violent and nonviolent refusal to abide by the commands of the central Israeli government. Whether decentralization could even begin to ameliorate the religious and cultural

\(^{43}\) See section 23 of the Charter, supra, note 7.
schisms of Northern Ireland is far more problematic. I do not propose the federalist ideal as a panacea for every affliction.

2. Demands for regional autonomy based on perceptions of externalities imposed by the central government

When regions believe that they are being plundered for the benefit of other regions, they react by demands for absolute or total autonomy. Often these perceptions are combined with dramatic differences in regional preferences resulting from cultural or linguistic difference. The assertions of autonomy from the central Soviet government by the federated republics of Russia, the Ukraine, and the Baltic republics are all variants upon this strain. The Baltic republics are probably driven more by cultural and linguistic difference than a deep belief that the central Soviet government has imposed burdens upon them for the benefit of other regions of the Soviet Union. However, the appropriation of national identity for the benefit of the central Soviet government is itself an extreme form of psychic external cost. On the other hand, the Russian and Ukrainian republics probably have good reason to believe that their manufacturing and agricultural productivity has been drained away in support of Soviet Central Asia, Eastern Europe, or other client states of the central Soviet regime.

The phenomenon is certainly not limited to the communist world. Staten Island's desire to secede from New York City reflects its belief that its economic base, relatively healthier than that of Brooklyn or the Bronx, will be tapped by a New York City Board of Estimate, which is controlled by those more populous boroughs, for the frank benefit of the Bronx and Brooklyn. No doubt there is also a measure of cultural disharmony added to the brew.

Western Canada has long felt itself isolated and excluded from the Canadian centre, but with Quebec's demands for more autonomy, Western Canada has begun to press even more vigorously for its own autonomy. Part of the reason is the perception that Western Canada, with its abundant forest, energy, and agricultural

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44 See Kilgour, supra, note 6.
Devolution or Disunion

assets, has been used by the central government to redistribute wealth to poorer regions, particularly Atlantic Canada. With respect to Canadian energy policy, it is arguable that Alberta has been forced to forego economic benefits of its petroleum stocks in favour of energy consumers throughout Canada, but particularly in populous Ontario and Quebec. It is for these reasons, and perhaps a bit of cultural difference with respect to Ontario (and major linguistic differences with Quebec), that Western Canada’s Reform Party has begun to advocate ever more vigorously an American-style national senate endowed with real legislative power, composed of equal numbers of provincially elected members. In addition, Western Canada’s premiers have floated the notion that the western provinces should establish their own regional income tax with countervailing tax concessions on the part of the central government.  

Sentiment like this is hardly surprising, for sixty-four per cent of all Canadians (much less westerners) feel that their province gets back less in federal spending than they send to Ottawa in the form of federally imposed taxes.  

It is possibly by virtue of these perceptions that a bare majority of Canadians now declare that they think of themselves as citizens of their province first and only secondarily as Canadian.  

If there is a theoretical case for decentralized federalism, and there are worldwide examples of the demands for its implementation, perhaps some of this theory can be usefully incorporated as part of a solution to the seemingly intractable constitutional wars of Canada.

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47 Ibid.
III. PRESERVING CONFEDERATION:
PROPOSALS FOR CHANGE

Sometime in the spring of 1990, with less than three months to go before the June 23 ratification deadline, Senator Gerald Beaudoin is said to have whispered to a colleague while listening to Clyde Wells, "C'est la fin du tout. C'est la fin du pays." Meech Lake may well have ended the Canada that was, but there will continue to be a Canada; it is simply the nature of that Canada that remains to be seen. The principal alternative is, of course, either a Canada without Quebec or a Canada including Quebec in some revised form of federal union. Within each of these alternatives, there exist additional possibilities. Canada without Quebec may attempt to preserve the existing structural arrangements of Canadian federalism, assume an even more centralized form of federal union or, at the opposite extreme, devolve enormous powers upon regional blocs or individual provinces. Canada including Quebec must, as a practical matter, reallocate powers from the centre to the provinces in order to keep Quebec within confederation. The nature of the reallocation is as variable as the human political imagination, but one threshold issue to be decided within this branch of the inquiry is the question of whether such reallocation would be equal with respect to all provinces or only with respect to Quebec.

In this section, I propose a form of devolution which is reasonably consistent with the theoretical justifications for a decentralized federal union advanced in section II and, hopefully, acceptable to enough of the nation to form a continued basis for confederation. I will also examine the levels of devolution appropriate in the event that all efforts at preserving confederation fail and Quebec departs.

48 Cohen, supra, note 3 at 227.

49 Of course, this assumes that force would never be used to keep Quebec within confederation. Americans, steeped in the historical lore of the American Civil War, would no doubt consider the alternative of force. It is one of the many things that make Canadians different from Americans that Canadians would, in overwhelming numbers, reject force as an option for preserving confederation.
Devolution or Disunion

A. A Decentralized Confederation Including Quebec

Quebec desires increased autonomy; Western and Atlantic Canada desire a larger voice at the centre, within the structure of the central government; aboriginal Canadians desire greater self-government and settlement of land claims; civil libertarians desire maintenance, if not strengthening, of the Charter; and confirmed centralists are loath to part with any significant portion of the authority of the central government. In order to keep confederation together, it may be necessary to address all of these concerns, although, given their contradictory nature, it appears almost an insoluble task. Compromise is essential, and compromise must occur in three areas: the allocation of legislative authority between the central government and the provinces, the nature and apportionment of provincial representation within the institutions possessing federal legislative authority, and the process by which the Constitution itself may be altered.

1. Allocation of legislative authority between the provinces and the central government

The central government ought to possess plenary and exclusive authority over those aspects of government that will be imperfectly accomplished by reasons of the externalities problem. Aspects of government that are not plagued by this problem can properly be left to the provinces or, alternatively, shared with the central government. Accordingly, authority over such matters as national defence, foreign policy, fiscal and monetary policy, customs duties, external trade, and environmental or conservation matters ought to be vested exclusively in the central government. The remaining issues need not and, indeed, should not, be vested exclusively in the central government. Given the necessity of accommodating both Quebec's desire for significantly greater autonomy and the preferences of others for retention of authority within the central government, it is appropriate to grant to the provinces and the central government concurrent authority over these remaining heads of legislative jurisdiction. Of course, if concurrent authority is granted, some principle must be used to
decide which policy prevails in the event that the legislative choices of the central government and the provinces conflict.

There are several options to resolve such conflicts. A principle of federal supremacy could be adopted, as is the case under the Constitution Act, 1867,50 the United States Constitution,51 and the Australian Constitution.52 The opposite principle, provincial paramountcy, could be adopted. Finally, some intermediate position could be adopted, such as deferring to the choice made by the government which has first acted to occupy the field with respect to which concurrent jurisdiction has been granted.

The first option is politically unworkable given Quebec’s insistence upon making its own choices in many legislative fields which are currently assigned to the central government. The last option is similarly unworkable since the federal government has already occupied many of the jurisdictional areas which Quebec desires to control. The principle of provincial paramountcy is not necessarily as radical as it seems, for the principle only applies to those areas of shared, or concurrent, legislative jurisdiction and, as a practical matter, it can be expected that, apart from Quebec, few provinces will actually act to strip the federal government of its current authority. For example, it is highly unlikely that Newfoundland or Manitoba would act to assume responsibility for unemployment insurance. Over time, to be sure, there might likely emerge a pattern of more aggressive assertions of provincial authority. That pattern is to be expected, however, and even

50 Supra, note 7, s. 95.

51 U.S. CONST. art. VI, cl. 2:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

52 Commonwealth of Australia Constitution Act (U.K.), 63 & 64 Vict., c. 12, s. 109 [hereinafter Australia Constitution Act]: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." For a discussion of the operation of this provision, see R.D. Lumb & K.W. Ryan, eds, The Constitution of the Commonwealth of Australia: Annotated (Sydney: Butterworths, 1977) at 354-58.
encouraged, if we are persuaded of the theoretical value of diverse policy choices among constituent elements of a federal union.

Moreover, the idea of provincial legislative paramountcy is not as new as it might first appear. The same principle is embodied in section 33 of the Charter: the notwithstanding clause. Because the advent of the Charter operated to impose new and additional limits upon the permissible extent of provincial legislative authority, the notwithstanding clause was included in the Charter as part of the price of winning provincial consent for patriation of the Constitution. It is true that the notwithstanding clause also operates partially to check the Charter's cession of authority from the legislature to the courts and, thus, is part of the long-standing Canadian and British tradition of parliamentary sovereignty. Provincial legislative paramountcy does not partake of the same tradition; rather, it lies far more in the Canadian tradition of altering the nature of federalism to accommodate both the French linguistic and cultural minority and to preserve confederation when faced with strong centrifugal pressures. It is thus both theoretically sensible and reasonably grounded in the Canadian tradition of federalism.

It is possible that the principle of provincial paramountcy could be confined to Quebec. To do so, however, raises the electrically charged spectre of "special status" for Quebec. It may well be that such official, formal recognition of a preferred status for Quebec would arouse substantial opposition in other provinces. One of the lessons of Meech Lake may be that the federalism

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53 See Mandel, supra, note 8 at 75: the provincial legislative override power "was conceded by the federal government to the opposing provinces as the price for agreement to the constitutional package." See also Cohen, supra, note 3 at 65: the notwithstanding clause "was inserted to satisfy the western premiers ... and not to appease Quebec."

54 See Simeon & Robinson, supra, note 11 at 19-30, 249-38.

55 Provincial legislative paramountcy would require elimination of the Governor General's power to disallow provincial legislation. See Constitution Act, 1867, supra, note 7, s. 90. This was a frequently exercised power in the early years of confederation. See E.A. Forsey, Freedom and Order (Toronto: McClelland and Stewart, 1974) and E.A. Forsey "Disallowance of Provincial Acts, Reservation of Provincial Bills and Refusal of Assent by Lieutenant-Governors Since 1867" (1938) 4 Can. J. Econ. & Pol. Sci. 47. However, "[i]ts use today would provoke intense resentment on the part of the provinces." See P.W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) at 90.
2. Regional representation at the centre: senate reform

The periphery of Canada — the West, the Maritime provinces, Newfoundland, the North, and aboriginal peoples — all desire a greater voice in the councils of the central government. One way of responding to that desire is by making the Senate a fully participating house of government and by altering the terms of representation in the Senate. Senate reform is a difficult and complex matter. If the Senate becomes an equal partner with the House of Commons, an institutional threat is created to the fusion of legislative power, executive power, and party discipline which characterizes parliamentary democracy. A counterweight is established, the force of which is not immediately ascertainable. If Senators are selected by the provinces rather than by the Prime Minister, a further counterweight is created. If provinces have equal representation in the Senate, it is possible that the will of the vast majority (centred in Ontario and Quebec), as voiced by their MPs, may be frustrated by the contrary votes of Senators from Newfoundland, the Maritime provinces, Saskatchewan, and Manitoba. Thus, Senate reform strikes at the heart of many parliamentary traditions. Moreover, the elimination of the traditional Senate, with its lifetime appointments by the central government, might produce changes in the type of person who sits in the Red Chamber. It is, in a sense, the difference between Eugene Forsey and Stanley Waters. Of course, it might also be the difference between John Buchanan and, say, Preston Manning or Lucien Bouchard.

Nevertheless, given the apparent necessity of responding to the alienation of the periphery in order to win support for a plan of devolution acceptable to Quebec, some type of Senate reform seems essential. On the other hand, the Reform Party’s "Triple E" Senate (equal, effective, and elected) seems certain to arouse deep

56 See, generally, Kilgour, supra, note 6.
opposition in Ontario and Quebec. The Quebec opposition might be partially defused by the creation of a much broader range of concurrent provincial and federal legislative jurisdiction, coupled with the principle of provincial paramountcy, but the Ontario opposition could be considerably more deep seated. Accordingly, something other than the "Triple E" Senate must be created.

To respond to the desire for equal provincial representation at the centre, each province could be allocated an equal number of Senators, selected in whatever fashion each province devised. Alberta might select its Senators by province-wide popular election, as in essence it did with respect to Stanley Waters. New Brunswick might choose to vest in its Premier the power of appointing its Senators. British Columbia might prefer to let the Legislative Assembly select Senators. Ontario might even desire to let the Prime Minister appoint Ontario’s Senators. In any case, Senators, however selected, would serve for a term of years, rather than for life.

The territories and the Aboriginal peoples of Canada should be treated equally as, in essence, another province. For example, if each province were allocated six Senators, the Yukon, N.W.T., and the Aboriginal peoples of Canada would share six Senators. Perhaps, in this example, two could be allocated to the Yukon, two to the N.W.T., and two to the Aboriginal peoples. The method by which the Aboriginal peoples would select their Senators will be discussed shortly.

An additional block of Senators would be appointed for a term of years by the Governor General. Hopefully, this power would be exercised with the national interest in mind. At its best, this block would be composed of the Eugene Forseys of Canada. If these "national" Senators were indeed men and women of national vision, there would be no skewing of the Senate in the direction of central Canada. Rather, the provincially selected Senators would perform in part the role of regional representatives, but, in company with the federal appointees, also seek to act in the interest of the entire nation.

The proportion of federally appointed to provincially selected Senators is important. If the federally appointed block is too large in relation to the provincially selected block, the equalizing effect of the Senate will be sufficiently diluted that the peripheral provinces
will not support the plan. If the federally appointed block is too small, Ontario and Quebec are likely to oppose the reform. A federally appointed proportion of about 15 per cent of the whole would produce a block that is twice as large as the contingent from any single province, but not so large as to control the Senate if the federal block were to act in concert with the Senators from Ontario and Quebec. For example, if each province and the unit of the Yukon, N.W.T., and native peoples were to have six Senators each, the federally appointed block would consist of twelve Senators. This hypothetical Senate would consist of seventy-eight members, sixty-six selected by the provinces, territories, and native peoples and twelve appointed by the federal government.

Quebec should not fear this revitalized Senate, for its jurisdiction would be shared with the House of Commons and would, in any case, be subject to the provincial paramountcy principle in the zone of concurrent jurisdiction. Since Ontario, New Brunswick, and Nova Scotia were each willing voluntarily to relinquish a substantial portion of their Senate seats in order to win approval of Meech Lake, it is reasonable to expect that those provinces might still be willing to make such a sacrifice for the benefit of a continued, undivided Canada. The periphery would not receive everything it desires in terms of Senate reform, but these proposed alterations are an enormous improvement upon current conditions. From the perspective of native peoples, assured representation in the Senate would be a tangible and symbolic recognition of the status of Canada's natives as a founding people.

3. Aboriginal self-government

The meaning of Aboriginal self-government and the process by which it is to be achieved are filled with contention. I do not propose to attempt solution of those issues here; rather, I will only

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57 Cohen, supra, note 3 at 248-51. However, the Ontario offer was made by the former government of David Peterson. It is possible that Bob Rae's NDP government may not share this view, although there is no reason to suspect that the Rae government is opposed. Similarly, Nova Scotia's Conservative government has changed leaders, and thus, premiers, with the appointment of John Buchanan to the Senate.
sketch out a proposed relationship between self-governing Aboriginal peoples and the federal government of Canada.

Each of the treaty bands and any other newly recognized bands of natives could have representatives in a Council of the First Nations. That Council would act as a parliament with respect to matters of shared interest or jurisdiction among the various Aboriginal peoples. It would also have the authority to select the Aboriginal senators. In this way, there would be certainty that the Aboriginal peoples of Canada would have a direct voice in the Senate. It is, of course, also likely that one or more of the Senators from the Yukon or the N.W.T. would be natives.

No doubt there could be some other arrangement for selection of Aboriginal Senators. Indeed, the precise arrangements are necessarily dependent upon the nature of the self-governance provided to Canada’s Aboriginal peoples and the settlement of Aboriginal land claims. Since the land claims problems are largely within provincial jurisdiction, it is possible that some bold and imaginative steps by the existing central government might be necessary to resolve the claims, institute self-governance, and compensate the provinces in connection with the settlement of native land claims. The entire issue is much too complicated for solution in this forum. Let it suffice that, in order to address the aspirations of native peoples, the constitutional revision should assure a native voice at the centre and, at least, insure commencement of a process for producing native self-governance and land claims settlement.

4. Preservation of the Charter

One of the problems of the Meech Lake Accord was the fear that the "distinct society" clause would become a basis for differing judicial interpretation of the Charter in Quebec and the rest of Canada. Many persons otherwise sympathetic to Quebec's aspirations for greater autonomy and recognition opposed the Accord out of fear that the Charter would thereby be irretrievably weakened. Any new constitutional revision must account for this concern.
The advantage of the devolution described in this article is that it would deal with specific legislative powers entirely on the plane of the allocation of legislative authority between the central government and the provinces. In short, it would not require amendment of the Charter so much as it would require amendment of sections 91 and 92 of the Constitution Act, 1867. Thus, the Charter would continue to operate as an independent limit on the power of both Parliament and the provincial legislatures. This fact should not, however, arouse Quebec opposition to the scheme, for Quebec (and all other provinces) would continue to be able to take advantage of the notwithstanding clause to override the Charter when politically acceptable to do so. This represents, of course, no change from the present circumstance.

Zealous advocates of the Charter would probably prefer to eliminate the notwithstanding clause altogether, but that option is simply not possible in any scenario which seeks to keep Quebec in confederation. If the ultimate result is indeed la fin du pays and Quebec should leave, it is entirely possible that the Canada which remains might then rethink the continued existence of this override power. To propose such a step when there yet remains hope for unbroken confederation is simply not responsible.

5. The amending process

One of the many defects of Meech Lake was the process by which it was proposed and sought to be ratified. Conceived in secret and presented as a non-negotiable holistic constitutional unit, the Meech Lake Accord bore all the earmarks of a back-room deal from which the public had been excluded as irrelevant. Perhaps, because it dealt with constitutional revision after the Charter, the people tended to regard this process as suspect. If the Charter was the guardian of popular liberty, was it really appropriate for its amendment to be conducted by governmental elites acting in the secret and haughty tradition of executive federalism? If the process, though flawed, had produced an accord which deserved ratification, was it appropriate that the requirement of unanimity prevented its adoption? Unanimity is too difficult, perhaps impossible except with respect to the trivial. Constitutions are expressions of the popular
will and embodiments of the fundamental political aspirations of a people. It is thus not appropriate to modify them in the same way one might renegotiate the contract of a stellar athlete. It is necessary to include the people of the nation or their representatives in a fashion that is more than perfunctory.

In future, constitutional amendments might be adopted by the approval of both houses of Parliament by a super-majority of sixty to seventy per cent and ratification under the existing formula of two-thirds of the provinces, composing at least fifty per cent of the population of all provinces, or by ratification of three-fourths of the provinces without regard to population. The effect of the latter change would permit the periphery of the provinces to act together to institute constitutional change, even over the objections of Ontario and Quebec, assuming that the measure was popular enough within Ontario and Quebec to earn the approval of a sufficient number of central Canadian MPs in the House of Commons. To ensure that Quebec would agree with this formula, it would be necessary to retain the provisions of section 38 of the Constitution Act, 1982 which provide that provinces may opt out of constitutional amendments derogating from the legislative or other powers of the provinces. Moreover, it might also be necessary to retain the unanimity formula for amendments altering representation in the House of Commons, language, and the composition of the Supreme Court in order to protect all provinces, but especially Quebec, from invidious alterations of the frame of government at the hands of its fellow confederation partners. If this proposal should succeed, it would probably also be necessary to include the provincial legislative paramountcy principle as another aspect of the constitution requiring unanimity for amendment.

Amendments would continue to be proposed initially in any provincial legislative assembly or in either house of Parliament. To prevent the possibility of protracted and inconclusive debate on

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58 Constitution Act, 1982, supra, note 3, s. 38(1).

59 Ibid. s. 38(2): a province may expressly nullify any amendment, as to itself only, if it is an amendment "that derogates from the legislative powers ... or any other rights or privileges of the legislature or government of a province."

60 Ibid. s. 46(1).
proposed amendments, the present three year time limit should be preserved, triggered by the first to occur of approval by both houses of Parliament or the first provincial legislature to propose an amendment. A shorter limit would be unduly restrictive upon amendments arising in the provincial legislatures, for it would take more time for the provinces to marshal support in Parliament and other provinces for amendments originating from the "grass roots" than from Parliament.

It might be prudent to consider modification of the amending formula in another respect. The current provision requires consent by "the legislative assemblies of ... the provinces." Given the strong party discipline that characterizes Canadian parliamentary government, the present requirement is a practical invitation for amendment by negotiation of constitutional change at secret convocations of the first ministers. As Eugene Forsey declared, the Meech Lake process has demonstrated that the "whole process of constitutional amendment is wrong: out of date, undemocratic. The Constitution belongs to the people, not the politicians. It is the people, not the politicians, who should decide what goes in, what stays in, what goes out." Forsey recommends the Australian process, which requires a proposed amendment to receive a majority of each house of Parliament, a majority of all electors nationwide, and a majority of the electors within a majority of the states. However, as Forsey acknowledges, modification of the Australian process is essential to address the uniquely Canadian circumstance.

The principle of a popular referendum, both nationwide and within each province, could easily be adopted as a mechanism that

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61 Ibid. s. 39(2).
62 Ibid. s. 38(1)(b).
64 Ibid. at 223.
65 Australia Constitution Act, supra, note 52, s. 128. For a discussion of the operation of this provision, see Lumb & Ryan, supra, note 52.
66 Forsey, supra, note 63 at 223.
ensures popular involvement and approval. Another means to do so could be a constitutional requirement that any vote in Parliament or a provincial legislature concerning a constitutional amendment must be a free vote. By some such mechanism, the iron party discipline that makes executive federalism work would be broken. The Meech Lake experience suggests that it should be. Quebec should not be antagonistic to this formula, so long as the requirement of unanimity prevails with respect to the items that are essential to preservation of Quebec autonomy.

Of course, under the existing amending formula, unanimity is required to alter the amending formula itself. The reality is that if any major constitutional change is to occur, sufficient to keep Quebec in confederation at a price acceptable to the remainder of Canada, it will only occur by unanimous consent. With that as the precondition for constitutional reconstruction, there is no reason to eschew alteration of the amending formula simply because unanimity is required.

6. Some concluding thoughts on devolution

The constitutional revision outlined here is one that is not likely to please passionate centralists such as Pierre Trudeau. The (perhaps unhappy) truth, however, is that Trudeau's vision of a strong central government will not come to fruition in a bilingual nation. It is ironic that, as will be discussed in the next section, there is perhaps more hope for that vision in each of the unilingual nations—Quebec and Canada—which may result from a rupture of confederation.

However, centralists need not regard these devolutionary arrangements with unmitigated distaste. There is nothing in this proposal which coerces, or even encourages, provinces to exercise paramount authority within the zone of concurrent legislative authority shared with the central government. If the people of any given province prefer Ottawa's legislative solutions, they need only elect a provincial government committed to that point of view. Indeed, the possible use of the provincial paramountcy power would likely operate as a salutary curb upon the temptation of the central government to adopt policies sufficiently inimical to the best
interests of the provinces as to trigger contrary provincial legislation. If it turns out that every province except Quebec prefers Ottawa's legislation, there is no reason to expect that the provincial paramountcy power will in fact radically alter the present allocation of actual legislative authority.

When Sir John A. Macdonald dreamed of a post-confederation Canada, he saw it in terms of a strong central government; when Pierre Trudeau dreamed of a truly bilingual Canada, he saw it in terms of a strong central government. Macdonald's dream was partially realized; so, too, is the likely fate of Trudeau's dream. The consolation for both may be the survival of confederation. That is no small consolation, for so long as confederation's life continues there is always another night for the next installment of the dream. Perhaps by granting Quebec and the other provinces room to experiment, the ultimate result will be a mutual recognition that each province's advantage is best secured by collective action.

B. Devolution After Disunion

If Quebec does separate, it will be a painful rupture. There may be euphoria in Quebec, and even among those of ill-will or ignorance in the remainder of Canada, but before long there will be a sense of loss, probably felt more deeply in Canada than Quebec. After all, the history of les habitants is also a part of the heritage of Albertans as well as les Québécois. In that mourning will come reflection, re-evaluation, and, ultimately, change. If the failure to preserve confederation will have been due in part to Canada's unwillingness to accept a substantially more decentralized federal union, there is little reason to assume that Canadians will change their minds on this point when it no longer matters. Accordingly, it is far more likely that a Canada without Quebec will assume an even more centralized shape, acquired in part to assure that the Canada which remains does not fracture further.

67 See supra, note 9.
Additional centralization in Canada without Quebec cannot occur simply because Ontario might deem it desirable. In order for more authority to vest in Ottawa, it will be essential to respond to the concerns of the periphery: Atlantic Canada, the West, and the North. As we have seen, these regions desire a larger voice at the centre. Smarting from the wounds of one rupture, Ontario would likely regard it essential to accommodate the desires of the periphery. Having done so, it is entirely possible that the notwithstanding clause would disappear from the Charter, the constitutional amending formula would be altered to make amendment easier, and such foreign inventions as the direct legislative initiative might creep into Canadian politics. The counterweight to centralization would likely be greater popular accountability of legislators. Thus, it is not unthinkable that a Canada without Quebec might develop weaker party discipline, reflecting greater popular accountability of MPs directly to their constituents, independent of the party caucus. An unlikely extreme might even be the ultimate abandonment of the parliamentary system, replaced instead by the American troika of a directly elected chief executive, bicameral legislature, and Supreme Court wielding with finality the power of constitutional judicial review. If this prospect is too awful for Canadians to contemplate, perhaps it is wise to think of the possibility now, while there is still time to achieve rapprochement with Quebec.

IV. CONCLUSION

One central fact of political union is that some regions or groups within a nation will tend to dominate the political process, sometimes to the point that a disproportionate share of the benefits of political union will be captured, leaving less politically adept regions and groups with a disproportionate share of the social and economic costs of the captured benefits. When these pressures become unbearable, political fission results, offering the possibility of a dramatic alteration of the previously inequitable arrangement.

In those societies where political dominance by a segment of the whole is not so clear or the arrangements equitable enough to secure continued adherence to the nation, these pressures are containable and do not lead to rupture. Indeed, there are even
cases where nations perceive their individual lots to be bettered by union with other nations. Though it may seem paradoxical, precisely that phenomenon is occurring within the European Economic Community (EEC), as internal barriers to the movement of people and goods collapse in 1992. This political fusion is an economic one, motivated by a desire to rationalize a continental economy that already exists. A similar desire brought Americans together in Philadelphia in 1787, and the resulting American federal union, at least in its original intended form, was much closer to the economic union being forged by the EEC than today’s highly centralized United States, where the congressional power to regulate interstate commerce, for example, has become a plastic device to regulate virtually any aspect of American life. The EEC would do well to stop with economic union and let the diverse societies of Europe reach different conclusions on other aspects of life. The United States Congress might also contemplate the institutional pressures created by continuation of its passion for national regulation of increasing aspects of life. Though state sovereignty has a bad historical pedigree in the American experience, that alone cannot contain the pressures created by ignoring local desires with respect to local problems.

Securing local control over local issues requires governmental structures that vest considerable autonomy in local units of government. Moreover, exercise of the powers of the central government ought to be conditioned in some fashion upon the consent of the internal constituent groups of the nation. Through the current unrest in federal systems around the world, we will see new solutions being tried. Whether such solutions are as radical as secession or as mild as supermajority voting requirements for central government action, they are all occasioned by the simple and eternal desire for greater human autonomy. Governments often forget and need continuously to be reminded that they are the servants, not the masters, of the people.

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68 See Perez v. United States, 402 U.S. 146 (1971), establishing that Congress may regulate any class of activity under its commerce power, so long as it has made a rational judgment that the regulated activity “affects” interstate commerce; Wickard v. Filburn, 317 U.S. 111 (1942), holding that Congress possessed authority under its commerce power to regulate the amount of wheat grown for one’s personal consumption.
The Canadian crisis is as much one of federalism as it is of culture and language. For a bilingual, bicultural confederation to continue, it is necessary to devolve power from the centre to the provinces. The trick is to do so in a fashion that will simultaneously achieve political acceptance throughout Canada and will not weaken the bonds of union, permitting the constituent elements of the Canadian federal system wholly to depart from their orbits.

I have sketched out such a formula, the essence of which is the identification of those powers of government which must remain exclusively central and the granting of all other powers concurrently to the central government and the provinces, with the explicit recognition that in cases of conflict the provincial legislative choices prevail. Exclusively federal powers are those which are so susceptible to the externalities problem that they must be removed from the temptation of local politicians to manipulate them for local gain produced at a cost borne by others. Additional elements of the formula are provision of a greater regional voice in the centre, through senate reform (though not of the variety desired by the Reform Party), aboriginal self-governance and representation of both the native peoples and the territories in the Senate, and alteration of the amending formula to make constitutional amendment both easier and more controllable by the people's immediate political representatives. Whether this will prove efficacious is, of course, wholly unknown. The risks are high; the consequences of miscalculation enormous.

In another context, following the 1980 sovereignty referendum, a defeated René Lévesque could only murmur "a la prochaine." This may be the last time to preserve a united Canada. It is a moment which must not be squandered.

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69 Cohen, supra, note 3 at xi.