

CAN CANADA SURVIVE THE *CHARTER*?

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*Professor Taylor begins his analysis of Canada's current constitutional crisis by discussing two long-standing "existential" questions: why should Canada exist, and why should Quebec be part of Canada? The contradictory answers to these questions reflect contradictory understandings of the nature of rights, as reflected in the debate over the Charter of Rights and Freedoms. Professor Taylor traces the roots of this debate in differing philosophical views of the nature of liberalism. He concludes by proposing a new kind of confederation in which these differing views could be accommodated.*

*Le professeur Taylor commence son analyse de la crise constitutionnelle canadienne actuelle en traitant de deux questions «existentielles» de longue date: pourquoi le Canada devrait-il exister, et pourquoi le Québec devrait-il faire partie du Canada? Les réponses contradictoires reflètent la nature de notre compréhension des droits, comme l'indique le débat portant sur la Charte des droits et libertés. Selon le professeur Taylor, ce débat a ses origines dans des perceptions philosophiques différentes de la nature du libéralisme. Il conclut en proposant un nouveau type de confédération, où ces points de vue divergents pourraient coexister.*

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## I. INTRODUCTION

I apologize for my somewhat over-dramatic attention-grabbing title. If Canada breaks up, it won't be the *Charter* which does it alone, or even mainly. But I think the *Charter* has come to play an important role in the estrangement between the two parts of the country, especially among political elites, and it is worth trying to understand what is happening here.

In order fully to grasp what is going on, I think, we have to place the differences about the *Charter* in the context of the long-standing series of Canadian misunderstandings, the long struggle between French Canada and the rest of the country over a definition of Canada as a political entity. In a way, the divergences about the *Charter* constitute only the latest avatar of a running disagreement or misunderstanding which has plagued our federation from its beginning (or even before).

The disagreement emerges whenever we really face the question: what is a country for? That is, what ought to be the basis of unity around which a sovereign political entity

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can be built? This is a strange question, in a way; it is not one that would likely be asked in many countries. But it arises here because there are alternatives and, therefore, a felt need for justification. These alternatives exist for us — that is, in our understanding of our situation — even when they are not very likely, when they enjoy minimal support and are hardly in the cards politically. They can still exist as a challenge to self-justification, because they existed historically, and we retain the sense that our prevailing arrangements emerge out of a choice which excluded them.

## II. WHY CANADA?

In Canada-outside-Quebec (COQ)<sup>1</sup> the alternatives are two: the country or bits of it could join, or could have joined the U.S.; and the bits could also have failed to join together — and indeed, could one day deconfederate again. So there are two "existential" questions for COQ which we can call the unity and distinctness questions respectively. For Quebec, there is one big question, which is too familiar, and too much on the agenda today to need much description. It is the issue whether to be part of Canada or not; and if so, how. I stress that neither of the "existential" alternatives may be strong options in COQ today, but that doesn't stop them functioning as reference points for self-definition, as ways of defining the question: what do we exist for? In a sense the existential questions of the two societies are interwoven. Perhaps COQ would not feel the need for self-definition to anything like the same degree if Quebec were not contemplating answering its existential question in a radical form. But once the country's existence is threatened in this way, all the suppressed alternatives rise to the surface in the rest of Canada, as well.

So what are the answers? It will be easier to set out the problem by taking "English Canada" first. The answer here used to be simple. Way back when it really fitted into our official name of British North America, the distinctness question answered itself; and unity seemed to be the corollary of the drive for distinctness in the face of the American colossus. But as the Britishness, even "Englishness," of non-Quebec Canada declines, this becomes less and less viable as an answer. We are all the Queen's subjects, but this seems to mean less to fewer people; and more awkwardly, it means quite a bit to some still, but nothing at all to others, and thus cannot be the basis of unity.

What binds Canada together outside Quebec is thus no longer a common provenance, and less and less a common history, but political institutions and ways of being. This is not a total break from the old identity, because Britishness also defined itself largely in terms of political institutions: parliamentary government, a certain juridical tradition, and

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<sup>1</sup> In Quebec we speak blithely of "English Canada," but the people who live there do not identify with this label. We need a handy way of referring to the rest of the country as an entity, even if it lacks for the moment political expression. In order to avoid the clumsy three-word hyphenated expression, I plan to use "COQ" henceforth in this paper. I hope the reader will not take this as a sign of encroaching barbarism or Québécois self-absorption (although it might partake in small measure of both).

the like. The slide has been continuous, and without a sharp break from the old to the new. There are even certain continuing elements, but the package is different.

Canadians feel that they are different from the Americans, because (a) they live in a less violent and conflict-ridden society. This is partly just a matter of lucking out. We do not have a history which has generated an undeclared, low-level race war continuously feeding itself in our cities. But it is also a matter of political culture. From the very beginning Americans have put a value on energetic, direct defense of rights, and therefore they are ready to mitigate their condemnation of violence. There is more understanding of it south of the border, more willingness to make allowances for it. And this has something to do with the actual level being higher there, as well as with a number of strange penchants of American society, such as that expressed in the powerful lobby for personal firearms. Canadians tend to put more value on "peace, order and good government." At least, this is how we see ourselves, which is perhaps what is important for our purposes; but there seems to be some truth in the perception.

As a consequence, there is more tolerance here of rules and restrictions which are justified by the need for order, more of a favourable prejudice (at least in English Canada), a free gift of the benefit of the doubt, to the police forces. Hence the relative absence of protest when the *War Measures Act* was invoked in 1970; hence also the strange reluctance of the Canadian public to condemn the RCMP, even after all the revelations of its dubious behaviour.

We might add that the Americans' tolerance of conflict extends into the domain of law, as well. They are more litigious than we are. They think that's a good thing, that it reflects well on them. No one should take any guff from anyone. We tend to deplore it. From an American point of view, we seem to have an endless appetite for guff. But perhaps the long term effect of the 1982 *Charter* will be to diminish this difference.

Related to this first point, Canadians (b) see their political society as more committed to collective provision, over against an American society which gives greater weight to individual initiative. Appeals for reduced government can be heard from the right of the political spectrum in both countries, but the idea of what reduced government actually means seems to be very different. There are regional differences in Canada, but generally Canadians are proud of and happy with their social programs, especially health insurance, and find the relative absence of these in the U.S. disturbing. The fact that poverty and destitution have been left to proliferate in American cities as they have during the Reagan years is generally seen here as a black mark against that society. Canadian practice may be not as much better as many of us believe; but the important point is that this is seen as a difference worth preserving.

(a) (Law and order) and (b) (collective provision) help to answer the distinctness question. They explain why we are and want to remain a distinct political unit. But what answers the unity question? Why be a single country, and what common goals ought to animate this country? In one sense, (a) and (b) can serve here as well, if one thinks (as

many Canadians instinctively do) that we need to hang together in order to maintain this alternative political culture as a viable option in North America. And then (b) can be logically extended into one of the principal, declared common objectives of the Canadian federation in recent decades: (c) the equalization of life conditions and life chances between the regions. The solidarity of collective provision, which within each regional society generates such programs as medicare, can be seen as finding its logical expression in a solidarity of mutual help between regions.

And so Canadian federalism has generated the practice of large-scale redistribution of fiscal resources through equalization payments, and attempts have been made at regional development. This, too, contrasts with recent American practice and provides a further answer to the distinctness question. We perhaps owe the drive to equality to the fact that we have been confronted with existential questions in a way that our neighbours have not since 1865. The Canadian federal union has been induced to justify itself, and greater inter-regional solidarity may be one of the fruits of this underlying *angst*.

But this bonding principle has also been a worrying source of division, because it is widely seen as a locus of failed aspirations and disappointed expectations. The principles of regional equality and mutual help run against a perceived reality of Central Canadian domination in the outlying regions, a grievous mismatch of promise and performance. Recently it has become clearer that the disappointment takes two rather different forms, reflecting different ideas of regional equality. A source of disappointment in some parts, mainly Atlantic Canada, is the failure of federal programs actually to improve regional economic standards. The failure is one of mutual help. Elsewhere, mainly in Western Canada, the sense of grievance is mobilized around neglected interests: the regions are not listened to, their interests are ridden over roughshod by a dominant Central Canada. The failure is one of balance of power. In one version, the implicit contract which is seen as unfulfilled calls for redistribution to poorer regions. In the other version, it calls for a redress of power and influence in favour of the regions with less demographic and economic clout. In one case, the implicit promise is of equalized incomes; in the other it points to more equalized power between regional societies.

It is clear that this issue of regional equality is a very troubled one in Canada. That's because on one hand it is an indispensable part of the answer to the unity question, while on the other it seems to many so largely unrealized, and on top of it all, we agree less and less on what it actually means.

But even if things were going swimmingly in this domain, we still would not have a full answer to the unity question. "English" Canada has been becoming more and more diverse, less and less "English," over the decades. The fact that it has always been an immigrant society, i.e. one which functions through admitting a steady stream of new arrivals, on top of the fact that it couldn't aspire to make immigrants over to its original mould, has meant that it has *de facto* become more and more multicultural over the years. It could not aspire to assimilate the newcomers to an existing mould, because this was originally British, hence ethnic. In the United States, which has always operated on a

strong sense that it incarnates unrivalled political institutions, the drive to make everyone American could proceed apace. It was never as clear what the Canadian identity amounted to in political terms, and insofar as it was conceived as British, it couldn't be considered normative for new arrivals. First, it was only the identity of one part of the country, and second, it couldn't but come to be seen as one ethnic background among others.

Canadians have seen their society as less of a melting pot than the U.S.A., and there has been some truth in this. In contrast to the neighbour society, people have spoken of a Canadian "mosaic." So this has even become for some a new facet of their answer to the distinctiveness question, under the rubric of (d) multiculturalism. This is also far from trouble-free. Questions are being posed in both the major cultures about the pace and even goals of integration, or assimilation of immigrants into the larger anglophone or francophone society. This is particularly troubling in Quebec which has much less of a historic experience of assimilating immigrants and a much higher proportion of whose francophone population is *pure laine*.

This makes even more acute the need for a further point of unity, a common reference point of identity, which can rally people from many diverse backgrounds and regions. In a quite astonishing way, (e) the *Charter of Rights* has come to fill this role in English Canada in recent years. It is astonishing, because nine years ago it didn't exist. Nor was there that much of a groundswell of support demanding its introduction before it became a bone of contention between federal and provincial governments in the run-up to the patriation of 1981-82. But the Meech Lake debate showed how important it has become in COQ not just as an additional bulwark of rights, but as part of the indispensable common ground on which all Canadians ought to stand. For many people, it has come in the space of a few years to define in part the Canadian political identity.<sup>2</sup> And since in COQ the national identity has to be defined in terms of political institutions for reasons rehearsed above, this has been a fateful development.

### III. WHY QUEBEC?

How about Quebec? How can it go about answering its existential question? The terms are very different. In Quebec, there isn't a distinctness issue. The language and culture by themselves mark us off from Americans, and also from other Canadians. Much of (a) to (e) is seen as a Good Thing in Quebec. (a) People do not compare themselves a lot with the U.S., but there is no doubt that Quebecers are spontaneously on the side of law and order, and are even more horrified by internecine conflict than other Canadians. The FLQ utterly and totally relegated themselves to irrecoverable history as

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<sup>2</sup> Alan Cairns has written very insightfully on this development. See in particular his "Constitutional Minoritarianism in Canada" in R.L. Watts and D.M. Brown, eds., *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990) 71; and "Ritual, Taboo and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style" (1990) 54 *Sask. L. Rev.* 121.

soon as they murdered Laporte. The present rather halfhearted attempts to romanticize their escapades on the 20th anniversary of the October crisis should not mislead in this regard. The reaction to the massacre at Polytechnique is also eloquent on this score. Quebec society reacted more like a wounded family than like a large-scale, impersonal political unit. (b) It goes without saying that people are proud of their social programs in the province, and want to keep them. (d) Multiculturalism is more problematic. As a federal policy, multiculturalism is sometimes seen as a device to deny French-speaking minorities their full recognition, or even to reduce the importance of the French fact in Canada to that of an outsize ethnic minority. And within Quebec itself, the growing diversity of francophone society is causing much heartburn and anxiety. (c) Regional equality is generally supported in Quebec, and even (e) the *Charter* was very favourably seen until it came to be perceived as an instrument for the uniformization of language regimes across the country. Even now its other provisions are widely popular.

But these factors do not go very far to answer the question, "what is a country for?" There is one obvious answer to this question, which has continued down through the decades for over two centuries: (f) you need a country to defend and promote the nation. The nation here was originally "la nation canadienne-française." Now without entirely abandoning the first formulation, it tends to be put as "la nation québécoise." This does not betoken any change in ethnic identity, of course. It reflects rather a sense which presents itself as realistic, but may be too pessimistic, that the really survivable elements of "la nation canadienne-française" are only to be found in Quebec.

But the real point here is that (f) makes the survival and flourishing of this nation/language one of the prime goals of political society. No political entity is worth allegiance which does not contribute to this. The issue, independent Quebec versus remaining in Canada, turns simply on different judgements about what does contribute to it. Put in terms of a possible formula for Canada, this means that from a Quebec perspective, (a) to (e) may be attractive features, but the absolutely crucial one, that Canada must have to possess a *raison d'être*, is that it contribute to the survival and furtherance of la nation canadienne-française.

This means in practice some kind of dualism. It was this, of course, which successive Quebec leaders always gave expression to when they described Canada as a pact between "deux nations" or "deux peuples fondateurs." Dualism in turn had to exist at two levels. (1) It meant that French had to be recognized as a language along with English in the federation. That is, French had to be given a status clearly different from that of an ethnic immigrant language, even if it were the most important among these. And (2) "la nation canadienne-française," or its major part, had to have some autonomy, some ability to act as a unit. Both these features were built to some degree into the original Confederation pact, but in the case of (1) in partial and somewhat grudging form. (1) and (2) are separate requirements, but also in a sense related. There is a certain degree of complementarity, in that the more freely and completely (1) is granted, in theory the less the need will be felt for autonomous action. It is perhaps the tragedy of Canada that (1)

was eventually granted too late and too grudgingly, and that this established a high and irreversible pattern of demands on (2).

Both these requirements have been a source of difficulty. The extension of (1) beyond its original limits raised a problem because COQ in its developing multiculturalism was naturally led to accord English the status of a common language, and to split language from culture. That English was the main language was not meant to imply that people of English descent had privileges or were somehow superior. The hegemony of English had to be justified in purely utilitarian terms. Within this framework, the case for putting French alongside English was impossible to make. Outside Quebec, a special status for French was rarely justified by numbers, and certainly not by its indispensability as a medium of communication. It seemed like indefensible favouritism.

Secondly, both (1) and (2) met with resistance because of a perceived difference of Quebec from the values of the rest of Canada. This starts off as a dark prejudice in the mind of Orange Protestants, but it continues on in many another milieu because of the supposed appeal of illiberal modes of thought in Quebec. In particular, this militated against further concessions in the area of (2).

It has been one of the remarkable achievements of the last 30 years, and particularly of the Trudeau government, to have established (1) almost integrally. There has been a certain cost in resentment in some areas, and this may be fateful in the forthcoming negotiations. I shall return to this below. But there is no doubt that a big change has been brought about. On (2) as well, great progress has been made. First, the Canadian federation has proven a very flexible instrument, giving lots of powers to the provinces. And secondly, where Quebec's needs have been different from the other provinces, a large *de facto* special status has been developed. Quebec has its own Pension Plan, levies its own income tax, has a special immigration regime, and so on.

But where things have blocked is on the recognition of this. Giving Quebec the autonomy it needs without disbalancing the Canadian federation would involve giving Quebec a different kind of relation to the federal government and institutions. Although this has been worked *de facto* to a remarkable extent, there are powerful resistances to according it recognition in principle. This is because there is a deep clash of purpose between the two sides of Canada. Where the old clash of values seems to have disappeared, a new conflict of purposes, of answers to the question, "what is a country for?" has surfaced.

The demands of (2), of a special status for Quebec, run against those of regional equality (c) as these are conceived by many in COQ, and against a widespread understanding of the *Charter* (e). (c) has come to be defined for some as entailing an equality of the provinces. The great moral force of the principle of equity between regions has been mobilized behind the rather abstract juridical issue of the relative constitutional status of provinces. Now regional equity seems to be flouted if all

provinces are not placed on the same footing. But a special status can be presented as a breach in this kind of equality.

More grievously, the special status for Quebec is plainly justified on the grounds of the defence and promotion of la nation canadienne-française (f). But this is a collective goal. The aim is to ensure the flourishing and survival of a *community*. Now the new patriotism of the *Charter* has given an impetus to a philosophy of rights and of nondiscrimination which is highly suspicious of collective goals. It can only countenance them if they are clearly subordinated to individual rights and to provisions of non-discrimination. But for those who take these goals seriously, this subordination is unacceptable. The *Charter* and the promotion of the nation, as understood in their respective constituencies, are on a collision course. The reactions to Bill 178 and much of the Meech Lake debate were eloquent on this score.

This difficulty arises with (2), where it didn't for (1). The provisions for bilingualism in federal legislation can be justified in terms of individual rights. They concern the guarantee that francophones can be dealt with and obtain government services in their language. Once French is given this status along with English, what is protected is the rights of individuals. The collective goal goes beyond this. The aim is not only that francophones be served in French, but that there still be francophones there in the next generation; this is the objective of (f). It cannot be translated into an assurance of rights for *existing* francophones. Indeed, pursuing it may even involve reducing their individual freedom of choice, as Law 101 does in Quebec, where francophone parents must send their children to French-language schools.

So the two halves of Canada have come onto a collision course because of the conflict between their respective answers to the question "what is a country for?" In particular, a conflict between (c) regional equality as widely understood and (e) the *Charter* as a symbol of unity on one hand, and (2) Quebec autonomy on the other. But before examining a bit more closely how this conflict works out in the case of the *Charter*, I want to look a little at the history of our national misunderstanding in order to see what is special about the present conjuncture.

#### IV. WHY NOW?

For one might well ask, why the collision course now? Surely the old "English" Canada, before the legislation about bilingualism and the Trudeau revolution, was even more inhospitable to the demands of Quebec. It balked not only at (2), but at (1) as well. Moreover, it penetrated much more within Quebec. In those days, the English minority, backed often by the federal government or pan-Canadian institutions like the CPR, maintained its own English-only forms of operation, excluding or marginalizing or downgrading the French language. Why didn't things fly apart then?

The answer is that separation did not seem a realistic option back then for all sorts of reasons. It started with a clear-sighted appreciation of the relation of forces, and a sense



of what the English Canadian majority would tolerate. There was also a greater commitment to the francophone minorities outside the province than there now is. But an extremely important factor was the restricted economic role of French Quebecers. The English still had a preponderant role in the economy. Big business spoke English; anglophones dominated the ranks of management and had more than their share of certain key economic professions like engineering. This was a source of grievance on many levels. In particular, it was what permitted English to arrogate to itself a place in the province which demographics would never justify. For instance, to take just one kind of instance, before the Quiet Revolution, again and again, union leaders would have to bargain in English with management on behalf of a work force which was 100% francophone. But at the same time, that imbalance contributed to a climate in which Quebec society felt incomplete, in which essential functions were being filled by outsiders. The relation was never articulated in this way at the time, but it helped to keep the option of a total break off the agenda. Separation wasn't a real option before 1960, even though it seems to have been toyed with as an eventual long-term destination by Abbé Groulx.

Paradoxically, as some of the most crying grievances were resolved, as the insulting and sometimes threatening marginalization of the French language was reversed, as francophone Quebecers began to take their full place in the economy, at first through the public and para-public sectors (e.g. Hydro-Québec) and then the private sector, precisely in the wake of all these successes, the demand for independence gained strength; until it became one of two major constitutional options, on a par with its federalist rival, and since Meech even ahead. And all this while outside Quebec at the federal level, bilingualism is advancing and Quebecers wield more power than ever before. These are the years of "French Power." Some westerners have the feeling that the federal government is run by Quebecers. Why does break-up loom now? How is this paradoxical and even perverse result to be explained?

Part of the answer, implicit in the above, is that now for the first time the option looks conceivable, possible, even safe. In this regard, even the last decade has seen a change. In 1980, most Quebecers still found sovereignty a somewhat frightening prospect. The referendum revealed that clearly. In 1990, this no longer seems to be so. A great deal of the difference seems to stem from the now perceived high-profile place of francophones as big players in our economic life. This change has been happening over a number of decades, but as is the way with media-driven public perceptions, the realization has come all in a rush. And with this realization, a great flush of confidence. As often with these media-driven perceptions, we go easily from one exaggeration to another. Quebecers were not as powerless before as they thought, and they are not as powerful now as they think. Separation risks being much more economically costly than they now believe, even as it would have been less catastrophic than many thought in 1980. And we may even be in for another swerve of opinion as the present recession dims expectations. But the basic change is undeniable. Separation is really thinkable.

But that can't be the whole explanation. To claim this would be to say that Quebecers never really wanted anything else, that they were just waiting for the moment when they

could dare go for it. And nothing could be more false than that. Francophone Quebecers are attached to this country by a great deal: first of all, the sense that the larger entity was the home of la nation canadienne-française, whose whole extent included more than Quebec; then a certain attachment to a constitutional home which had become familiar, and which their leaders had had a hand in building. But what was always missing was a genuine patriotism for Canada. That kind of sentiment was reserved for la nation canadienne-française. It has lately been transposed onto Quebec, as the viable segment of that nation, but never managed to spread from there onto the whole political unit. That is why people have often spoken of Canada as being for Quebecers a *mariage de raison* (marriage of reason). This somewhat understates the case, because it doesn't take account of the multiform attachment to Canada I have just described, but it is emotionally true in the negative sense that a genuine patriotism for a bilingual, two-nation Canada never developed.

But this by itself still does not explain the strength of the independentist option today. After all, if Canada was a *mariage de raison*, why abandon it when it has never been so reasonable, when the deal seems the most favourable ever? Of course, many federalist Quebecers are pleading the cause of Canada today in just these terms. But why does it not have more success? Why are even those who are making the plea profoundly ambivalent about it?

Here one can easily be misled, because the opponents of these partisans of "profitable federalism" seem to want to engage them on their own ground, and strive to prove that confederation is a bad deal for us. But in fact, the emotional drive behind independence is elsewhere. It is much more a failure of *recognition*. For decades, Quebec leaders explained that Confederation was a pact between two founding peoples, two nations. This was never the way the matter was understood outside the province. But the claim was not so much to the effect that this was the plain sense of the confederation pact, somehow perversely forgotten by the others — although that is how it was often put. It was much more an expression of the profound sentiment that this was the only form in which Confederation could be ultimately acceptable to French Canadians in a way which could engage their hearts and respect their dignity.

In reality it was necessary to live with compromises, in which the duality principle got a rather limited and grudging expression. It was necessary to operate in a country which for many purposes was run much more as a nation with one hegemonic culture, with more or less generous provision for minorities on a regional basis. Present-day Canadians, some of whom still may want to complain about the number of languages on their corn flakes boxes, have no idea of how exiguous the place of French was in the bad old days. In the '30s even the money was still unilingual English.

Canada had to be accepted, but never so as to engage the heart or respect dignity. It could not be accepted "dans l'honneur et l'enthousiasme," to use the phrase which has been so often repeated during the drama of Meech Lake. Below the rational acceptance of the *mariage de raison*, these denials bite deep. This is easy to lose sight of, because those

who are frustrated in their desire for recognition understandably do not want to present their case in those terms. It is only when one is recognized that one is happy to avow the desire. So the phrase "dans l'honneur et l'enthousiasme" emerged when it looked as though that aspiration was at last met. But when it is denied, the opponents of federal Canada will pretend that no one was ever interested in mere symbols, that the calculus of independence is made in the realistic terms of power and prosperity, that the attitudes of the English-Canadian partner mean nothing to us. In all this, they do protest a little too much.

The present strength of independentism is thus due in part to the new confidence of Quebeckers, in part to the fact that Canada never gelled as a nation for them, but in large part it is due to the continued denial of their understanding of Canada, of the only terms on which it could have been fully accepted by them. These were articulated, among other forms, in the "two-nations" view of the country. Of course, this was unacceptable as it stood to the rest of the country, which did not itself feel like a "nation." Here there was an attempt by French-Canadians to foist a symmetrical identity on their partners. And this attempt is not yet abandoned, as one can see from much of the discussion in Quebec today, to which I will return below. But there was a basic demand which could be extricated from this presumptuous definition of the other. This was the demand that la nation canadienne-française be recognized as a crucial component of the country, as an entity whose survival and flourishing was one of the main purposes of Canada as a political society. If this had been granted, it wouldn't have mattered how the rest of the country defined itself.

In practice, the country has come to arrange itself not at all badly for this purpose, through federal bilingualism, through advances made by some French-speaking minorities elsewhere, and through a *de facto* administrative special status for Quebec. But what was missing was a clear recognition that this was part of our purpose as a federation. This is why Meech Lake was so important, and why its failure will have such dire consequences. If one just listens to what people say in Quebec, this can seem strange. Lots of Quebeckers never even admitted that they were in favour of Meech, or expressed lukewarm support. Basically, all the independentists took this line. Those who were sceptical about English Canada hedged their bets and never wanted to allow that the recognition mattered to them. But the depth of the reaction to its demise shows how little this represented how they felt.

Meech was important because it was the first time that Canada was writing into a statement of what it was about a recognition of Canadian duality and the special role of Quebec. The fact that the accord conferred no additional powers largely narrowed its significance to this one clear declaration of intent. The importance of this declaration can be understood only in the light of the years of non-recognition, of the *mariage de raison* that failed to engage the heart and reflect dignity. It can be understood in the context of a present generation which is quite free of the timidity of its ancestors before a possible break, which is even a little surprised, sometimes a trifle contemptuous of its predecessors, for having put up with non-recognition for so long. And its refusal when

it was no more than a declaration of pure intent takes on fateful significance. (That's the point of the oft-repeated phrase that Meech constituted our "conditions minimales.")

With the demise of Meech, something snapped. I think it can be rather simply described. Quebeckers will no longer live in a structure which does not fully recognize their national goals. In the early '80s, after the defeat of the "yes" in the referendum, many toyed with the idea of accepting the *mariage de raison* and making a go of it with or without recognition. The new confidence could also have motivated this rather different stance, which marginalized the issue of recognition. After all, if you know your own worth, why do you need the other? But in a sense, Meech wiped out this possibility, just because it raised the hope of recognition. And now we are irretrievably on another track. (Not that I think the "reasonable" track could have lasted very long anyway; it was always at the mercy of some new development.)

What remains to be explained is the extraordinary euphoria which all observers noted among the crowds celebrating Quebec's national holiday, St. Jean Baptiste Day in 1990. Why did Quebeckers feel so united, and so relieved at being united, almost as though the demise of Meech had taken a great weight off them? I think it's because the long division and hesitation, between the "reasonable" acceptance of a structure which did not recognize them and the insistence on having their national purposes openly accepted, had at last been resolved. This was felt as a division between Quebeckers, and especially painfully at the time of the 1980 referendum, when families were often split. But is also divided many Quebeckers within themselves. At last the long conflict, the long hesitation, the long ambivalence was over. Quebeckers were clear on what they wanted to ask of any future political structure on the northern half of this continent. Consensus was recovered, but also a kind of psychic unity. A certain kind of compromise was forever over.

But what does this mean for the future? It means that demand (2) has become imperious and virtually non-negotiable. And this brings a real danger of breach between the two parts of the country. For it follows that Quebeckers will not accept any structure in which their collective aspirations are not fully and overtly recognized. Already this is expressing itself in the requirement that negotiation be one-on-one, because this is felt to reflect in itself the acknowledgement of Quebec's status as a distinct society. But all this is happening at the moment that COQ's newfound *Charter* patriotism is making it less capable of acknowledging the legitimacy of collective goals and as regional alienation is lending further strength to the principle of the equality of provinces. The common ground seems to be shrinking fast.

## V. RIGHTS AND NATIONS

From the above discussion we can see that the impact of the *Charter* on our impending potential break-up fits into an already distressingly familiar pattern. What Quebec or French Canada has felt to be essential to its recognition seems in COQ to violate one of the conditions of national unity on a fair basis. Just as bilingualism seemed to many an

unconscionable favouritism to one minority language, just because they saw Canada as a multicultural mosaic united around a lingua franca, English; so the recognition of collective goals for one province seems to violate the status of the *Charter* as the framework of rights enjoyed equally by all Canadians. And in fact the anti-Meech majority in COQ brought together these two kinds of opposition under one roof, even though many *Charter* patriots had been vigorous and courageous defenders of bilingualism.

But do we have to fight over the *Charter*? Is it all perhaps based on a misunderstanding? It is time to delve into the philosophical and political sources of the dispute.

At first sight, it might appear that the disagreement could have been avoided. Those who drafted the *Charter* were aware of the complexity of the Canadian political scene. They tried to strike a balance between individual rights and collective goals. The *Charter* not only entrenches the internationally recognized list of immunities, it also deals with language rights, which although they do not strictly figure as collective rights derive their political significance from the existence of communities striving to secure their survival. In addition, the document recognizes "aboriginal rights," which, although as yet undefined, will clearly have to incorporate some which are collective in nature.

But as the *Charter* entered public consciousness, this balance was progressively lost. This is not surprising if we take into account the whole movement towards entrenched rights and judicial retrieval which has been proceeding throughout western societies, and to some extent even on a world scale, since the Second World War. Our *Charter* in fact follows the trend of the last half of the 20th century and gives a basis for judicial review on two basic scores. First, it protects the rights of the individual in a variety of ways. And second, it guarantees equal treatment of citizens in a variety of respects; or alternatively put, it defends against discriminatory treatment on a number of irrelevant grounds, like race or sex. Our *Charter* consists of much more, as I have just mentioned, but the two themes I single out dominate in the public consciousness.

This is no accident. These two kinds of provisions are now quite common in entrenched schedules of rights which provide the basis for judicial review. In this sense, the western world, perhaps the world as a whole, is following American precedent. The Americans were the first to write out and entrench a bill of rights, which they did during the ratification process of their Constitution and as a condition of its successful outcome. One might argue that they weren't entirely clear on judicial retrieval as a method of securing those rights, but this rapidly became the practice. The first amendments secured individuals, and sometimes state governments,<sup>3</sup> against encroachment by the new federal

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<sup>3</sup> For instance, the First Amendment, which forbade Congress from establishing any religion, was not originally meant to separate state and church as such. It was enacted at a time when many states had established churches, and it was plainly meant to prevent the new federal government from interfering with or overruling these local arrangements. It was only later after the Fourteenth Amendment,

government. It was after the Civil War in the period of triumphant Reconstruction, and particularly with the Fourteenth Amendment which called for "equal protection" for all citizens by the laws, that the theme of non-discrimination became central to judicial review. But it is by now on par with the older norm of the defence of individual rights, and in public consciousness even perhaps ahead.

Now for a number of people in COQ, a political society's espousing certain collective goals threatens to run against both of these basic provisions of our *Charter*, or indeed any acceptable bill of rights. First, the collective goals may require restrictions on the behaviour of individuals which may violate their rights. For many non-francophone Canadians, both inside and outside Quebec, this feared outcome has already materialized with Quebec's language legislation. For instance, Law 101 prescribes the type of school to which parents can send their children; and in the most famous instance, it forbids certain kinds of commercial signage. This latter provision was actually struck down by the Supreme Court as contrary to the *Quebec Bill of Rights* as well as the *Charter*, and only re-enacted through the invocation of the notwithstanding clause.

But second, even if this were not the case, espousing collective goals on behalf of a national group can be thought to be inherently discriminatory. In the modern world it will always be the case that not all those living as citizens under a certain jurisdiction will belong to the national group thus favoured. This by itself could be thought to involve some discrimination. But beyond this, the pursuit of the collective end will in all likelihood involve treating insiders and outsiders differently. Thus the schooling provisions of law 101 forbid (roughly speaking) francophones and immigrants sending their children to English-language schools, but allow Canadian anglophones to do so.

This sense that the *Charter* clashes with basic Quebec policy was one of the strong grounds to opposition in COQ to the Meech Lake Accord. The worry here concerned the distinct society clause, and the common demand for amendment was that the *Charter* be "protected" against this clause or take precedence over it. There was undoubtedly in this a certain amount of old-style anti-Quebec prejudice, the continuing echoes of the old image of "priest-ridden Quebec." Thus various women's groups voiced the fear that Quebec governments in pursuit of higher birth rates might adopt Ceausescu-type policies of forbidding abortions or making birth control more difficult. But even when one factors out the silliness, contempt and ill-will, there remains a serious point here. Indeed, there are two serious points. First, there is a genuine difference in philosophy concerning the bases of a liberal society; and second, there is a difference in view about the basis for national unity.

Let us take the philosophical difference first. Those who take the view that individual rights must always come first, and along with non-discrimination provisions must take

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following the so-called "Incorporation" doctrine, that these restrictions on the federal government were held to have been extended to all governments, at whatever level.

precedence over collective goals, are often speaking out of a view of a liberal society which has become more and more widespread in the Anglo-American world. Its source is, of course, the United States, and it has recently been elaborated and defended by some of the best philosophical and legal minds in that society, for instance John Rawls, Ronald Dworkin, Bruce Ackerman, and others.<sup>4</sup> There are various formulations of the main idea, but perhaps the one which encapsulates most clearly the point which is relevant to us is Dworkin's way of putting things in his short paper entitled "Liberalism."<sup>5</sup>

Dworkin makes a distinction between two kinds of moral commitment. We all have views about the ends of life, about what constitutes a good life, for which we and others ought to strive. But then we also acknowledge a commitment to deal fairly and equally with each other, regardless of how we conceive our ends. We might call these latter "procedural" commitments, while those that concern the ends of life are "substantive." Now Dworkin claims that a liberal society is one which as a society adopts no particular substantive view about the ends of life. The society is rather united around strong procedural commitments, to treat people with equal respect. The reason why the polity as such can espouse no substantive view, cannot for instance allow that one of the goals of legislation should be to make people virtuous in one or another meaning of that term, is that this would involve a violation of its procedural norm. For, granted the diversity of modern societies, it would unfailingly be the case that some people and not others would be committed to the favoured conception of virtue. They might be in a majority; indeed, it is very likely that they would be, for otherwise a democratic society would probably not espouse their view. But nevertheless this view would not be everyone's, and in espousing this substantive outlook the society would not be treating the dissident minority with equal respect. It would be saying to them, in effect, "your view is not as valuable, in the eyes of this polity, as that of your more numerous compatriots."

There are very profound philosophical assumptions underlying this view of liberalism, which is very influenced by the thought of Immanuel Kant. Among other features, it understands human dignity to consist largely in autonomy, that is, in the ability of each person to determine for himself or herself a view of the good life. Dignity, that is, is connected less with any particular understanding of the good life, than it is with the power to consider and espouse for oneself some view or other. We are not respecting this power equally in all subjects, it is claimed, if we raise the outcome of some people's deliberations officially over that of others. A liberal society must remain neutral on the good life, and restrict itself to ensuring that however they see things, citizens deal fairly with each other and the state equally with all.

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<sup>4</sup> J. Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1971); "Justice as Fairness: Political not Metaphysical" (1985) 14 *Philosophy and Public Affairs* 223; Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); B. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

<sup>5</sup> In S. Hampshire, ed., *Public and Private Morality* (Cambridge: Cambridge University Press, 1978).

The popularity of this view of the human agent as primarily a subject of self-determining or self-expressive choice helps to explain why this model of liberalism is so strong. But there is also the fact that it has been urged with great force and intelligence by liberal thinkers in the United States, and precisely in the context of constitutional doctrines of judicial review.<sup>6</sup> And so it is not surprising that the idea becomes accredited, well beyond those who might subscribe to a specific Kantian philosophy, that a liberal society cannot accommodate publicly-espoused notions of the good. This is the conception, as Michael Sandel has called it, of the "procedural republic"<sup>7</sup> which has a very strong hold on the political agenda in the United States, and which has helped to place increasing emphasis on judicial review on the basis of constitutional texts at the expense of the ordinary political process of building majorities with a view to legislative action.

But a society with collective goals like Quebec's violates this model. It is axiomatic for Quebec governments that the survival and flourishing of French culture in Quebec is a good. Political society is not neutral between those who value remaining true to the culture of our ancestors and those who might want to cut loose in the name of some individual goal of self-development. It might be argued that one could after all capture a goal like *survivance* for a proceduralist liberal society. One could consider the French language, for instance, as a collective resource that individuals might want to make use of and act for its preservation, just as one does for clean air or green spaces. But this cannot capture the full thrust of policies designed for cultural survival. It is not just a matter of having the French language available for those who might choose it. This might be seen to be the goal of some of the measures of federal bilingualism over the last 20 years. It is also a matter of making sure that there is a community of people here in the future which will want to avail itself of this opportunity. Policies aimed at survival actively seek to create members of the community, in assuring that the rising generations go on identifying as French-speakers or whatever. There is no way that they could be seen as just providing a facility to already existing people.<sup>8</sup>

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6. E.g. L. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990).

7. "The Procedural Republic and the Unencumbered Self" (1984) 12 *Political Theory*.

8. An ingenious argument has recently been put forward by Will Kymlicka in his brilliant book, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989). He argues that what I have been calling procedural liberalism can be made compatible with the defense of collective rights and cultural survival in certain cases. Kymlicka, unlike the major American authors, writes in full knowledge of the Canadian scene and with a strong commitment to the defence of aboriginal rights in this country. While espousing a politics of "neutral moral concern," that is, a view of the liberal state as neutral between conceptions of the good life (at 76), he nevertheless argues that collective cultural rights can be defended on the grounds that the members of certain threatened communities will be deprived of the conditions of intelligent, self-generated decisions about the good life if the "cultural structures" through which they can grasp the options are undermined (at 165). If Kymlicka's argument really went through, it would close the gap between the two models of liberalism that I am contrasting in these pages.



Quebeckers therefore, and those who give similar importance to this kind of collective goal, tend to opt for a rather different model of a liberal society. On this view, a society can be organized around a definition of the good life, without this being seen as a depreciation of those who do not personally share this definition. Where the nature of the good requires that it be sought in common, this is the reason for its being an object of public policy. According to this conception, a liberal society singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good, and above all by the rights it accords to all its members. But in this case, the rights in question are conceived to be the fundamental and crucial ones which have been recognized as such from the very beginning of the liberal tradition: such rights as to life, liberty, due process, free speech, free practice of religion and the like. On this model, there is something exaggerated, a dangerous overlooking of an essential boundary, in speaking of fundamental rights to things like commercial signage in the language of one's choice. One has to distinguish the fundamental liberties, those which should never at any time be infringed and which therefore ought to be unassailably entrenched, on one hand, from privileges and immunities which are important, but which can be revoked or restricted for reasons of public policy — although one needs a strong reason to do so — on the other.

A society with strong collective goals can be liberal, on this view, provided it is also capable of respecting diversity, especially concerning those who do not share its goals, and provided it can offer adequate safeguards for fundamental rights. There will undoubtedly be tensions and difficulties involved in pursuing these objectives together, but they are not uncombinable, and the problems are not in principle greater than those encountered by any liberal society which has to combine, for example, liberty and equality, or prosperity and justice.

Here are two incompatible views of liberal society. One of the great sources of our present disunity is that they have come to square off against each other in the last decade. The resistance to the "distinct society" which called for precedence to be given to the *Charter* came in part from a spreading procedural outlook in COQ. From this point of view, attributing the goal of promoting Quebec's distinct society to a government is to acknowledge a collective goal, and this move had to be neutralized by being subordinated to the existing *Charter*. From the standpoint of Quebec, this attempt to impose a procedural model of liberalism not only would deprive the distinct society clause of some of its force as a rule of interpretation, but bespoke a rejection of the model of liberalism on which this society has come to be founded. There was a lot of misperception by each society of the other throughout the Meech Lake debate, as I mentioned above. But here each saw something right about the other — and didn't like it. COQ saw that the distinct society clause legitimated collective goals. And Quebec saw that the move to give the *Charter* precedence imposed a form of liberal society which is alien, and to which Quebec could never accommodate itself without surrendering its identity. In this context, the protestations by *Charter* patriots that they were not "against Quebec" rang hollow.

This was one source of deep disagreement. There was also a second one, which was interwoven with it. The *Charter* has taken on tremendous importance in COQ not only because of the growing force of procedural liberalism, but also because in the steadily increasing diversity of this multicultural society people are looking for new bases of unity. COQ has seen its reason for existence partly in terms of its political institutions, for reasons discussed above. Even though the *Charter* offers a relatively weak answer to the distinctness question, because it makes us more like the U.S., it nevertheless can provide a convincing answer to the unity question. The two motives for *Charter* patriotism come together here. As the country gets more diverse, we are more and more acutely aware of the divergences in our conceptions of the good life. It then appears that what can and ought to bind us together are precisely the procedural norms that govern our interaction. Procedural liberalism not only begins to look more plausible in itself, but it also seems to be the only unquestionable common ground. But if so, then it is hard to accept that its meaning and application may be modulated in one part of the country by something like the distinct society clause, but not in others. The resistance to this clause of the Meech Lake Accord came partly from the sense that the *Charter* of all things had to apply in the same way to all Canadians. If the procedural bond is the only thing which can hold us together without ranking some above others, then it has to hold without exception.

## VI. LEVELS OF DIVERSITY

Can this conflict be arbitrated? In a sense not. One side insists on holding the country together around a model of liberalism which the other cannot accept. If there is to be agreement, the first side has to give way. But ought it to give way? I can only offer an answer to this question by deserting all appearance of neutrality and taking an openly partisan stance. So let me throw off the mask and state my position.

It seems to me that the claim of proceduralist thinkers to define the very essence of liberalism is erroneous and in a sense arrogant. We have to acknowledge that there are other possible models of liberal society. This becomes pretty evident once one looks around at the full gamut of contemporary free societies in Europe and elsewhere, instead of attending only to the United States. Further, it should be evident to procedural liberals in COQ that their francophone compatriots wish to live by one such alternative. This should be clear to anyone with a modicum of knowledge of Quebec history and politics.

But once we accept these premises, then it is clear that the attempt to make procedural liberalism the basis of Canadian unity is both illegitimate and doomed to failure. For it represents an imposition of one society's model on another, and in the circumstances of late 20th century Canadian democracy this cannot succeed. The only way we can coexist is by allowing ourselves to differ on this. Does this mean that we can only coexist as two independent societies, perhaps loosely linked by supra-national institutions? That is the thesis of Quebec sovereigntists. But this has never seemed to me to be self-evident. It becomes true only to the extent that procedural liberals stand so firmly on principle that they cannot bear to share the same country with people who live by another model. Rigidity of this kind began to be evident during the Meech Lake debate. If this were to

be COQ's last word, then indeed the independentists are right, and there is no solution short of sovereignty-association.

But do they have to be right? Is there something wrong with accommodating difference in this way?

In a way, accommodating difference is what Canada is all about. Many Canadians would concur in this. That is why the recent bout of mutual suspicion and ill-will in the constitutional debate has been so painful to many of our compatriots. It is not just that the sources of difference I have been describing are becoming more salient. Old questions may be re-opened. To some extent Trudeau's remarkable achievement in extending bilingualism was made possible by a growing sympathy towards the French fact among political and social elites in COQ. They pushed the process faster than many of their fellow citizens were happy with. For many people lower down in the hierarchy, French was being "stuffed down their throats," but granted the elite-run nature of the political accommodation process in this country they seemed to have no option but to take it.

But during the Meech debate the procedures of elite negotiation came under sharp criticism and challenge. Moreover, the COQ elites were themselves split on how to respond to the new package in a way they had not been on bilingualism. It was therefore not surprising that we began to see a rebellion against the accommodation of French. This might be the harbinger of greater resistance to come. Already one hears Westerners saying that Canadian duality is an irrelevancy to them, that their experience of Canada is of a multicultural mosaic. The very bases of a two-language federation are being questioned again. This important axis of difference is under threat.

But more fundamentally, we face a challenge to our very conception of diversity. Many of the people who rallied around the *Charter* and multiculturalism to reject the distinct society are proud of their acceptance of diversity. And in some respects rightly so. What is enshrined here is what one might call first-level diversity. There are great differences in culture and outlook and background in a population which nevertheless shares the same idea of what it is to belong to Canada. Their patriotism or manner of belonging is uniform, whatever their other differences, and this is felt to be a necessity if the country is to hold together.

But this is far from accommodating all Canadians. For Quebeckers, and for most French Canadians, the way of being a Canadian (for those who still want to be) is via their belonging to a constituent element of Canada, la nation québécoise, or canadienne-française. Something analogous holds for aboriginal communities in this country. Their way of being Canadian is not accommodated by first-level diversity. And yet many people in COQ are puzzled by the resulting sense of exclusion, because diversity is the only kind they are sensitive to, and they feel they fully acknowledge that.

To build a country for everyone, Canada would have to allow for second-level or "deep" diversity, where a plurality of ways of belonging would also be acknowledged and accepted. Someone of, let us say, Italian extraction in Toronto, or Ukrainian extraction in Edmonton, might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. Her belonging would not "pass through" some other community, although the ethnic identity might be important to her in various ways. But this person might nevertheless accept that a Québécois, or a Cree, or a Dene, might belong in a very different way, that they were Canadian through being members of their national communities. And reciprocally, the Québécois, Cree or Dene would accept the perfect legitimacy of the "mosaic" identity.

Is this utopian? Could people ever come to see this way? Could they even find it exciting and an object of pride that they belong to a country which allows deep diversity? Pessimists say no, because they do not see how such a country could have a sense of unity. The model of citizenship has to be uniform, or people would have no sense of belonging to the same polity. Those who say this tend to take as their paradigm the United States, which has indeed been hostile to deep diversity, and has sometimes tried to stamp it out as "un-American."

But these pessimists should bear in mind these things:

- Deep diversity is the only formula on which a united federal Canada can be rebuilt — once we recall the reasons (like (a) to (c) above) why we all need it.
- In many parts of the world today, the degree and nature of differences resemble Canada's rather than those in the U.S. If a uniform model of citizenship fits better the classical image of the western liberal state, it is also true that this is a straitjacket for many political societies. The world needs other models to be legitimated, in order to allow for more humane and less constraining modes of political cohabitation. Instead of pushing ourselves to the point of break-up in the name of the uniform model, we would do ourselves and some other peoples a favour by exploring the space of deep diversity. To those who believe in according people the freedom to be themselves, this would be counted a gain in civilization.

In this exploration we would not be alone. Europe-watchers have noticed how the development of the European Community has gone along with an increased breathing space for regional societies — Breton, Basque, Catalan — which were formerly threatened with the steamroller of the national state.

- After dividing to form two polities with uniform citizenship, both successor states would find that they had failed after all to banish the challenge of deep diversity, because the only way that they can do justice to their aboriginal populations is by adopting a pluralist mould. Neither Quebec nor COQ could succeed in imitating the United States, or the European national states in their

chauvinist prime. Why not recognize this now, and take the road of deep diversity together?