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Legitimate Constitutional Change

and

The Debate on Quebec Secession

by

Alissa Malkin

A thesis submitted in conformity with the requirements for the degree of Master of Laws
Graduate Department of Law
University of Toronto

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Abstract

Legitimate Constitutional Change and the Debate on Quebec Secession

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I propose a theory of what constitutes legitimate constitutional amendment in Canada. I argue that the Constitution of Canada is in essence a tradition, the continuity of which is provided by a particular set of values embodied in principles, institutions and remedies. These are informed by a certain conception of the individual; and developed over the centuries in order to further a certain understanding of human dignity. Canadians have been shaped as a people within this tradition; and political and legal legitimacy therefore depend upon continued conformity to its underlying values. Legitimate constitutional change must be in accordance with these values. Secession of a province, like any other constitutional change occurring within this tradition, must respect the relation between individual liberty and democratic governance within which our tradition's understanding of individual dignity is best realized. I suggest that the debate over Quebec secession should be framed in these terms.
# Table of Contents

Chapter 1: Introduction............................................................................................ 5  
Chapter 2: The Constitution of Canada..................................................................... 16  
  1. The Compact Theory of Confederation....................................................... 18  
      Provincial Compact..................................................................................... 19  
      Two Nations................................................................................................. 21  
  2. The Constitution and The People of Canada............................................. 35  
      Tradition....................................................................................................... 35  
      Constitutional Legitimacy........................................................................... 38  
      The People of Canada.................................................................................. 43  
      Sovereignty................................................................................................. 47  
  3. Conclusions.................................................................................................... 52  
Chapter 3: Constitutional Values........................................................................... 54  
  1. Our Constitutional Inheritance................................................................. 55  
      Autonomy, Equality, Dignity......................................................................... 64  
  2. Our Confederation Arrangements............................................................ 68  
  3. The Canadian Continuation of This Tradition........................................ 73  
      Legislative Supremacy................................................................................ 74  
      Evolving Political Consciousness.......................................................... 77  
      Liberty and Democracy................................................................................ 84  
  4. Conclusions.................................................................................................... 86  
Chapter 4: Constitutional Change.......................................................................... 89  
  1. Continuity and Legitimate Constitutional Change.................................... 90  
  2. Legal Limitations on Constitutional Change........................................... 95  
  3. Conclusions.................................................................................................... 110  
Chapter 5: Secession................................................................................................ 112  
  1. Secession Within The Constitution........................................................... 114  
  2. Justifying Secession..................................................................................... 121  
  3. Conclusions.................................................................................................... 129  
Chapter 6: Conclusion............................................................................................ 131
How far does a constitution affect the character of a people? I have no doubt that the effect of constitutions was much exaggerated one hundred years ago and later on no one I suppose now questions that, in general, a constitution is, in the main, the outcome of the character and history of the people on whom it exists. But then do people not too readily assume, when all this is granted, that a constitution does not in turn affect the character of a people and the history of a country?¹

A.V. Dicey

Chapter 1: Introduction

The aim of this thesis is to suggest a framework for debating the legitimacy of any proposed change to the Constitution of Canada. I offer a theory of what constitutes legitimate amendment and propose a standard against which any particular constitutional change may be measured.

My interest in undertaking this project developed while listening to the public debate surrounding the recent Quebec referendum. Statements made by representatives of the two official 'sides' in the debate consisted, for the most part, in appeals to principle rather than assertions of force. Each side seemed intent on persuading the Canadian public that their position was the legitimate one. But according to what standard was legitimacy to be judged? Very different ideas about constitutional legitimacy seemed to underlie the opposing positions. Thus the secession debate seemed characterized by a strange confusion: while the very exercise was premised on the assumption that there is a common set of values to which all participants can appeal, the notions of legitimacy underlying the positions taken seemed very much at odds.

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2On October 30, 1995 Quebeckers voted in a referendum on Quebec secession. Electors were asked: "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?" The latter referred to an agreement signed by the leaders of the Parti-Québécois, the Bloc Québécois and the Action Démocratique, outlining their common project for the sovereignty of Quebec. According to this agreement, following a Yes vote in a referendum the National Assembly would be empowered to proclaim the sovereignty of Quebec; and the government obliged to propose to Canada an agreement on a new economic and political partnership. Bill 1, "An Act respecting the future of Québec" (1st Sess., 35th Leg., Quebec, 1995) authorized the National Assembly to proclaim the sovereignty of Quebec, following a formal offer of economic and political partnership with Canada. (s.1).

The result of the referendum was 50.58% for "No" and 49.42% for "Yes". Québec, Rapport des résultats officiels du scrutin: référendum du 30 octobre 1995 (Québec: Directeur général des élections du Québec, novembre, 1995)
Separatist leaders continually invoked 'democracy': It is 'the people of Quebec', speaking democratically, who must determine whether Quebec is to become a sovereign state.

"Le dernier mot n'appartient pas à un homme, pas à un gouvernement, pas à un texte imposé d'en haut. Selon nous, le dernier mot appartient à la démocratie québécoise, au peuple québécois."3

The secession of Quebec would not only be decided, but also realized, by this democratic will. In the first draft Bill on sovereignty, tabled in the National Assembly by former Quebec Premier Parizeau in December of 1994, the people of Quebec, through their votes in a referendum, would actually bring the new Quebec state into being.4

Separatists invoking 'democracy' were countered by federalists asserting 'the rule of law': secession must be effected under the Constitution of Canada, and in particular, according to the amending formulae provided therein. As required by these provisions, Canadians outside Quebec must consent to Quebec secession. The courts, as guardians of the Constitution, have jurisdiction to rule on the constitutionality of any secession project.

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3 Lucien Bouchard, "Notes pour une allocution rononcée à la Faculté de droit de l'Université de Montréal à Montréal, jeudi, le 12 février, 1998."

4 Section 1 states, "Quebec is a sovereign country". As per section 17, approval by a majority in a referendum would be required for the legislation to come into force. As Mr. Parizeau repeatedly emphasized, "c'est le peuple du Québec qui va adopter cette loi". (Transcript of press conference held by Premier Parizeau following the tabling of the Draft Bill (6 December, 1994) quoted in the factum of the Attorney General of Canada in the Quebec Secession Reference, par.13.)

Bill 1, "An Act respecting the future of Québec", which replaced this Bill (see note 2, supra) was not to be given force of law by means of a referendum. Nevertheless, 'the people' are still the legitimate creators of the new state. The declaration of sovereignty appearing in the preamble of this Bill, reads:

"We, the people of Quebec, through our National Assembly, proclaim: Quebec is a sovereign country."
In the media, in the courtroom, and in popular debate, 'democracy' seemed thus to be pitted against 'the rule of law' in a battle of competing legitimacies. Two months before the 1995 referendum, Quebec city lawyer Guy Bertrand instituted proceedings in Quebec's superior court, seeking an injunction to stop the referendum process, alleging that it was "illegal, unconstitutional and immoral", claiming that the actions of the Quebec government aimed at a unilateral declaration of sovereignty exceeded the powers of that government conferred in the Constitution and violated his Charter rights.5

At the interlocutory stage the Quebec government applied to have the case dismissed, arguing the court had no jurisdiction to hear the motion. The court rejected this.6 The Quebec government refused to participate any further in the proceedings. In a statement to the media Mr. Parizeau explained,

"Quebecers want to vote, they have the right to vote, they will vote. We cannot submit Quebecers' right to vote to a decision by the court. It would be contrary to our whole democratic system."7

The court denied the interlocutory injunction,8 but granted Me. Bertrand the preliminary declarations he sought: the draft bill tabled by the Premier giving the National Assembly the power to proclaim Quebec a sovereign state without following the

5 Bertrand c. Bégin No. 200-05-002117-955 (C.S. Que.)
6 "La menace que le Gouvernement du Québec ferait porter aux institutions politiques de la fédération canadienne est une question grave et sérieuse, qui de sa nature est justiciable en regard de la Constitution du Canada." August 31, 1995, per Lesage J. (200-05-002117-955 Sup. Ct.)
8 The judge found that an injunction against the referendum would risk the greater harm of preventing the people from expressing themselves than the wrong that was sought to be prevented.
amending procedure set out in the constitution was unconstitutional and a serious threat to Ms. Bertrand's Charter rights. Lesage J. stated,

"The actions taken by the Government of Quebec in view of the secession of Quebec are a repudiation of the Constitution of Canada. [...] The constitutional change proposed by the Government of Quebec would result in a break in continuity in the legal order, which is manifestly contrary to the Constitution of Canada."

Following the 1995 referendum, Ms. Bertrand proceeded with the main action. The Quebec government filed a motion to dismiss this action, again urging lack of jurisdiction. The federal government intervened to respond to the arguments by the Quebec government that the Constitution of Canada and the Canadian courts have no role to play in Quebec's accession to sovereignty. The superior court again rejected Quebec's motion to dismiss. The Quebec government again refused to participate any further. The case is pending.

In September, 1996 the Attorney General of Canada referred three questions to the Supreme Court of Canada, the first of which was whether the secession of Quebec can be effected unilaterally under the Constitution. Stauchly maintaining that the courts

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9 See supra note 4.
11 p.428 D.L.R.
12 Motion to dismiss the Bertrand action, 12 April, 1996 Quebec 200-05-002117-955.
13 [1996] R.J.Q. 2393. Pidgeon J. dismissed claims that the issue is purely political and that it is academic; and held that questions of parliamentary privilege, primacy of international or Canadian constitutional law, and validity of the Constitution Act, 1982 given that there is no official French version, should be decided by the judge who hears the action on the merits.
14 The questions referred to the Court by the Governor-in Council on September 30, 1996, were:
   1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
   2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
have no role in the decision on Quebec's future, the Quebec government refused to participate in the reference, and an amicus curiae was appointed to argue Quebec's position. At the time of writing, a decision has yet to be rendered. The position of the Quebec government is that the Quebec people will not be bound by the decision.

The reason given for this is 'the primacy of democracy'. In the position put forward by Quebec government representatives, anything willed by 'the people' is ipso facto legitimate - far more so than any constitutional or judicially imposed constraints upon this will. The democratic principle, and the 'people' who alone may decide Quebec's future, are in this sense prior to the Constitution. The will of the Quebec people, manifested by a bare majority in a referendum, is subject to no law and beyond the jurisdiction of any court. It is paramount over, and thus unfettered by, any other

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15See for example the speech made by Premier Lucien Bouchard to students at the Université de Montréal, Faculté de Droit on the eve of oral argument in the Reference, supra note 3.


17According to Mr. Bouchard in his speech to students at the Université de Montréal, "la volonté démocratique des Québécois ne peut être limitée par une constitution ou un jugement." Supra note 3.

principle. But this leads one to ask: is unconstrained majoritarianism really what Quebeckers and other Canadians understand by 'democracy'? 

The idea of political legitimacy underlying the federalist position is somewhat less clear. Insisting that 'democracy' functions within the framework of the 'rule of law' in support of a claim that the rest of Canada must consent to Quebec secession, federalists often add that it would be illegitimate to withhold this consent if faced with the clearly expressed will of Quebeckers to secede. No connection is articulated between 'the rule of law' and this idea of legitimacy. Indeed, statements made by federalists seem to imply that our most deeply held values would dictate a response to Quebec secession not required by the Constitution itself. This leads one to ask: is the law of the Constitution really so divorced from our political values?

'Democracy' and 'the rule of law' thus seem to be opposed; and very different, and often contradictory, ideas about political legitimacy are engaged in a debate that professes to be on common terms. I began this thesis project with the aim of clarifying some aspects of this debate. If a common set of values could be found to underlie the separatist and

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18Thus, 'democracy' is paramount to 'the rule of law'. As expressed by Bloc Quebecois justice critic Pierrette Venne in a statement to the House of Commons, "The federal government should understand that the rule of law always justifies itself by respecting the democratic principles and values that prevail in our society. The rule of law should never push into the background the will and legitimacy of the Quebec people to proceed democratically to sovereignty." Quoted in The Globe and Mail, "Bloc: Not a matter for the Courts", Friday, September 27, 1996, p.A-21.

19As stated by former federal Justice Minister Allan Rock, "The great value of the principle of the rule of law derives from the fact that it is democratic. It takes its substance from our democratic institutions. This principle applies to all without reservation; thanks to it, the democracy can flourish, because it establishes a stable frame within which the democratic process can function." Quoted in The Globe and Mail, "Rock: Does the law permit Quebec's unilateral secession?", Friday, September 27, 1996, p.A-21.

20See statements quoted note 28 infra.
federalist positions\textsuperscript{21} it might be possible to identify a single standard by which the arguments put forward by each side could be measured. If a theory of what constitutes legitimate constitutional change could be formulated, with a set of criteria for legitimate change acceptable to Canadians, a more fruitful debate on the legitimacy of secession could then be conducted. My conclusions are elaborated in the chapters to follow.

In Chapter 2 I begin by discussing some preliminary concepts. One of the many difficulties with the debate on Quebec secession is that opposing positions are premised on very different constitutional models. Statements made by participants presuppose different ideas about the nature of the Canadian constitution, the historical and legal basis for the Canadian polity and the locus of sovereignty within its borders. How can Canadians properly debate the legitimacy of any proposed constitutional change without a clear idea of what the Constitution is?

I first examine a model of the constitution often invoked in the debate - primarily by separatists, but by others also: that of a "compact" between peoples or among provinces. I argue against the compact view, showing that strong versions of this theory are untenable, and weaker versions are inadequate to fully explain our constitutional arrangements. Nevertheless, the compact theory does highlight certain truths about the character of our constitutional arrangements and therefore about constitutional

\textsuperscript{21}Note that political leaders on each side have made public statements recognizing the legitimacy of the principle appealed to by the other. (For example, in the same month that the federal government submitted its reference on Quebec secession to the Supreme Court of Canada, Quebec Premier Lucien Bouchard repeatedly insisted that the Newfoundland government abide by the rule of law in the matter of its contract with Quebec on power for Churchill Falls. Mr. Bouchard stated, "I'm in favour of the rule of law. Ottawa would even have to intervene through its institutions in order to stop Newfoundland from violating the law." Mr. Bouchard was referring to two decisions by the Supreme Court of Canada upholding the validity of the contract between Quebec and Newfoundland. Quoted in "Heed law, Bouchard tells Tobin", The Globe and Mail, Monday, September 23, 1996 A-1.)

The difference lies not in the recognition of the legitimacy of the two principles, but in the priority accorded them. (See notes 20 and 21, supra.)
legitimacy in Canada. I attempt to separate these insights from the grander claims which, I believe, merely cloud the debate. I then propose an alternate way of understanding the Constitution of Canada. I suggest that it is in essence a tradition - inherited from Britain and adapted by Canadians to suit the particular conditions of Canadian political and social life. I argue that 'the people of Canada' has created itself as a civic people within this tradition by participating in institutions animated by its values, and as a result has been shaped as such by these values. I argue that this includes Quebeckers: that the distinctiveness of Quebec does not include a distinctive public law tradition; that Quebeckers share the same deeply rooted political and legal values held by Canadians in other provinces. I suggest that what will be perceived by all Canadians as legitimate exercise of political power depends, at least in part, upon conformity to these 'constitutional' values.

Having thus set the framework for my analysis, in chapter 3 I take a closer look at this tradition. I begin by tracing the evolution of the doctrine of 'the rule of law' in English constitutional history. I show that the idea of legal limits on sovereign power is deeply rooted in this tradition; and that from earliest times these limits had to do with the protection of individual liberty. I describe the development of Parliamentary institutions and show how the democratic principle evolved within this tradition which, at least until the nineteenth century, knew no concept of limitless power. I show how the democratic principle and the principle of the rule of law developed together, entwined, in order to realize different aspects of a single goal; and argue that the institutions of democratic governance, and the remedies, procedures and principles which together comprise 'the rule of law' in our constitutional tradition, are informed by a common set of values.
I then suggest that the particular arrangements entered into at Confederation be seen as an attempt to realize these constitutional values in the particular circumstances of colonial British North America. The federal principle, the principle of minority protection, and the moral commitment which forms the heart of our 'Confederation compromise', can be seen to be animated by the same values which underlie both 'democracy' and 'the rule of law'. Canadian constitutional history might be described as the slow working out of the implications of these values and their gradual expression in laws and institutions. In this, legal developments and evolving political consciousness have been mutually reinforcing.

Chapter 4 then focuses on constitutional change. I suggest that our constitutional tradition be viewed as an inter-generational commitment to further the values identified in the previous chapter. I argue that upholding this commitment entails both that our constitutional arrangements be changed whenever necessary to continuously realize these values in changing social circumstances; and conversely, that only changes in accordance therewith will be legitimate. Among other things, this means that the immediate effects of any change must be proportional to the ends sought: constitutional change must respect the relation between valid collective goals and individual liberty within which our constitutional values are best realized.

In chapter 5 I apply the results of my analysis to the secession debate. I argue that the secession of Quebec would be a constitutional change that takes place within a particular political and legal tradition and must satisfy the standards of legitimacy imposed by that tradition. I suggest how public debate on secession might be structured in order to address an issue which I believe crucial to determining the legitimacy of any change to the Constitution of Canada: is this the necessary means to a constitutional goal so important and pressing as to justify any infringement of liberty and equality of
individual citizens? I illustrate how arguments commonly invoked in the debate might be measured against this standard. My conclusion is that a rigorous debate on this issue is possible: the vague, speculative, or purely emotive assertions made on both sides could be abandoned in favour of thoughtful argument conducted on common terms.

Before proceeding, there are two points I wish to emphasize.

The first is that any discussion of the legitimacy of secession must include a careful examination of the claims of Aboriginal groups - both within and outside Quebec. This would involve a comprehensive analysis of the relations between the Canadian Crown and Aboriginal peoples in light of our constitutional values, and would likely entail calling into question the very basis for Canadian sovereignty over the territories within Canada's borders, and re-interpreting our understanding of this sovereignty. Such analysis is beyond the scope of this paper. The discussion presented here focuses on only one dimension of an extremely complex issue. My use of the term, 'sovereignty', in the pages to follow is thus qualified accordingly.

Second, I do not claim that the Constitution of Canada is animated solely by the set of values I identify - although I do maintain that these values are foundational to its basic structure, and thus compliance with them is a necessary condition for legitimate constitutional change. In the same way, while I recognize that Canadian political culture is animated by a diversity of values, I do believe that conformity with those discussed

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22As Roderick Macdonald notes, strong non-liberal and non-egalitarian threads are woven into Canada's political fabric. Macdonald identifies Toryism and Whiggism as two predominant and influential political traditions in Canadian history which are not committed to the political equality of citizens; both Toryism and socialism - another significant tendency in Canadian political history - involve organic and communitarian views of society in direct contrast to the individualism of the liberal-democratic tradition. "Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice" 39 University of Florida Law Review 217 at p.221.
in this paper is a *sine qua non* for legitimate government action in Canada. In other words, conformity with these values is a necessary, although perhaps not sufficient, condition for legitimate exercise of state power in Canada.

A true debate on secession must ensure room and opportunity for all Canadian voices to be heard fairly, and for all positions to be taken into account in good faith. The aim of this paper is certainly not to foreclose this - to structure the debate in such a way as to exclude all those whose positions are informed by values other than the ones I identify. Rather, I wish to clear up an area of confusion which I believe prevents any true debate from occurring. I believe that we cannot even begin to attempt any creative reconciliation of what may be *actually* competing values, until we have recognized where participants are appealing to the same ones. I leave it to others to suggest what further considerations need be addressed in examining the legitimacy of Quebec secession, and how the debate must be structured to take these also into account.

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To this the political traditions of Canada’s Aboriginal peoples need also be added, including conceptions of government and society quite different from the liberal-democratic model. A comprehensive account of Canadian political culture would take into account this complexity. My aim is not to provide such a description; rather, to argue that *certain* liberal-democratic values are foundational to the Canadian legal tradition and therefore significant to Canadian political culture. Their significance is such that they may be ignored or denied only at great cost to political legitimacy.

23Thus to take an extreme example, 'disappearances' - imprisonment or killings carried out by the state absent any criminal conviction in accordance with "principles of fundamental justice", would be considered illegitimate by the vast majority of Canadians.
In the debate over Quebec secession, participants often seem to be arguing at cross-purposes. Opposing positions are premised upon very different assumptions about the character of the Canadian constitution, the historical and legal basis for the Canadian polity, and the locus of sovereignty over territories within its borders. This is rarely recognized. Assertions such as, "le Québec peut se retirer de la fédération de la même façon qu'il avait de choix initial de se fédérer" are countered with statements that according to the Constitution, all Canadians must consent to the secession of any province; yet the underlying dispute is not addressed. The former position is based on the view that Confederation was an historical and legal "compact" between two peoples (or alternatively, among ten provinces) which have never renounced their former sovereignty; the latter, that 1867 marked the beginning of an evolving Canadian political and territorial sovereignty.

Opposing positions are also based upon different, and largely unarticulated, notions of constitutional legitimacy. In statements made by separatists, the democratic will of the Quebec people is proclaimed to be unfettered by constitutional law or principle, beyond the jurisdiction of any court. These statements are not phrased as assertions of pure

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24 Henri Brun and G. Tremblay, Droit constitutionnel, Cowansville, Yvon Blais, 1990, p.237. For the full quotation see note 40 infra.

25 "La primauté de la démocratie" was the theme of the speech given by separatist Premier Lucien Bouchard to assembled law students at the Université de Montréal on the eve of oral argument in the Quebec Secession Reference. According to Bouchard, "la volonté démocratique des Québécois ne peut être limitée par une constitution ou un jugement." Supra note 3.

power but rather, appeals to legitimacy. It is as if anything willed by 'the people' is *ipso facto* legitimate - more so than any constitutional constraints upon this will.\(^{26}\) Federalists, who invoke the 'rule of law' when arguing that the rest of Canada must consent to Quebec secession, often add that it would be illegitimate to withhold this consent if faced with the clearly expressed will of Quebeckers to separate.\(^{27}\) No connection is articulated between the rule of law and this idea of legitimacy. Indeed, statements made by federalists often seem to imply that our political values would dictate a response to Quebec secession not required by the Constitution itself. This leads one to wonder: is the law of the Constitution really so divorced from our deeply held values?

In this chapter I address these preliminary issues of history, legality, and legitimacy. I begin by examining the 'compact' theory of Confederation. I show how strong versions of

\[^{26}\text{Thus to resort to constitutional law is to "faire primer la légalité sur la légitimité." Daniel Turp, supra, note 3. In the more hyperbolic rhetoric, the Constitution, devoid of legitimacy, is a prison for Quebeckers and the amending formula is the padlock. See for example, "Padlock' won't stop Quebec: Bouchard", Robert McKenzie, Toronto Star, Sunday, Sept. 29, 1996 p.A-11; "Quebeckers held Captive, Bouchard says", Rhéal Séguin, The Globe and Mail, Monday, Sept. 30, 1996 p.A-4.}\]

\[^{27}\text{See for example, the much-quoted statement made by federal Justice Minister Allan Rock to the House of Commons on Thurs. Sept. 27, 1996: "The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebeckers clearly expressed. And this government agrees with that statement. This position arises partly out of our traditions of tolerance and mutual respect, but also because we know instinctively that the quality and the functioning of our democracy requires the broad consent of all Canadians." Quoted in The Globe and Mail, Friday, Sept. 27, A-21. A similar statement was made by federal Intergovernmental Affairs Minister, Stéphane Dion in an open letter to former liberal leader Claude Ryan: "[T]here is no first minister, no government, no major political party in this federation that wants to keep Quebeckers against their very clearly expressed will." English translation of the letter published in The Gazette, Montreal, Saturday, February 7, 1998. That the federal government "would not stand in the way of a clear expression of the Quebec people's will to secede", was reiterated by Mr. Yves Fortier, arguing the federal government's position before the Supreme Court in the Secession Reference. See "Supreme Court asked to stick to basic issues", The Globe and Mail, Friday, February 20, 1998.}\]
this theory, involving claims about the locus of sovereignty and about the legal basis for
the Canadian polity, cannot be sustained. The Canadian people as a whole are sovereign
over the entire territory comprising Canada. Nevertheless, the compact thesis does
highlight certain truths about the character of our constitutional arrangements and
therefore about constitutional legitimacy in Canada. I attempt to separate these insights
from the grander conclusions which are claimed to flow from them and which I believe
merely cloud the debate.

I then propose an alternate model of the Canadian constitution. I suggest that it is in
essence a tradition, inherited from Britain and adapted to suit the conditions of Canadian
life. I argue that the Canadian people, Quebeckers included, was created as a democratic
people within this constitutional tradition and has been shaped by its values. What will
be perceived by Canadians as legitimate exercise of sovereign power depends upon
conformity to these values.

The conclusions to be drawn from this discussion are elaborated in the chapters to
follow. In the third chapter I trace the evolution of our constitutional tradition, showing
that a common set of values can be seen to inform the institutions of democratic
governance, the procedures and remedies which evolved under the rubric of 'the rule of
law', as well as the principles and arrangements adopted at Confederation; thus appeals
to 'democracy' invoke the same fundamental values as appeals to 'the rule of law'. In the
fourth chapter I suggest that these values function as political - and, arguably, legal -
constraints upon constitutional change; and in the fifth chapter I examine the
implications of this for the secession issue. The aim of the present chapter is thus to
provide a framework for the discussion to follow.

1. The Compact Theory of Confederation
There are two variants on the compact theory of Confederation: one views Confederation as a pact between two founding peoples; the second, the 'provincial compact theory', as a pact among provinces. While the former is the original compact theory, I will begin with the provincial theory, because it figures less in the current debate, and may be addressed more quickly.

**Provincial Compact**

Proponents of this theory claim that the ten provinces - either as a matter of historical fact or in a notional sense - voluntarily decided to form a union, the terms of which were later ratified in the *British North America Act* . In one classic statement of the theory, the *British North America Act* was not an imposed constitution but an imperial ratification of the provincial pact; it must therefore be interpreted as if the provinces were sovereign bodies with power to form such a compact, a fiction which Britain reified in retroactively legalizing their acts. When they united, the provinces did not renounce their former sovereignty but merely delegated a portion of it to the federal government created by the compact. The Constitution therefore derives its force and

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30 See for example, the New Brunswick brief to the Sirois commission: the provinces, as "sovereign and independent nations under the British Crown" had created the federal government for certain limited purposes and the *British North America Act* "did not effect any change in their status. They are still independent sovereignties...". Quoted in *Ibid.*, p.165.

31 The central government was "essentially the creation" of the provinces, much "as an ordinary partnership is the work of the partners." *Letters upon the Interpretation of the Federal Constitution known as the British North America Act (1867)*, T.J.J. Loranger, Quebec, 1884, quoted in *Ibid.*, p.152
legitimacy from its voluntary acceptance by ten inherently sovereign political communities.

The Supreme Court has dismissed the provincial compact theory as unsustainable in fact and having no legal significance. Nevertheless, a notion of a provincial compact continues to hold much symbolic importance for many Canadians and often informs political rhetoric.

Unlike the 'two nations' variant, the provincial compact theory has little factual basis. Of the original uniting provinces, only New Brunswick and Nova Scotia pre-existed Confederation; the provinces of Quebec and Ontario were created by the Constitution Act, 1867. British Columbia and Prince Edward Island entered Confederation after negotiation with the federal government only; and Manitoba, Alberta and Saskatchewan were later created by federal statute. The resolutions which resulted from the Quebec Conference were never approved by the legislatures of New Brunswick or Nova Scotia. The planned union did not enjoy support in either New Brunswick or Nova Scotia, and it was accomplished in fact only as a result of persistent pressure by the Imperial Government on the governments and legislatures of those provinces.

The arrangement described in the provincial compact theory - a union of independent, sovereign states, joined by a treaty which can be amended only with consent of all

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32 Re: Resolution to Amend the Constitution [1981] 1 S.C.R. 753 (hereinafter Patriation Reference ) at 803:
"Theories, whether of a full compact theory (which, even factually, cannot be sustained, having regard to federal power to create new provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan) or of a modified compact theory, as urged by some of the provinces, operate in the political realm, in political science studies. They do not engage the law, save as they might have some peripheral relevance to actual provisions of the British North America Act and its interpretation and appliation."

parties - is not federal, but rather confederal. There is no legal support for an argument that the Canadian union is a confederal one. The provinces that were joined in 1867 were not sovereign entities and therefore could not unite by voluntary act. Union was "imposed by a superior sovereign will"\(^{34}\) that of the Imperial Parliament. The legal basis for the Canadian Union was thus not a contract among ten provinces, but rather a British statute.

The preamble of the Constitution Act, 1867, begins: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion....". In light of the above, this cannot be taken as referring to the sovereign will of 'the people' of each of these political communities to join to form a confederal union. However, its inclusion bears testimony to the importance of the values of autonomy and self-government in the English constitutional tradition - values which required that the colonists at least formally accept the terms of the arrangement according to which they were henceforth to govern themselves. The implications of these values, and that they are deeply rooted in the English constitutional tradition, will be discussed infra. \(^{35}\)

**Two Nations**

The original compact theory - the 'two nations' theory - understands Confederation as a pact between two founding peoples who, at the time of Confederation, voluntarily decided to form a union. According to this theory, the terms of the agreement of these two groups

\(^{34}\)Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) p. 74, speaking of Australia, but equally applicable to Canada.

\(^{35}\)For the argument that these values are deeply embedded in the English constitutional tradition please see chapter 3; for the implications of this in the secession context, see chapter 5.
formed the basis for the *Constitution Act, 1867*, and the provisions of that Act must therefore be interpreted in light of the mutual understandings of the two 'parties'.

Those who propound the two nations theory point to various provisions of the *Constitution Act, 1867* which were included at the instance of the representatives of French Canada. These include the preservation of the Civil Law in Quebec via section 92(13); the exclusion of Quebec from section 94; the special guarantees of sections 98, 133, and 144; the provision for a Legislative Council in Quebec under sections 71 et seq.; the confirmation of Roman Catholic Schools in Upper Canada by section 93; and shared provincial jurisdiction over immigration under section 95.

In its strongest form, the two nations view holds that, although now joined under a single constitution, the two founding nations remain distinct within Canada: 'English' Canada is represented by the government in Ottawa; French Canada is represented by the government in Quebec. Former Quebec Premier Jacques Parizeau recently made the following statement to the international community:

"The problem with Canada can be summed up in one question: How many nations live in its midst? For Quebecers, who have spoken French on this continent since

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36 The following list is taken from R. MacDonald, "...Meech Lake to the Contrary Notwithstanding (Part I)", 29 Osgoode Hall Law Journal, 253 at p.288.
37 As MacDonald notes (*Ibid.*), the phrase "property and civil rights", the touchstone of provincial jurisdiction, was taken from the *Quebec Act, 1774*.
38 This point received its strongest official expression in the report of the Tremblay Commission of 1956:
"By reason of its history, as well as of the cultural character of its population, Quebec is not a province like the others, whatever may be said to the contrary. It speaks in the name of one of the two ethnic groups which founded Confederation, and as one of the two partners who officially have the right to live and expand in this country. It is the only one able to represent one of these two partners."
1608 and who make up 25 per cent of Canada's population, the answer is obviously two."\textsuperscript{39}

Separatists, relying on the compact theory to support their claims, argue that the two founding nations were sovereign at the time of Confederation, and despite their union, never renounced their ultimate sovereignty. Therefore the continued existence of Canada is dependent upon the continuing consent of its constituent parts. Quebec may at any time decide, as an exercise of its inherent sovereignty, to revoke its consent and leave the Union.\textsuperscript{40}

The strong version of the compact thesis invoked by separatists - that Canada consists of two 'sovereign' peoples, each of which may leave the Union at will - is difficult to understand. First, who exactly are the Quebec 'people' for which this capacity is claimed? Certainly, the current population of the province of Quebec is not the same as the French-Canadian 'nation' said to be party to the compact. Largely as a result of immigration policies on the part of the Quebec government, Quebec society has become increasingly heterogeneous; and as a result of linguistic policies of this same government\textsuperscript{41}, the community which defines itself in terms of the French language - that which uses this language in its public and commercial life - is increasingly a community of mixed ethnicity and multiple histories.

\textsuperscript{39}Jacques Parizeau, "The Case for a Sovereign Quebec", \textit{Foreign Policy}, Summer, 1995, No.99 at p.69.

\textsuperscript{40}"Il est possible d'affirmer que le Québec peut se retirer de la fédération de la même façon qu'il avait de choix initial de se fédérer. Cet argument, qui repose sur le fait que le Québec constitue un peuple historiquement distinct implique que la sécession soit valablement et réellement décidée ou voulue par la collectivité concernée. Dans cette mesure, le droit conventionnel laisse place à la reconnaissance et à la sanction efficace du principe constitutionnel supérieur de la souveraineté collective du peuple concerné, en marge de la stricte technique fédérative." H. Brun, G. Tremblay, \textit{supra}, note 24.

\textsuperscript{41}In particular, Quebec's \textit{Charter of the French Language}, S.Q. 1977, c.5 which declared French the official language of the province of Quebec and prescribed its increased use in commercial and public life.
"The recruitment of non-francophones into the French-speaking majority through language policy simultaneously increases its numbers, dilutes its homogeneity, and generates a visible pluralism which cannot be ignored by the provincial government which brought it into being. With the passage of time, that enlarged majority will contain increasing numbers of French speakers who do not share in the history of the bulk of their linguistic confrères, and for whom the Conquest happened to somebody else's ancestors."  

The result is some confusion in separatist doctrine as to who constitutes the "Quebecois" who are to determine their destiny at the ballot box. Is it all Quebeckers? Is it francophone Quebeckers? Or is it 'de souche' Quebeois? Any claim that this people is defined solely in terms of the language of public life has been severely undermined by statements made by separatist leaders which strongly imply that only ethnic Quebeois form the Quebec people for which sovereignty is sought.

The theoretical - and political - difficulties involved in defining the people who are to determine their political destiny in a referendum can be seen in the writings of sovereigntist jurist Jacques Brossard. In his classic treatise on Quebec secession, Brossard argues that, in principle, only the French Canadian population of Quebec should vote in a referendum on sovereignty. Nevertheless, as this will likely be distasteful to many and thus politically impossible, he suggests the following solution: that Quebec francophones expressly consent (preferably in a separate referendum) to allow the

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43 For an excellent discussion of the confusion and contradiction in recent separatist doctrine as to who constitutes the 'Quebeois people', see Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec, Grand Council of the Crees, October, 1995 at pp.18-32.  
44 Most notably, the remark made by former Premier Jacques Parizeau, immediately following separatist defeat in the 1995 referendum, that the referendum was lost because of the 'ethnic' vote - strongly implying that participation of these groups was illegitimate.
Anglophone minority to participate in a referendum on sovereignty.\textsuperscript{45} Brossard does not address the question of why it would be politically inconceivable to exclude Anglophones from voting on Quebec's future - that is, what deeper values in Canadian political culture render such a suggestion so repugnant that it is not even worth proposing.

Even assuming that the Quebecois 'people' can be identified, upon what theory of sovereignty do they enjoy rights to the land mass of the current province of Quebec? The separatist position, as stated by one government official, is that,

"When Quebeckers exercise their right to self-determination in a referendum, it will apply to the existing territory of Quebec, which shall then form the territory of a sovereign Quebec state."\textsuperscript{46}

At times, the claimed connection of the Quebec people to the entirety of this territory seems to take on mythical dimensions, as evidenced in a 1979 publication by the Parti Quebecois government:

"Quebec's resources are permanent; we do not owe them to a political system, or to specific circumstances. They are a gift of nature...."\textsuperscript{47}

Some writers argue that the stronger compact thesis cannot be rejected, as it alone can account for the way in which a majority of Quebeckers identify with their political community. Charles Taylor argues that French Canadians have always understood Canada's constitutional arrangements in terms of the compact theory; that to French Canada, "allegiance to the whole is via allegiance to the part - one adhered to the larger

\textsuperscript{46} David Cliche, "The Sovereignty and Territorial Integrity of Quebec", \textit{The Network}, No.5 May 1992 at p.10 quoted in \textit{Sovereign Injustice}, supra, note 43.
\textsuperscript{47} Gouvernement du Québec, \textit{Québec-Canada: A New Deal} (Québec: Editeur Officiel du Québec, 1979) at 89, quoted in \textit{Ibid.} p.119.
entity because this was the political home which the nation had chosen for itself"\textsuperscript{48} and that therefore Quebeckers alone should be able to decide whether or not to remain in Canada.\textsuperscript{49} Another theorist argues forcefully that changing conceptions of political identity actually result in a \textit{transfer} of sovereignty:

"To the extent that a group begins to envisage itself as a people and sees a government as representing that people, that government has received its sovereign authority from the people, even if it once obtained its powers through delegation from other authorities. (...) If the majority of the people of the province now regard themselves first as Quebeckers and only secondarily as Canadians, then the ultimate sovereign authority for the Québécois has become their province, even if Ottawa exercises sovereign authority in a number of areas. If that is the case (...) then the issue is Quebec separatism not as a goal but as a procedural matter." \textsuperscript{50}

But to claim that subjective feelings of political identity may result in either an entitlement to sovereignty, or in de facto sovereignty, presents difficulties in a region such as Quebec where residents hold competing notions of political allegiance. For what is to distinguish the claims of the Quebec majority from those of the Crees or the Anglophone minority within its borders? If the Crees of Northern Quebec see themselves as Crees first, represented by the Cree Regional Authority\textsuperscript{51}, have they thereby become a fully sovereign nation, secession of which from Canada (or from a sovereign Quebec) is merely a procedural matter? Why, if a majority of Anglophones in Quebec retain a primary allegiance to Canada, as represented by the federal government,


\textsuperscript{49}Ibid., at note 29


\textsuperscript{51}Established pursuant to section 11A of the \textit{James Bay Northern Quebec Agreement}
may they not secede from a sovereign Quebec and rejoin Canada? In light of the many competing notions of political allegiance which obtain among the population of Quebec, the bare fact that a majority of Quebeckers identify primarily with Quebec (if true) cannot provide the basis for an entitlement for the province as a whole to secede from Canada - or for a claim that Quebec is already a sovereign nation.

A weak version of the two-nations compact theory - that is, one which includes no claim to sovereignty over territory - is not without merit. It might be argued that certain terms agreed upon by representatives of two linguistic groups evidence a moral commitment about how the future Canadian polity would be governed. This has some historical basis: the terms of Union did result directly from negotiation and agreement by representatives of the British North American colonies, and in particular, between representatives of the two founding cultural-linguistic groups. At the Quebec Conference of 1864 the delegates adopted seventy-two Resolutions in which it was decided that the new union should be federal in character; that its central parliament should contain two houses, one based on representation by provinces and the other on representation by population; that the powers of the central government should be of a general character, and those of the provincial legislatures of a local nature; that powers should be enumerated, the residuum given to the central parliament; and that the French and English languages would enjoy equal status in the central parliament and courts and in the legislature and courts of the province of Lower Canada. Records show that the delegates each emphasized the unalterable character of the agreement, speaking of it in terms of a 'treaty' or 'pact'. The terms of the agreement drafted and adopted in London in 1866 were substantially the same as those which had previously been agreed upon at Quebec.

A possibility which Adelman does not entertain when canvassing options available to this minority.
Authorities in the United Kingdom seemed to share the delegates' own understanding of the character of the agreed upon terms. The British Colonial Secretary, Lord Carnarvon, and his undersecretary, the Honourable Charles Adderley, spoke of the agreement in terms of a compact representing a compromise among the interests involved and, upon introducing the Bill based upon the resolutions into the British House of Commons, urged the members to adopt it without alteration. Carnarvon emphasized,

"There might be alterations where they are not material and do not go to the essence of the measure ... But it will be my duty to resist the alteration of anything which is in the nature of a compromise between the Provinces, as an amendment of that nature, if carried, would be fatal to the measure."53

No changes were made in the Bill.54

This attitude of respect on the part of the British officials cannot plausibly be attributed to any recognition of the 'inherent sovereignty' of the individual colonies for which union was being sought. Rather, British acquiescence in the terms agreed upon by the colonists for their own governance may be explained as a combination of practicality and respect for the values of autonomy and self-government which, as will be discussed infra, are deeply rooted in the English constitutional tradition and political culture.

While the weaker compact thesis does have some merit, no simple theory can account for anything so complex as the formation and continued existence of the Canadian polity. The compact thesis attempts to view our constitution through a single lens - one which filters out all that does not easily fit. While useful as a means of understanding our

54Ibid.
constitutional arrangements, it is not adequate to fully explain them. The compact theory cannot account for the legal authority of our constitutional text, or for the legal continuity of Canada's beginnings. Nor can it explain certain of the provisions of this text. It cannot account for the existence of a single citizenry, with equal constitutional rights; and its simple relation of parts to whole glosses over the complexity of the relationship among the communities which form Canada.

Legally, Canada was constituted as a single political community through legislative action of the Imperial Parliament, with a constitution "similar in Principle to that of the United Kingdom". Our constitutional text derives its legal authority by virtue of its status as an Imperial statute; and, as will be elaborated below, it derives much of its legitimacy by virtue of the fact that legal continuity was maintained in this manner.

While many of the provisions of the British North America Act can be traced to the agreement embodied in the Quebec Resolutions, others, such as, sections 55, 58, 90, section 91, section 92(10)(c), sections 93 to 95, section 96, and section 132 of the Constitution Act, 1867 imply a division of powers weighted more toward the central government, inconsistent with the compact theory.

More important, the compact theory cannot account for the existence of Canada as a single nation with undifferentiated citizenship. In the pre-Charter case of Winner v. S.M.T. (Eastern) Ltd. Rand J. stated,

"The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and

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55 MacDonald, supra note 36 p.283.
in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status."

As will be argued in the final section of this chapter, the nation is the primary political community in Canada. Since long before enactment of the *Canadian Charter of Rights and Freedoms*, membership in this community has entailed certain rights. The implications of the individual rights of Canadian citizens for the issue of secession will be discussed in chapter 5. Here I wish only to note that the compact thesis provides no explanation for a single Canadian citizenship and the rights thereby implied.

Among these are mobility rights. As was stated in *Winner*, the right or capacity to live in any province in Canada and to engage in work there inhere in every Canadian "as a constituent element of his citizenship status". This means, among other things, that each member of the larger national community has the right to choose to be a full member of any of the provincial communities comprising Canada. In other words, boundaries of political communities within Canada are permeable, and their membership is fluid; the only hard and fast boundary is that delineating the larger Canadian community, within which all enjoy equally the benefits and burdens of citizenship.

Nor can the compact thesis account for the reality of the larger Canadian community, greater than the sum of its parts. The *British North America Act* created a single nation in law; and at the time of its enactment, the Canadian national community existed only in the thinnest possible sense. But through decades of national projects and infrastructure-building, of national dialogue and policy-making, of regional

57 at p.919
equalization, inter-provincial co-operation and trade, individual mobility and international relations, Canadians have created a single political community in fact. The claim that Canada is no more than a composite of two groups which have remained distinct within its borders is difficult to maintain in light of the reality of the Canadian national community. The very idea of a compact between peoples implies a degree of distinctness impossible to maintain within a single polity. The theory cannot account for the sociological fact that Canadians in every province are joined by a complex network of ties engendered during decades of political, economic and social interaction as a single national community.

The development of the Canadian welfare state and the institution of regional equalization programs have done much to create and foster a larger national community, but are also premised on the recognition of such a community. In recent decades the federal government has assumed leadership in the development of social welfare in Canada; and as Alan Cairns notes, this "derives from the premise that social rights in the welfare state should be countrywide, and should be possessed by individuals as attributes of Canadian citizenship." This understanding of the extent of community obligations has evolved over the decades. Speaking of income security, Keith Banting notes that "[i]n the Canada of the interwar period, residency tests stood as symbolic statements that recognized obligations stopped at the municipal level. Today they stop at the national

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58See: Interprovincial Trade: Engine of Economic Growth, By Global Economies Ltd. for The Canadian Chamber of Commerce and the Chambre de Commerce du Québec, 1995, showing that the economic ties that unite Canada's provinces have been developed over hundreds of years and constitute a complex and detailed network.

59A contract is formed when two (or more) parties, mutually independent, agree on certain terms which define their future relationship; at all points during the contractual relationship each party retains its essential independence from the others, the contractual terms constituting their sole point of connection. See Peter Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice", [1992] 77 Iowa Law Review, 515.

60Alan Cairns and Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: an Overview", in Cairns and Williams eds. Constitutionalism, Citizenship and Society in Canada, supra, note 42, p.1 at p.18.
borders (...)."\(^{61}\) A similar conception underlies the goal of regional equalization: it is increasingly recognized that, as much as possible, citizens across Canada should have the same relative access to resources and opportunities, and that therefore the disparity in wealth and resources among regional communities must be diminished. Thus, the single national polity described in the *Constitution Acts, 1867 to 1982* has a single citizenry among which benefits are distributed across regional political communities. The evolution of these benefits in recent decades corresponds to an evolving conception of their legitimacy - that is, that Canadians constitute a single political community within which certain mutual obligations obtain.

The goal of equalizing burdens and benefits of citizenship by providing similar levels of essential services to Canadians across the country and by redressing regional inequalities, receives its strongest constitutional expression in section 36 of the *Constitution Act, 1982* \(^{62}\) - which, it must be noted, provides a role for both levels of government in the fulfilment of this goal. In other words, members of provincial communities are committed as such to ensuring the maintenance of a single national community.

A notion of a single Canadian community also informs the exception to mobility rights provided in section 6 of the Charter. Section 6 provides, in subsection 2, that Canadians have the right to move to, reside, and gain a livelihood in any province; however, subsection 4 clarifies that this does not preclude any policy aimed at ameliorating


\(^{62}\)Subsection one imposes a commitment on both levels of government to promote equal opportunities for the well-being of Canadians, to further economic development to reduce disparity in opportunities, and to provide essential public services of reasonable quality to all Canadians. Subsection two commits the federal government to the principle of equalization payments so that provinces can provide similar levels of public services to residents at comparable levels of taxation.
conditions of social or economic disadvantage in a province if the rate of employment in that province is below the national average. While operating as a limitation on the right to reside and gain a livelihood anywhere in Canada, this provision, aimed at equalizing opportunities of Canadians across the country, is based on the same premise and promotes the same goal as do mobility rights: the recognition and continued creation of Canada as a single national community.63

But the message contained in the exception to mobility rights and in regional equalization is more complex than merely a statement that all Canadians are members of a single national community and therefore should have equal economic opportunities. It is also a statement about the value of regional communities. For it is not merely as individual citizens that Canadians are protected (to some extent) against economic inequalities - as would be the case with the enshrinement of a social Charter; rather, it is as citizens who are members of particular regional communities that they are so protected. The notion underlying these provisions is that Canadians should not be forced for economic reasons to move away from the regional community with which they identify; rather, opportunities should be increased in underdeveloped areas in order that the communities situated there may be preserved. In other words, while provincial communities are committed to the preservation of the national community, the national community is similarly committed to the viability of regional communities. The two-nations thesis cannot begin to account for the complexity of the community of communities described in these provisions.

63\n\n\nWinner v. S.M.T. (Eastern) Ltd. Estey J. noted the crucial link between mobility rights and this larger goal:

"The Dominion of Canada was created by the British North America Act as 'one Dominion under the name of Canada' (...) There is but one Canadian citizenship and, throughout, the British North America Act contemplates that citizens, and all others who may be for the time being in Canada, shall enjoy freedom of passage throughout the Dominion (...) ."

supra, note 56 p.935.
To summarize the conclusions of this section: The provincial compact theory has little basis in our constitutional text, and cannot be supported historically. A weak version of the two-nations theory provides an explanation for many of the provisions of the Constitution Act, 1867, as well as for the adoption of the federal principle itself, and is thus a useful lens through which to view our constitutional arrangements. Nevertheless, this theory also leaves much out of the picture; and if relied upon exclusively presents a distorted view of these arrangements. Strong compact claims suffer from the difficulty of defining the Quebec people for which secession is sought; and there is no legal basis for claiming that sovereignty already resides in the Quebec 'people' however defined. Nor can subjective notions of political allegiance provide such a basis, particularly in view of the many competing notions of political identity which obtain in that province.

Perhaps the most accurate position, in light of the fact that numerous provisions of our constituent Act do reflect the concerns of French Canada at Confederation, is that there was indeed a moral 'compact' at the heart of Confederation: an agreement to create a polity within which the two 'founding' cultural-linguistic groups might both flourish. This commitment may be said to go beyond the specific provisions agreed upon and included in the British North America Act to effect that aim. Because this agreement is foundational - at least in an historical sense - to the existence of Canada, and because (as will be elaborated below) the values embodied therein are foundational to our constitutional tradition, its promises must be fulfilled to the utmost - both in letter and in spirit.

Nevertheless, it must be emphasized that a number of the provisions invoked in support of the compact thesis - notably, sections 93 and 133 of the Constitution Act, 1867 and section 23 of the Manitoba Act, 1870, secure the preservation of English Protestant
minorities in Quebec and French Catholic minorities throughout Canada, and provide a role for the federal government in ensuring this protection - both within the framework of federal institutions as well as outside Quebec. In other words, the continuing 'duality' of Canadian society as originally conceived in the Constitution\textsuperscript{64} is not that of two nations - one represented in Quebec, the other represented in Ottawa - each looking out for its own interests; but rather, a commitment by all components of Canadian society to ensure the continued existence of two religious and linguistic groups within Confederation. Moreover, as will be elaborated in the chapter to follow, this commitment is not so much between two 'nations' as between the state and the individuals which comprise it - to maintain the language and cultural groups essential to their flourishing, throughout the new polity.

2. The Constitution and the People of Canada

In this section I will suggest a very different way of looking at the Constitution. I will suggest that the Constitution of Canada embodies a tradition: one which we have inherited from Britain and adapted to suit the conditions of Canadian life; that constitutional legitimacy therefore has to do with continuity, with upholding the spirit of our Confederation arrangements, and, ultimately, with the deeper values of this tradition. I will argue that the Canadian people was created as a people within this tradition, that Canadian political culture has been greatly influenced by its values, and that Canadians have accepted this tradition and its values as their own.

\textbf{Tradition}

\textsuperscript{64}And wrongly, as this ignored the Aboriginal peoples who were prior occupants of the territories now comprising Canada.
Unlike the union of the Thirteen Colonies forming the United States, which involved a rupture with the past and a new constitutional beginning by 'the people', the Canadian union involved no break in continuity. Rather, the Constitution of Canada is the continuance of a particular tradition; and because of this, constitutional legitimacy is derived in part from tradition itself.

American history begins with a revolution. The Thirteen Colonies which joined to form the United States threw off a legal authority which was seen by them to be illegitimate and began again, with a new government which derived its authority from the consent of the governed. Thus, the Constitution of the United States of America begins: "We, the people of the United states, in order to form a more perfect union... do ordain and establish...." and then proceeds to stipulate the relations between that people and the government they were instituting. This is the model based on the philosophy of John Locke - where the constitution is a statement by 'the people' of the conditions upon which they consent to the authority of the government they are creating.

In contrast, the colonists who were instrumental in the creation of Canada desired no new beginning. "Apart from the changes needed to establish the new federation, the British North Americans wanted the old rules to continue in both form and substance exactly as before."66 This is evident in the preamble of our constituent Act: whereas the American, French, and German constitutions begin by identifying 'the people' who consent to be governed in a manner set out in the rest of the document, ours speaks of the continuance of a tradition.68

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65 At least in theory and in law; although in a deeper sense it is questionable to what extent the Americans really did break with the tradition within which they were formed.
67 See infra this section.
68 "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion ... with a Constitution similar in Principle to that of the United Kingdom..." (emphasis added). According to the Supreme
This is a tradition in which a constitution is a tradition. English constitutionalism has less to do with the philosophies of Locke or Rousseau than those of Edmund Burke and A.V. Dicey. The constitution is not created all at once in the articulation by its founders of a set of 'self-evident' principles. Principles and institutions of government evolve only slowly over centuries of trial and error; rights of citizens and obligations of government are not created with a stroke of the pen in a founding document, but rather grow by accretion out of the conventions and understandings of social life. As stated by Dicey,

"The 'rule of law' ... may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; ....in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."69

And by another scholar,

"It is not too much to say that the Anglo-Saxon liberty has been created and made secure because the Anglo-Saxon mind has instinctively felt that the affirmation of abstract rights, however emphatic and solemn, protects nothing, but that the end was to be reached as a practical reality by providing for remedies for the enforcement of particular rights or for averting definite wrongs."70

Court of Canada, by means of this preamble the fundamental principles and understandings of the English constitutional tradition become the organizing principles of the Constitution of Canada. Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice), 1997 3 S.C.R. 1 (hereinafter, Manitoba Provincial Judges Assn.)


The English constitution is the composite of institutions, procedures, and remedies which evolved over the centuries under the rubric of 'the rule of law'. As such, it cannot be contained in a single document, but rather is found in a variety of sources. As expressed by Dicey, the English constitution is the entire collection of "rules ... whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law..." as well as "conventions, understandings, habits or practices".71

The Canadian constitution begins with the principles, institutions, and understanding of rights which compose our inherited constitutional tradition. Superimposed upon this, and incomprehensible except in their context72, are the enacted provisions of our founding documents. Both enacted law and common law principle form the law of the Constitution of Canada.73

Constitutional Legitimacy

As the continuance of a tradition in which a constitution is a tradition, legitimacy of the Constitution of Canada derives in large part from tradition itself. Thus the crucial importance of continuity to both legality and legitimacy in Canadian constitutionalism -

71 Dicey, Op.Cit at pp.23-24
72 Thus, in Manitoba Provincial Judges Assn. supra , note 68, the Supreme Court interpreted the judicature provisions of the Constitution Act, 1867 in the light of the Act of Settlement, 1701 and the legacy of understandings and principles which can be traced to that enactment (at pp.63, 65 and 76). As stated by the Court in that case, the provisions of our written constitution should be understood as "elaborations of the underlying, unwritten, and organizing principles" of that tradition, referred to in the preamble of the 1867 Act. (p.76 emphasis added.)
73 Manitoba Provincial Judges Assn. Ibid. : "I agree ... that the constitution embraces unwritten as well as written rules, largely on the basis of the wording of s.52(2). Indeed, given that ours is a constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document or a set of documents, it is of no surprise that our constitution should retain some aspect of this legacy." (at p.68 per Lamer C.J.C.); See also: N.B. Broadcasting Co. v. Nova Scotia, [1993] 1 S.C.R. 319.
and, indeed, in all of law, as embodied in the common law doctrine of precedent. The importance of continuity was evidenced in the 1982 constitutional exercise when, even though Canada was uncontestably a sovereign nation in political fact\textsuperscript{74}, "the old machinery" was operated one last time\textsuperscript{75} and the assent of the United Kingdom Parliament to the termination of its legal authority in relation to Canada was sought in the formal 'patriation' of the Canadian constitution. While the fact of Canadian sovereignty made such a formality unnecessary from a strictly political point of view, constitutional legality and legitimacy demanded that traditional authority be terminated in a traditional manner.

A second source of constitutional legitimacy is the 'moral compact' which, as argued in the previous section, formed much of the historical basis for Confederation and provided the genesis for two of our foundational constitutional principles: federalism and minority protection. As I will argue in the next chapter, the principles and arrangements adopted at Confederation served to better realize the foundational values of our constitutional tradition in the particular circumstances of British North America and thus might be viewed as a natural evolution of this tradition on Canadian soil; thus this second source of constitutional legitimacy ultimately derives from the first. Any departure from the letter or spirit of the moral commitment which forms our 'Confederation compromise' will be seen as constitutionally illegitimate.

Such an issue arose in 1981 when the Trudeau government attempted to have the package of substantial constitutional reforms formulated in view of patriating the constitution, enacted by the United Kingdom Parliament absent provincial consent. Provincial

\textsuperscript{74}A point which will be developed in this section, \textit{infra}.
\textsuperscript{75}"...we must operate the old machinery perhaps one more time." \textit{Patriation Reference supra}, note 32, p.788-9.
governments challenging unilateral patriation\(^76\) argued that this was contrary to the federal principle and thus constitutionally illegitimate - if not illegal. The Supreme Court, deciding that as a matter of strict law no provincial consent was required - either as a condition to the validity of the federal government's request for the legislation\(^77\) or to the validity of the resulting British statute as a law of Canada - held that as a matter of 'constitutional convention' a substantial degree of provincial consent was necessary. The reason for the convention was the federal principle; unilateral action by the federal government could not be reconciled with that principle.\(^78\) In other words, unilateral patriation, while legal, was constitutionally illegitimate.

The approach taken by the Court in the *Patriation Reference*, answering separately a question on law and a question on convention, has been criticized as effecting a separation between constitutional legality and constitutional legitimacy.\(^79\) But perhaps a fairer

\(^{76}\)Only two provinces - Ontario and New Brunswick - supported the Trudeau initiative; the other eight opposed it, claiming that provincial consent was required. Newfoundland, Manitoba, and Quebec referred the matter to their Courts of Appeal, asking whether provincial consent was required by law or by convention. These judgments were appealed to the Supreme Court of Canada: *Patriation Reference*, *supra*, note 32.

\(^{77}\)"There is no limit anywhere in law ... to the power of the Houses to pass resolutions." (p.784). Martland and Ritchie, J.J., in dissent, found that the federal principle does indeed govern the exercise of the power to pass resolutions; therefore, the Joint Resolutions were illegal - not merely contrary to convention.

\(^{78}\)"The reason for the rule is the federal principle. (.....) The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities." (pp. 905-906).

\(^{79}\)See for example, Gil Remillard, "Legality, Legitimacy and the Supreme Court" in Keith Banting and Richard Simeon eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Methuen, 1983) p.189 at p.193: "...for the first time in our constitutional history the court expressly erects an impenetrable barrier between law and its practice, between legality and legitimacy." See also Dan Soberman, "The Opinions of the Supreme Court: Some Unanswered Questions" in Russell et al., *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment* (Kingston: Institute of Intergovernmental Relations, 1982) p.67 at 71 where Soberman notes that many commentators interpreted the Supreme Court's ruling on convention as a statement that provincial consent is 'morally required', and thus equated rules of convention with moral rules - as distinct from, and opposed to, legal rules.

This perceived divorce of legality and legitimacy has some basis in the words used by the majority in that case: in deciding to answer the question on convention the Court stated that the Reference before it "is not confined to an issue of pure legality but it has to do
characterization of the dilemma faced by the Court and reflected in its decision is that, prior to patriation, rather than an opposition between legality and legitimacy, two aspects of constitutional legitimacy were opposed. In 1981 the Canadian Constitution could legally be amended only by statute of the Parliament of the United Kingdom.80 Because sovereignty of the United Kingdom Parliament is unlimited, that Parliament was not legally bound to exercise this power in accordance with the federal principle which limits exercise of constitutional powers in Canada.81 Tradition demanded that these rules be followed. But this meant that the power to amend Canada's constitution could be exercised in a way which was irreconciliable with a fundamental principle of the constitution - a principle which derived from, and was essential to, the second source of constitutional legitimacy. Thus the two types of legitimacy were at odds: tradition, which dictated that the Imperial Parliament enact the proposed Canadian amendments into law and that this Parliament is not bound by the federal principle, was opposed to the Confederation commitment, which mandated that any constitutional change be in accordance with that principle.

Because of the unique circumstances which characterized constitutional amendment at that time, the Court had no choice but to speak of the two types of constitutionality in terms of 'legality' and 'convention' in that context. Indeed, it might be argued that the conventions surrounding the process of constitutional amendment identified by the

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with a fundamental issue of constitutionality and legitimacy” Patriation Reference, at p.884 (majority: convention).
80This was because section 7(1) of the Statute of Westminster, 1931 [22 Geo. V, c.4 (U.K.)] maintained the exclusive power of the United Kingdom Parliament to repeal, amend, or alter the British North America Acts.
81Martland and Ritchie, JJ., in dissent, emphasizing substance as opposed to form, found in effect that while the formal power to amend was with the United Kingdom Parliament, in reality it was Canadian action which set the process in motion and thus the real power of amendment resided in Canada; this power was therefore subject to the federal principle which governs exercise of all government power in Canada. See Noel Lyon, "Constitutional Theory and the Martland-Ritchie Dissent", in Russell et al., The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment supra, note 79 at p.60.
Supreme Court in the *Patriation Reference* \(^{82}\) had evolved precisely in order to redress the anomaly that a power exercised *for* Canada was not governed by principles which would have governed were the power exercised *in* Canada; that in the context of constitutional amendment one type of constitutional legitimacy was opposed to the other.

The chapters to follow will discuss a notion of constitutional evolution as a slow working out of the implications of premises implicit in our constitutional tradition - that is, a striving toward coherence. On this view, patriation may be seen as an essential step in the evolution of the Canadian constitution. Now that the Constitution has been patriated, the contradiction described above no longer obtains. All constitutional powers are exercised in Canada. All are therefore governed by constitutional principle\(^{83}\) - both the principles which derive from tradition, and those which derive from our moral compact. No longer may a power be exercised legally yet illegitimately under the Constitution.

In the chapters to follow I will argue that the principles and institutions of our constitutional tradition were developed to further a certain understanding of individual

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\(^{82}\)The Supreme Court was concerned only with conventions surrounding the request made by Canada for U.K. legislation (that is, the existence of a Canadian convention); there were also similar conventions which had to do with the propriety of the United Kingdom Parliament enacting the legislation (conventions which pertained to the exercise of powers of that Parliament). This distinction is clearly made in the Kershaw report (First Report from the Foreign Affairs Committee, Session 1980-81, *British North America Acts: The Role of Parliament*, House of Commons (U.K.), Jan. 30th, 1981) which was concerned only with the latter: "...[t] would be in accord with the established constitutional position for the UK Government and Parliament - particularly Parliament - to take account of the federal nature of Canada's constitutional system, when considering how to respond to a request by the Canadian Government and Parliament for amendment and/or patriation of the British North America Acts. For when it acts or declines to act on such a request, the UK Parl. is exercising its powers and responsibilities as .... part of the process of Canadian constitutional amendment." (at par.83); "It seems to us that all Canadians (and thus the governments of the Provinces too) have, and have always had, a right to expect the UK Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system..."(at par. 103).

\(^{83}\)Re *Manitoba Language Rights* [1985] 1 SCR 721(*hereinafter* *Manitoba Language Reference* ).
dignity, autonomy, and equality, which form its premises. I will argue that both types of legitimacy outlined in the preceding paragraphs derive from, and are means of instantiating, these deeper values. Thus, ultimately, constitutional legitimacy has to do with upholding the values which underlie our constitutional tradition.

**The People of Canada**

In most modern liberal democracies, the constitution is explicitly the creation of 'the people'. As noted above, the Constitution of the United States of America begins: "We, the people of the United States... do ordain and establish....". Similarly, the preamble of the Basic law of the Federal Republic of Germany (1949) declares: "The German people ... are called upon to achieve in free self-determination the unity and freedom of Germany..."; and the constitution of the Fifth French Republic (1958) begins: "The French people solemnly proclaims....". In contrast, it might be said that the Canadian people were created within and by their constitution. Formally, the Canadian people were created as such by statute of the Imperial Parliament, whose authority and procedures derive from a particular constitutional tradition. The Canadian people then created itself as a democratic polity by participating in the institutions of democratic governance developed within that tradition, established in our constituent Act.

By section 3 of the *British North America Act*, the provinces of Canada, Nova Scotia, and New Brunswick were joined to "form and be One Dominion under the Name of Canada".

As stated by Rand J. in *Winner v. S.M.T. (Eastern) Ltd.*\(^{84}\)

"The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the

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\(^{84}\) *supra*, note 56.
The geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship.

The people of Canada, existing in law and in name only at the time of Confederation, then created itself as a democratic community through participation in the democratic governance of the Canadian polity. In a dialectic between the Canadian public and its elected representatives, laws shaping the new nation were formulated, debated, enacted, criticized, amended, repealed, and reformulated; and in the process a democratic people was formed.

For over a century, Canadians - including Quebeckers - have participated freely in the institutions of democratic governance established by the Constitution Act, 1867; for as many decades, judicial institutions established by that Act have commanded our voluntary compliance. As described by one jurist,

"Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."85

I submit that, by implicitly accepting the legitimacy of the democratic and judicial institutions established in the British North America Act, the Canadian people have accepted the values which inform them and the rules according to which they came into being. By participating freely in the democratic governance of the Canadian polity, Canadians have consented both to their existence as a national community86 and to

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86The question of express revocation of this consent to function as a single political community will be addressed in chapter 5, infra.
governance according to the principles embodied\(^8\) in these institutions. In so doing, they implicitly ratified that which had previously been accomplished by legislative fiat.

The people of Canada have been shaped as a people by the institutions within which they were created. The political culture of the Canadian people, the structure of Canadian legal thought, and this people's conception of itself, have been deeply influenced by the values which animate these institutions. In this sense, it can be said that not only were Canadians created within the Constitution but that they were created by their constitution. While the political culture of Canadians is a complex interweaving of various political traditions, it is significantly informed by the liberal-democratic values which underlie the principles, institutions and remedies which comprise the Constitution of Canada.

I can imagine the following objection to the argument thus far: The constitutional tradition referred to is not that of the people of Quebec. The Quebec people have their own distinctive public law tradition, with roots in French Civil Law, further developed to suit the particular conditions of Quebec society. Although the English constitutional tradition formally became part of the Constitution of Canada - and thus of Quebec - by virtue of the preamble of the Constitution Act, 1867, this was imposed upon the Quebec people. Its principles and procedures enjoy little legitimacy there.

Such an objection would have much romantic appeal in the current intellectual climate characterized by a zeal to find and condemn any supposed imposition of values (especially liberal values) upon a 'people'. However, in this case it would be false - as

\(^8\)That the principles of our constitutional tradition are embodied in the institutions established in the *British North America Act* was recognized by the Supreme Court of Canada in *Manitoba Provincial Judges Assn. supra*, note 68 and will be elaborated in chapter 3 *infra*. 
is evident as soon as one examines Quebec legal thought, as reflected in the writings of the jurists most respected in Quebec society.

Quebec has no distinctive public law tradition. In the years following Confederation, Quebec jurists were concerned exclusively with private law. Jurisdiction over individuals' interpersonal relations was deemed essential to preserving French Canadians' distinct cultural heritage, but there was a general acceptance of the idea that non-private law was of little concern to Quebec; that preserving a distinct nationality had to do with the way in which individuals organized their affairs with one another, not with the way in which they interacted with the state. Consequently, no one questioned that Anglo-Saxon law would govern the public realm. "Few seemed to have objected to (the) process of absorbing a political, judicial, and ideological heritage that had not been worked out in Quebec." As a result, Quebec's public law tradition is the Anglo-Canadian tradition. The administrative law treatises of Quebec jurists René Dussault and Patrice Garant, of unquestionable authority in Quebec legal society, describe the principles and jurisprudence of Anglo-Canadian public law; and neither scholar questions that Quebec's administrative law is "in essence constituted by ideas about liberalism and the rule of law that pervade Anglo-Canadian administrative law." Indeed, Dussault has suggested that "la promotion de la liberté constitue l'objectif premier de toute véritable démocratie".

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88 Robert Yalden, "Unité et Différence: The Structure of Legal Thought in Late Nineteenth-Century Quebec", 46 University of Toronto Faculty of Law Review p.365 at p.371.
89 Ibid., at 384.
90 Ibid., at 386.
Since the inception of the Canadian polity, Quebeckers have participated freely and avidly in the democratic governance both of the national community and of Quebec. Judicial institutions established under the Constitution Act, 1867 - including the Supreme Court of Canada - have commanded the voluntary compliance of Quebeckers. Having participated freely in these institutions for over a century, Quebeckers have implicitly acknowledged their legitimacy, and have demonstrated acceptance of the principles and values which inform them.

The constitutional tradition referred to above, and which will be described in the chapter to follow, is that of all Canadians. The Canadian people, which includes French Canadians in Quebec, developed as a people within this tradition, by participating in its institutions; and in so doing, have accepted and been deeply influenced by its principles and values.

Sovereignty

The Canadian people, created and expressing themselves as such within the Anglo-Canadian constitutional tradition, are sovereign over the entire territory of Canada. Canadian sovereignty was derived from Britain. This continuity is essential both to its legality and to its legitimacy.

At the time of Confederation, sovereignty over all the territories now comprising Canada resided in the United Kingdom - these lands having been acquired by Great Britain over a

92 Not only does Quebec have proportionate representation in Parliament and the federal Cabinet, not only are Quebeckers substantially represented in the federal civil service, but Quebeckers have held the Office of Canadian Prime Minister for 52 of the 130 years since Confederation. See Neil Finkelstein, George Vegh, Camille Joly, "Does Quebec Have a Right to Secede at International Law?" [1995] 74 Canadian Bar Review 225 at p.255.

93 The issue of Aboriginal rights and the qualifications of Canadian sovereignty implied by that concept, are beyond the scope of this paper. See comments in Chapter 1, supra.
period of several centuries, largely by military force (whether manifest, or threatened).\textsuperscript{94} Canada gradually gained independence from Britain through the \textit{de facto} assumption of powers by Canadian authorities and the corresponding withdrawal of British power.\textsuperscript{95} Canada's legal independence, granted in part in the \textit{Statute of Westminster, 1931}, was completed with section 2 of the \textit{Canada Act, 1982} which provided that no further Act of the United Kingdom Parliament shall extend to Canada as part of its law.

The factual acquisition of sovereignty by the Canadian people paralleled, and even preceded, its legal recognition.\textsuperscript{96} But this does not diminish the importance of the legal transfer of sovereignty. Because legal continuity is an essential condition of legitimacy in the Canadian constitutional tradition, sovereignty of the Canadian people over this territory, in order to be constitutionally legitimate, had to be transferred from Britain; and this transfer had to occur in such a manner as to preserve legal continuity.

To so claim is not to dispute that sovereignty in Canada is also a political fact;\textsuperscript{97} and that, were any legal reasons now to be removed, the political fact would remain. Rather, it is to hold that Canadian sovereignty as a purely political fact is not something that can be recognized in our constitutional tradition. Canadian sovereignty, to be constitutionally legitimate, must have a legal explanation.\textsuperscript{98}

\textsuperscript{95}ibid. p.391.
\textsuperscript{96}As noted by the Supreme Court of Canada, by the time of the enactment of the \textit{Statute of Westminster, 1931}, Canada was already, in fact, an independent and sovereign state. "There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931." \textit{Reference re Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792} at 816
\textsuperscript{97}Cf. Brian Slattery, \textit{supra} note 94, who writes that Canadian sovereignty is "at root a question of fact".
\textsuperscript{98}This may be contrasted with sovereignty of the Parliament of the United Kingdom, which, as noted by H.W.R. Wade, is a political fact for which no legal explanation can be
But the political understandings and conventions which resulted in a factual transfer of sovereignty prior to the legal transfer\textsuperscript{99}, may evidence a deeper truth about constitutional legitimacy in the Anglo-Canadian tradition. It may be that failure to effect this transfer would have been contrary to the fundamental values underlying our shared constitutional tradition. In a much cited passage, Lord Sankey, referring to the possibility of repeal of the Statute of Westminster, wrote:

"It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory, and has no relation to realities."\textsuperscript{100}

As will be developed in the next chapter, I believe these 'realities' refer to certain values deeply embedded in the English constitutional tradition - values of individual dignity and autonomy, expressed in such documents as the Magna Carta and the English Bill of Rights\textsuperscript{101} as well as in parliamentary institutions - which command a respect for self-government. As noted above, the \textit{British North America Act} created Canada as a nation. As expressed by the Judicial Committee of the Privy Council, "...the object of that Act [is] ... to provide a constitution for Canada, a responsible and developing State."\textsuperscript{102} To have failed to grant to Canadians the legal capacity to govern themselves

\textsuperscript{99}The \textit{Statute of Westminster, 1931}, recognized in its preamble the political necessity for Dominion request and consent to Imperial legislation, and then proceeded, in section 4, to require such request and consent as a condition to the legal validity of such legislation.

\textsuperscript{100}\textit{British Coal Corporation v. The King}, [1935] A.C. 500 at p.520.


fully as a nation - once a certain degree of political maturity had been achieved, or to revoke this capacity once granted, would have been contrary to the values which form the premises of our constitutional tradition.

The Imperial Parliament did not transfer sovereignty to several independent provinces or to two cultural-linguistic groups but to the people who constitute the Canadian nation. As will be elaborated in Chapter 5, in order to maintain legal continuity a transfer of sovereignty must fulfil certain requirements of voluntariness on the part of the entity effecting the transfer; thus the intent of the United Kingdom Parliament in transferring sovereignty to its former colonies is a significant factor in determining the legal locus of that sovereignty. According to the United Kingdom Parliament, sovereignty in a federal state resides in the people as a whole. This was evidenced in the *Western Australia* decision.

In 1935 the State of Western Australia petitioned the British Parliament, wishing to secede from the Australian Commonwealth. Secession had been approved by the majority of voters in Western Australia by referendum; it was opposed by the Commonwealth government. Legally, it could be achieved only by Imperial statute. The petition was referred to a Joint Select Committee of Lords and Commons which, after hearing argument and evidence from both the Commonwealth and Western Australia about the "long established and clearly understood principles" and "conventions of constitutional practice" concerning the exercise of the United Kingdom Parliament's right to legislate for self-governing territories such as Australia, and after considering the "all pervading division of powers" between the Commonwealth and the states, decided that the petition could not be received: it was not in accord with the division of

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103 For a full account and excellent discussion of the attempted secession of Western Australia see Gregory Craven, *supra*, note 34.
sovereignty within the Australian federation and therefore Parliament was "constitutionally incompetent"104 to take the legal action requested. The Committee stated,

"The Parliament of the United Kingdom in enacting the Constitution, was giving effect to the voice of the people of the continent of Australia, and not to the voice of any State or States.105 It is only therefore when invoked by the voice of the people of Australia that, according to constitutional usage, the Parliament of the United Kingdom can properly vary or dissolve that Federal Union."106

According to the Committee, the states are not sovereign but exist as political entities only in respect of the powers vested in them under the Constitution.107 Ultimate sovereignty is in the whole; therefore, a proper request for dissolution could only come from the whole of the Australian people.

104 This referred to constitutional conventions by which that Parliament felt itself bound. In strict law Parliament was able to accede to the request of Western Australia, or even to so legislate absent any request or consent. The central convention governing the exercise of the power of the United Kingdom Parliament to legislate in this context was, as stated in paragraph 3 of the Statute of Westminster, 1931, that no Imperial enactment shall extend to any of the Dominions as part of the law of that Dominion absent the request and consent of that Dominion - in accordance with the value of autonomy which, as discussed in previous chapters, commands a certain respect for self-governance. The crucial issue to be resolved in the case of Western Australia was which legislature was required by convention to consent to the legislation in question. This involved an inquiry into the division of democratic sovereignty in the Australian federation - that is, absent the legal requirement of Imperial legislation, in which political community would sovereignty inhere.

105 Note that in fact (although not in law) the application of the Australian Constitution to each colony was made dependent upon the consent of the people of that colony as expressed in a referendum (Craven, supra, note 35, p.156). This was not the case with the Union of the British North American colonies; therefore, this statement is even more applicable to the Canadian situation than to the Australian.

106 Report by the Joint Committee of the House of Lords and the House of Commons on the Petition of the State of Western Australia (1934-35) H.L. Jour. 180-82, at par.11.

107 "It is essential in this connection to keep in mind that Western Australia, in joining the Commonwealth, surrendered all those powers, previously enjoyed by it as a self-governing Colony, which under the Commonwealth of Australia Constitution Act, 1900, were vested in the Commonwealth, and that it has since the coming into operation of that Act, continued to exist as a political entity in respect only of the powers which remain vested in the States." Ibid. at par.8.
That sovereignty is in the whole and not in Canada's component parts, is both expressed in and evidenced by the mobility rights described in the previous section. As noted above, the right or capacity to live in any province in Canada and to engage in work there inheres in every Canadian "as a constituent element of his citizenship status". Now enshrined in section 6 of the Charter, this right was not created by that provision but - as recognized both by the Supreme Court of Canada in Winner and by the American Supreme Court - is implicit in the very concept of a single nation. Mobility rights mean that each member of the larger national community has the right to choose to be a full member of any of the smaller political communities comprising the nation. The national community is thus the primary political community: it alone possesses the capacity to include, to exclude and to determine criteria for membership - an essential attribute of sovereignty.

3. Conclusions

A strong version of the 'two nations' theory of Confederation - which holds that Canada is a compact between two sovereign peoples, either of which may leave the Union at will - suffers from confusion as to the identity of the 'Quebec people' who are held to enjoy this capacity; and provides no viable legal or theoretical basis for the sovereignty claimed for this people and denied to other groups within Quebec's borders.

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108 Winner, supra note 57 at p.919
109 In Shapiro v. Thompson the United States Supreme Court first found an implicit constitutional guarantee that "all citizens be free to travel throughout the length and breadth of our land." 394 U.S. 618 (1969) at 629. The court found no need to ascribe the source of this right to any particular constitutional provision (at 630). In Zobel v. Williams 457 U.S. at 67 Brennan J., concurring, said, "if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation." (emphasis added). See discussion in Tribe, American Constitutional Law 2nd ed., 1986, p.1455-1457.
A weaker version of the compact theory, which recognizes an historic agreement to create a polity within which two 'founding' cultural-linguistic groups might both flourish, provides an explanation for many of the provisions of the *Constitution Act, 1867*, as well as for the adoption of the federal principle itself, and is thus a useful lens through which to view our constitutional arrangements - although if relied upon exclusively, presents a distorted view of these arrangements. Nevertheless, rather than a *contract* between two distinct groups, the relevant provisions of the *British North America Act* bear witness to a moral commitment by all components of Canadian society to ensure the continued existence of two religious and linguistic groups within Confederation. Upholding this commitment in spirit as well as in letter is essential to constitutional legitimacy in Canada.

Rather than a compact, the Constitution of Canada might best be seen as a tradition: one which we have inherited from Britain and adapted to suit the conditions of Canadian life. The people of Canada - including Quebec - were created within this tradition and were shaped as a people by its underlying values, as embodied in its institutions and procedures. This people is now sovereign over the entire territory comprising Canada, sovereignty having been transferred from Britain in a manner which fulfilled the requirements of legitimacy as well as legality within our constitutional tradition.

Because our constitution is essentially a tradition, continuity is an important aspect of constitutional legitimacy. Nevertheless, continuity alone is not sufficient: legal and political legitimacy depends ultimately upon conformity to the values which underlie our constitutional tradition - the subject of the next chapter.
Chapter 3: Constitutional Values

In the previous chapter I suggested that the Constitution of Canada is in essence a tradition: one which we have inherited from Britain and adapted to suit the conditions of Canadian life; and that constitutional - that is, legal and political - legitimacy depends ultimately upon conformity to the values which underlie this tradition. In this chapter I elaborate upon these claims, showing that our constitutional history might be described as a consensus through time that individual autonomy, equality, and dignity be expressed and promoted in society's institutions and laws.

I begin by tracing the evolution of the doctrine of the rule of law in English constitutional history, showing that the notion of limitation on political power is deeply rooted in our legal consciousness and that from earliest times it had to do with protection of individual liberty. I describe how the idea of the rule of law developed along with Parliamentary institutions, and show that, at least until the end of the eighteenth century, democracy and protection of individual liberty were viewed as mutually supporting. I then argue that underlying the diverse elements comprising our constitutional tradition is a common set of values: a certain notion of individual autonomy, equality, and dignity. Our early constitutional history may be described as the slow working out of the implications of these values and their gradual expression in laws and institutions. In this, legal developments and evolving political consciousness were mutually reinforcing.

In the second section I suggest that the arrangements entered into at Confederation were an attempt to realize these deeply rooted constitutional values in the particular circumstances of colonial British North America. What I referred to in the previous
chapter as our 'Confederation compact' might thus be viewed as a natural evolution of our inherited constitutional tradition on Canadian soil. As such, these arrangements ultimately derive their legitimacy from the tradition itself and its underlying values. The enacted provisions of our constitution thus emerge from, and might be viewed as a part of, our constitutional tradition.

Subsequent to 1867, the slow process of developing institutions and creating laws which express and realize these constitutional values continued in the Canadian courts and in the Canadian political sphere. In the final section of this chapter I very briefly review some of the milestones along this journey, again emphasizing that legal developments and evolving political consciousness have been mutually reinforcing. I argue that the enactment of the Canadian Charter of Rights and Freedoms was a natural evolution of our constitution, limiting legislative supremacy and thus removing some of the contradiction between inherited doctrine and our tradition's underlying values, thereby increasing its coherence. Moreover, the Charter provided the occasion for the Supreme Court to articulate the relationship between liberty and democratic governance within which our constitutional values might best be realized.

1. Our Constitutional Inheritance

The beginnings of our constitutional tradition can be glimpsed in the embryonic notion of the rule of law embodied in the customary laws of England's early inhabitants. Nevertheless, it took centuries of legal writing, of court battles, of struggle between those interested in aggrandizing power and those intent on limiting this power, to work out the contours of this doctrine, and to begin to create the legal framework within which its underlying values might be realized.
The Germanic tribes which settled in the southern half of Britain and created 'Angleland' brought with them their customary laws - including those which governed the relations between the old English kings and their subjects. Thus, from the beginning of English history, rulers were subject to law; our early constitutional tradition contains no conception of limitless power. The idea of subjection of ruler to law was first expressed as a distinct principle in English legal theory in the thirteenth century, when Bracton wrote that the king is under the law because law makes the king.

The Magna Carta (1215), which first articulated this feudal notion in a legal document, has been considered the foundation of our constitutional tradition. However, the Magna Carta was not revolutionary, but declaratory - stating that certain incursions on the liberty of subjects were contrary to the law, and that the law must be obeyed. It was a general restatement of laws and customs of the realm which were then being disregarded by the Crown. As Maitland notes, the Magna Carta was


\[111\text{However, this principle was clearly articulated as far back as ancient Greece, where the Rule of Law was expressed by the term, 'isonomia', referring to the equal application of laws and the certainty of being governed legally in accordance with known rules. Isonomia predated democracy, and was more highly valued than democracy as a basis for good government. Aristotle wrote, }

\["[H]e who asks Law to rule is asking God and Intelligence and no others to rule: while he who asks for the rule of a human being is bringing in a wild beast; for human passions are like a wild beast and strong feelings lead astray the very best of men. In law you have the intellect without the passions."\]

\text{Aristotle, } The Politics , Book III, Ch, 16, cited in Geoffrey de Q Walker, The Rule of Law: Foundation of Constitutional Democracy (Melbourne: Melbourne University Press, 1988). The idea of equality of laws also found expression in republican Rome - although under the emperors the Rule of Law was eventually abandoned in favour of the idea of a prince who was above the law. One of the earliest sources of Roman law, the Laws of the Twelve Tables, provided that 'no privileges, or statutes shall be enacted in favour of private persons, to the injury of others contrary to the law common to all citizens, and which individuals, no matter of what rank, have a right to make use of.' quoted in }Ibid.\text{ p.94.}

\[112\text{"The king is below no man, but he is below God and the law; law makes the king; the king is bound to obey the law, though if he break it, his punishment must be left to God". Bracton, De Legibus Angliae (Rolls Series), I, 38; quoted in F.W. Maitland, The Constitutional History of England , H.A.L. Fisher ed., (Cambridge: Cambridge University Press, 1979) p.100-101.}\]
"intensely practical; it is no declaration in mere general terms of the rights of Englishmen, still less of the right of men; it goes through the grievances of the time one by one and promises redress. (...) the law that it states is not new law; it represents the practice of Henry II's reign. The cry has been not that the law should be altered, but that it should be observed, in particular, that it should be observed by the king."¹¹³

Thus provisions of the Magna Carta emerged from, and merely restated, the customs and traditional understandings of a particular people. Included in that document were prescriptions of due process, and the idea of equal application of laws. As for the former, article 39 proclaimed:

"no freeman shall be taken or (and) imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or (and) by the law of the land."

The notion that the liberty of an individual may be infringed only according to the law of the land implied several things. It necessitated that there be a body of settled law, and that what constitutes law be defined and knowable. It meant that this law cannot be changed at will by the Crown; and that the Crown may not act outside the law - in particular, where the liberty of individuals was concerned. Finally, it included a notion of procedural due process: a person may not be condemned or otherwise acted against except according to certain settled common law procedures.¹¹⁴

¹¹³Ibid. at p.15, emphasis added.
¹¹⁴According to D.G. Galligan, in early English legal thought, substantive and procedural due process were inseparably linked; and both were subsumed in the notion of the rule of law. Due Process and Fair Procedures: A Study of Administrative Procedures (Oxford: Clarendon Press, 1996) p.172-3
Equal application of laws was provided in article 40: "To no-one will we sell, to no one will we refuse or delay, right or justice". Sir Edward Coke summed up the import of this provision:

"And therefore, every subject of this realme, for injury done to him in [goods, land or person], by any other subject, be he ecclesiasticall or temporall, free, or bond, man or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him."115 (emphasis added)

Equal application of laws thus included a notion of equal access to the remedies afforded by the law for unauthorized incursions on the liberty of individuals. Thus 'the rule of law' as embodied in the provisions of the Magna Carta meant rule of the common law: a single body of law which applied to all subjects of the realm, protecting individual liberty, providing remedies for unauthorized incursions thereupon.

The principles stated in the Magna Carta were not to be fully implemented for centuries. Nevertheless, while courts may not have been able to use the Magna Carta to strike down inconsistent statutes or government action, it stood as a statement of constitutional principle that guided the development and interpretation of public law, and in time, the ideas of liberty and remedial justice expressed there became accepted as axioms of English political morality.

"But, though this Charter wanted most of those supports which were necessary to ensure respect to it, - though it did not secure to the poor and friendless any certain and legal methods of obtaining the execution of it (...); -yet it was a prodigious advance toward the establishment of public liberty. Instead of general maxims respecting the rights of the people and duties of the prince (maxims

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against which ambition perpetually contends, and which it sometimes openly and absolutely denies), here was substituted a written law; that is, a truth admitted by all parties, which no longer required the support of argument. The rights and privileges of the individual (...) became settled axioms." 116

During the oppressive rule of the Tudor kings, the ideas of individual liberty and legitimate government under law expressed in the Magna Carta persisted in the popular consciousness, shaping the structure of legal thought, creating a political culture within which the rule of law might later be more fully realized. The survival of the idea of the rule of law during the period of Tudor despotism was due in part to the maintenance of medieval institutions - in particular, parliamentary institutions - and of the monarchs' interest in using them. 117 The power of the monarch was increased if he worked through Parliament, which, though subservient, nevertheless provided greater legitimacy to the king's arbitrary acts: "it strengthens his hands that what he does should be the act of the whole nation" 118. This in turn strengthened the law: it sustained parliamentary procedures and institutions and gave them increased significance, reinforcing their legitimacy. Eventually, Parliament would become strong enough to limit the power of the monarch. Thus the rule of law and parliamentary institutions developed together and reinforced each other.

In the seventeenth century the developing doctrine of the rule of law was severely undermined by the expansion of the royal prerogative. The Crown's prerogatives were recognized at common law and thus had a legal basis: the common law courts determined their existence and extent. 119 Nevertheless, with a judiciary willing to defer to the

117 Walker, supra, note 111, p.99-100.
wishes of the Crown, the legal limits of prerogative could be expanded almost indefinitely, making a mockery of the rule of law. In Godden v. Hales a majority of the King's Bench held that

"the Kings of England were absolute Sovereigns; that the laws were the King's laws; that the King had the power to dispense with any of the laws of Government as he saw necessity for it; that he was the sole judge of that necessity; that no Act of Parliament could take away that power..."\textsuperscript{120}

A major figure in the struggle of the common law against expanded use of the prerogative was Sir Edward Coke. Coke invoked article 39 of the Magna Carta as the basis of English constitutional law: all official bodies were subject to the law of the land; no one could be deprived of liberty or property except in accordance with this law; and any such deprivation must be according to settled procedures. To Coke, \textit{per legem terrae} meant both the law of Parliament and the common law. Both existed in order to protect the individual; to safeguard the liberties of the people against the arbitrary extension of the prerogative.\textsuperscript{121} Administrative authorities had no jurisdiction except that conferred by statute or the common law; and the common law courts could determine whether this jurisdiction existed.\textsuperscript{122} Coke produced a restatement of the common law - gathering the old precedents, distilling the principles within them, and articulating them in a manner relevant to seventeenth century life, thus firmly establishing the common law as a body

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\textsuperscript{120}(1686) 2 Shower 475, 477; 89 E.R. 1050, 1051.
\textsuperscript{121}Anne Pallister, \textit{Magna Carta: The Heritage of Liberty} (Oxford: Clarendon Press, 1971) p.10 with respect to the common law; p.48 with respect to Parliament.
\textsuperscript{122}Galligan (\textit{supra}, note 114) cites the \textit{Case of Marshalsea} (10 Jacobi,10, Coke Reports 680) where Coke as Chief Justice directly invoked art.39 of the Magna Carta as establishing a test of jurisdiction.
of law which could govern the actions of ruler and ruled, and providing an important basis for the independence of the judiciary.123

At that time civilian ideas were being imported from the continent and many important criminal cases were tried by inquisitorial procedure, in which torture was an accepted method of investigation. Due process and judicial independence were being severely undermined by Crown intervention in criminal trials - interviewing judges prior to trials to make known the government's preferred verdict,124 preventing counsel from freely acting for the defendant.125 As Chief Justice of the Court of King's Bench, Coke fought against these practices, declaring them to be unconstitutional, contrary to right and to tradition.126 The notion of 'natural justice' as a standard of procedural due process was articulated by the seventeenth century Court of King's Bench as two rules: audi alterem partem (let the other party be heard) and nemo iudex in causa sua debet esse (let no man be a judge in his own cause).127 The remedy of habeas corpus was developed, under Coke's direction, into a powerful safeguard against the use of coercive power.

As the legal consciousness shaped by the promises of the Magna Carta developed and spread, coercive actions on the part of the Crown became increasingly viewed as illegitimate by ruler and ruled alike. As F.R. Scott observed, "the kings and queens of

123 Walker, supra, note 111, p.105-6. As Walker notes, the fact that there was a coherent body of law, that existed independently of government policy making, meant that expertise in the law, and not deference to government policy, was a basis for appointment to the bench, and that a judge deciding according to law had an answer to any charges of anti-government bias.
124 Such actions were declared by Coke to be unconstitutional, contrary to right and to tradition, in Peacham's Case, (1615) 2 St. Tr. 870.
125 In Fuller's Case (1607) 12 Co. Rep. 41; 77 E.R. 1322 the court under Coke held that the ecclesiastical court of High Commission had no power to punish counsel for contempt for anything he said in the course of legal submissions.
126 See previous two notes. See discussion in Walker, supra, note 111, p.114 -115.
England knew they ruled on the terms of a contract with their subjects, a contract to observe the laws and customs of the realm and to safeguard the rights and liberties of the people. The legitimacy and power of Parliament increased and the powers of the monarch were correspondingly limited. In 1689 Parliament enacted a Bill of Rights forcing the Crown to rule ever after through Parliament and providing for certain rights and liberties. Among other things, the Bill of Rights protected freedom of speech in Parliament and prohibited 'cruel and unusual punishments.' In the same enactment strengthening democratic governance and prohibiting incursions upon individual dignity, perhaps evidencing an implicit recognition of the connection between these two aims. The rule of law was further strengthened by the Act of Settlement of 1701 which gave judges security of tenure, better ensuring their independence. Thus, democratic institutions and the rule of law continued to develop in a symbiotic relationship. By the end of the seventeenth century a new constitutional order had been established based on the supremacy of Parliament, a monarchy limited by law, and the independence and authority of the common law courts.

While in the seventeenth century struggle against Crown prerogative Parliament was viewed as the protector of the rule of law and individual liberties against royal despotism, in the eighteenth century the development of a new doctrine, that of parliamentary sovereignty, rendered Parliament itself a potential threat to liberty. Ironically, this doctrine, under which there are no legally enforceable limits to the legislative authority of the Parliament at Westminster, had its roots in the seventeenth century battle against arbitrary power. In order to better defend the fundamental laws of the realm, Parliament had begun to assert its right and capacity to authoritatively interpret these laws; this was then extended to a claimed right to make and set aside law

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128F. R. Scott, Civil Liberties and Canadian Federalism supra, note 101, p.15
at Parliament's pleasure. Those who first articulated the emerging doctrine of parliamentary sovereignty conceived it as applying only in the chaotic circumstances of the time and maintained a belief in fundamental law of the realm - protective of individual liberty - which Parliament was bound to uphold. The Settlement of 1689, which determined that in the future supreme power should lie in the two houses of Parliament, was effected with the intent only of placing lasting and legal restraints upon Crown power. In other words, far from establishing an unlimited power, the roots of the doctrine of parliamentary sovereignty lay in an effort to limit power - and in particular, to constrain it by law which was protective of liberty. It was only in the nineteenth century when the positivism of John Austin provided the theoretical foundations for a full notion of parliamentary sovereignty, that this doctrine developed in a manner inconsistent with its origins. According to Austin, the sovereign is the supreme power from which all law derives; liberty is itself entirely dependent upon this sovereign and can be removed at any time at the sovereign's pleasure and discretion. Nevertheless, even Austin recognized a "moral limitation" on sovereignty: "rules set and enforced by mere opinion, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct", "ethical maxims which the sovereign spontaneously observes". Thus, it might be argued that room was left even in Austin's positivism for limitations on sovereign power protective of individual liberty: as a political necessity, such power must be exercised in accordance with the principles of the Magna Carta, diffused in English political consciousness.

Coke's efforts as Chief Justice to curb coercive government power were continued in several leading eighteenth century cases in which courts insisted that the executive be

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129 See discussion in Pallister, supra, note 121, pp.11ff.
130 Ibid.
131 Ibid. p.44.
able to indicate a legal foundation for each and every infringement of an individual's rights. In particular, *Entick v. Carrington* firmly established the principle that the government may not invade the rights of an individual absent specific statutory authorization. By the end of that century Dicey could assert with some measure of accuracy that, "Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else"; that there was (in theory at least) "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"; and that "the law of the constitution (...) [is] (...) the consequence of the rights of individuals, as defined and enforced by the courts." 

**Autonomy. Equality. Dignity**

As the above review has shown, throughout our tradition the rule of law has meant that there be a body of settled law which is well defined and knowable, applicable to all members of society equally. This requirement was captured in the phrase "by the law of the land" in the Magna Carta; it provided the impetus for Coke's efforts to produce a restatement of the common law as an intelligible body of law to govern the actions of ruler and ruled; and echoes in Dicey's assertions that all Englishmen are subject to the ordinary law of the realm. A settled body of stable law allows individuals to plan their

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133 *Entick v. Carrington* (1765) 19 St. Tr. 1029; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161; *Wilkes v. Wood* (1763) 19 St. Tr. 1153. See discussion in Walker, *supra*, note 111, p.125.
134 See previous note. There it was held that Crown servants could not enter the plaintiff’s premises and seize his papers absent legal authorization.
137 See the *Patriation Reference* supra, note 32, at p. 805-6: "The 'rule of law' is a highly textured expression ... conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." Emphasis added.
lives - to make informed choices about their future actions in light of their likely consequences. That these laws apply to everyone means that individuals can also be reasonably assured about the likely conduct of others. Thus the law provides a stable framework within which individuals, while respecting the constraints which these rules impose on everyone, may each pursue their own ends. A legal system which ensures certainty of laws thereby treats people as capable of making rational choices about their own lives and their actions and seeks to promote such autonomy and responsibility.

That the law applies equally to everybody, evidences a conception of individuals as equal in this autonomy and embodies a respect for their fundamental equality.

As noted above, the rule of law as it developed in our tradition combined both substantive and procedural due process: from the Magna Carta to Entick v. Carrington, the idea that incursions upon individual liberty must be justified by law meant, among other things, that the requisite common law procedures be followed. Underlying these common law procedures is a similar understanding of individual autonomy and equal human dignity. This is exemplified in the common law requirement of effective participation in the adjudicative process and the similar but more attenuated requirements of *audi alterem partem* in administrative decision making: those liable to damages or penalty must be entitled to understand the issue, to present their own case, and to respond to the case against them. The idea underlying these procedural requirements is that, as autonomous and responsible beings, individuals must be able to exert influence over the processes by which they are affected, to play a role in the process of decision with respect to their interests, and thus take responsibility for their lives and their futures.

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139 Here I wish to emphasize: This paper does not argue for a liberal conception of the individual; rather, that this is the conception which informs the institutions, remedies and procedures that comprise the rule of law in our constitutional tradition.

140 See D.J. Galligan, *supra*, note 114, for an argument that participation in legal and administrative processes can be justified in a manner similar to self-defense: as
conception, a fair hearing respects the dignity of those whose interests are at stake. As expressed by one writer,

"we think we owe it to a man as a human being to engage in argument with him, and allow him to engage in argument with us, rather than take decisions about him behind his back, completely disregarding, as it were, his status as a rational agent, able to appreciate the rationale of our decisions about him, possibly willing to co-operate in carrying them out."\(^{141}\)

Other procedural requirements such as the proscriptions against torture in criminal trials or the writ of *habeas corpus* - for which Coke and other jurists fought and won - are directly based on a notion of equal individual dignity and thus inviolability.\(^{142}\)

From the time of the Magna Carta, the rule of law has also meant that remedies be provided to redress unlawful infringement of the liberty or other interests of individuals. These are available only at the instance of those whose rights were denied: in other words, vindication of rights necessitates action on the part of the individual. Again, this evidences a notion of individuals as responsible, autonomous agents capable of informed choice about their lives and futures.

Thus, the rule of law as it developed in our constitutional tradition - expressed in certainty of laws, in particular remedies for unwarranted incursions on liberty available at the instance of citizens, and in judicial procedures which show respect for

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\(^{142}\) See R. Summers, "Evaluating and Improving Legal Procedure: A Plea for Process Values" (1974) 60 *Cornell L Rev*. See also George Kateb, "Remarks on the Procedures of Constitutional Democracy", in *Constitutionalism* J. Roland Pennock, John W. Chapman eds. 1979 p.215 at p.225: The right not to be treated inhumanely gives suspects, defendants, and prisoners "the experience of having their dignity respected when they seem, in the eyes of others and often in their own, to have lost their dignity because they failed to respect that of others."
individual autonomy and maintain human dignity, all of which afforded to all subjects equally - can be seen to have its genesis in the idea that individuals, as beings equal in inherent dignity and requiring autonomy, must be respected by others and by the state.

A similar conception of individuals as autonomous, equal and possessing of dignity, might be seen to underlie the democratic principle. As explained above, in our tradition democracy evolved not as an abstract principle, but within parliamentary institutions. Parliamentary government assumes a capacity of people, acting freely, to govern themselves.\textsuperscript{143} It also assumes that individuals \textit{should} govern themselves: that is, that humans, because of their nature, should enjoy a large degree of autonomy, which may be realized in part by sharing in the governance of their community.\textsuperscript{144} Participants in the democratic process are deserving of respect by virtue of this capacity; moreover, they are equally deserving of respect.\textsuperscript{145} This translates to equal participation in the political process: as autonomous beings equally deserving of respect, individuals are allowed equal say in shaping the laws by which they will be governed.

Thus, a particular conception of the individual can be seen to inform both the rule of law and the democratic principle. The idea that humans must enjoy a large measure of

\textsuperscript{143}As expressed by Mr. Justice Rand: "Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles." \textit{Switzman v. Elbling} [1957] S.C.R. 285 at p.306.

\textsuperscript{144}See Walter Murphy, "Constitutions, Constitutionalism, and Democracy", in Douglas Greenberg et al. eds., \textit{Constitutionalism and Democracy: Transitions in the Contemporary World} (New York: Oxford University Press, 1993) at p.3.

\textsuperscript{145}As articulated by George Kateb, the individual, as voter, finds in this status a series of attributions affirmed and acknowledged by society:

"I count; I count only as one; I am owed an account; I take part guiltlessly; I help to determine; I press myself forward without feeling shame; I can talk back; I have a right to be talked to; I am part of the ultimate constitution of the body politic; I take sides without wickedness; I should have access; I judge and accept judgment without the odium of presumptuousness; I win even when I lose."

autonomy forms the basis for self-governance as well as the prescription that laws be knowable; the fundamental equality of individuals in society is expressed in the notion of universal franchise, as well as in the equal application of laws. Informing all of this is a conception of human dignity, realized in part through self-governance and in part through individual liberty; expressed in institutions of self-government and maintained and vindicated in the procedures and remedies afforded by the judicial system.

Thus it might be said that notions of individual autonomy, equality and dignity form essential premises of our constitutional tradition, embodied in its fundamental institutions and principles. The constitutional history outlined above might be described as a slow working out of the implications of these values - both by jurists and by the populace at large, and of the gradual creation of institutions within which they might be realized. As will be illustrated in the third section of this chapter, this process is a continuing one.

2. Our Confederation Arrangements

The constitutional arrangements entered into at Confederation - those which were described in the previous chapter as the 'Confederation compact' - might be viewed as an attempt to realize our deeply rooted constitutional values in the particular circumstances of colonial British North America.

As Will Kymlicka observes, preservation of a minority culture can be seen to be essential to the freedom and dignity of its individual members. Societal cultures provide people with a range of meaningful options, and thus a context for individual choice as to
how to live their lives. Equality of opportunity for individuals to live a meaningful life is possible only if the cultures which provide their members with valuable life choices are maintained. Societal cultures also provide a basis for self-identity; because of this, individual self respect depends in large part upon the esteem in which the group to which people belong is held by society at large. Thus, individual dignity is integrally bound up with the recognition given to one's cultural group by the larger polity.

The 'compact' which informed our Confederation arrangements constituted a recognition that equal respect is due to the members of two cultures. Even prior to Confederation, the Act of Union of 1840 which granted equal representation to the two 'founding' groups was viewed as evidencing "the mutual acceptance of equality of status" which was "the premise upon which Anglo-French collaboration was based". The Confederation agreement was viewed by the French Canadian representatives as having succeeded in "maintaining the fundamental principle of the entente between the two racial groups in Canada, equality of race, equality of religion, equality of language, equality of laws." Ultimately, this translated to recognition of the equality and dignity of the individuals which comprised these groups.

The principle of minority protection underlies all our Confederation arrangements; for it was in order to protect a minority that Canada was created as a federal state. The

147 Ibid., p.89. See also: R. v. Keegstra, [1990] 3 S.C.R. 697 at p.746: "A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs." (citing I. Berlin, "Two Concepts of Liberty" in Four Essays on Liberty, (New York: Oxford University Press, 1969) 118 at p.155.
149 Ibid. p.104-5.
French Canadian delegates to the Confederation conferences had objected to the creation of a legislative union, fearing that, as a linguistic and religious minority, their language and culture would disappear. The establishment of a federal - as opposed to a legislative union - was a condition of French-speaking Canadians' agreement to participate in a new polity in which they would be a minority. A crucial term of the Confederation compromise was the creation of one province in which French Canadians would be a majority, given control over those matters which, in 1867, seemed most important for the preservation of French Canada's distinctiveness - education, civil law, and matters respecting religious life. The federal principle was thus adopted in order to enable members of the national minority to govern themselves, enacting laws that express their distinctive culture in at least one geographical component of the new state. This provided an opportunity for members of that minority to realize that aspect of individual dignity which can only be expressed in self-government.

But the concerns of minority protection generally were not thereby satisfied: what of provincial minorities? There were French Canadian communities outside Lower Canada. Special protections would be needed to ensure their cultural survival. Moreover, establishing one province in which French Canada was a majority meant that an English-Protestant minority was thereby created in that province. If the Confederation compact had been merely a commitment to protect two linguistic-cultural groups, as such, this could have been accomplished by means of the federal principle alone - with the creation of one political unit within which the French-Canadian minority would be a majority.

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150 See Richard Arès, Dossier sur le Pacte fédératif de 1867: La Confédération: pacte ou loi? (Montreal: Les Éditions Bellarmin, 1967) p.229, quoting statements by John A. MacDonald that a legislative union would have been preferable, but would never have been agreed to by Lower Canada, which felt that, in its position as a linguistic and religious minority, its institutions and laws would suffer (Confederation Debates, 6 feb. 1865 p.30).

151 See Confederation Debates, 6 feb. 1865 p.30, quoted in Ibid. p.229.

152 Ramsay Cook, Canada and the French-Canadian Question (Toronto: Macmillan, 1966) p.44.
able to protect its language and culture. But the principle of minority protection goes much farther. It does not merely ensure the flourishing of two groups within the whole, but embodies a commitment to ensure that individual members of each group may enjoy their societal culture and participate in public affairs in their maternal language, anywhere in Canada. The Confederation compact thus embodies a commitment not only between two 'nations', but also between the state and the individuals which comprise it to preserve the minority communities essential to their freedom and dignity, throughout the new polity.

Linguistic protections included in section 133 of the 1867 Act ensure that individual members of the national linguistic minority may use French in Parliamentary debates and in federal courts anywhere in Canada, and that members of the English-Protestant minority in Quebec may use English in the Quebec courts and legislature\textsuperscript{153} - thus affording equal opportunity to members of both linguistic groups to participate in the government of political units in which they are a minority. Similar protections were provided minorities in Manitoba\textsuperscript{154} and Saskatchewan and Alberta\textsuperscript{155} in the statutes establishing those provinces.

\textsuperscript{153}Although as interpreted by the Supreme Court of Canada, this protection is somewhat illusory. While either language may be 'used' by any person in legislative debates or in court, no one has a right to be understood in this language, or to understand what is being said by others. Nor does the section guarantee the issuance of court documents in the language of the recipient. \textit{Macdonald v. Montreal} [1986] 1 S.C.R. 460.

\textsuperscript{154}by s.23 of the \textit{Manitoba Act, 1870}. However, these were not respected until, in 1979, the Supreme Court declared unconstitutional the \textit{Official Languages Act} of 1890, which had provided that the English language only shall be used in the records and journals of the Manitoba legislature and in court proceedings, and that Acts of that legislature be printed only in English. See \textit{A.G. Manitoba v. Forest} [1979] 2 S.C.R. 1032. Moreover, the protections afforded by this provision are as scant as those of section 133 (see previous note): according to the Supreme Court, a summons issued by a Manitoba court may be in English only. See \textit{Bilodeau v. A.G. Manitoba} [1986] 1 S.C.R. 449.

\textsuperscript{155}by s.110 of the \textit{North-West Territories Act}, R.S.C. 1886, c.50, found by the Supreme Court to apply to Saskatchewan (\textit{R. v. Mercure} [1988] 1 S.C.R. 234) and Alberta (\textit{R. v. Paquette} [1990] 2 S.C.R. 1103) by virtue of sections 14 and 16 of each of the statutes establishing those provinces.
Section 93 of the 1867 Act, which establishes provincial jurisdiction over education, preserves rights or privileges with respect to denominational schools enjoyed by minority groups at the time of Union. This provision has been referred to by the Supreme Court of Canada as "a fundamental part of the Confederation compromise". Its structure illustrates the reciprocal and interlocking nature of minority rights in Canada: placing education within provincial jurisdiction, it allows members of the national minority, made a majority in one province, to govern themselves in a matter most crucial to cultural survival; at the same time, it protects the rights of the English-Protestant provincial minority created when the federal principle was adopted; in consideration for which it provides similar protections for the French-Catholic minorities in other provinces.

The wording of these provisions emphasizes the idea of equality which informs their reciprocal guarantees. Each clause of section 133 provides parallel guarantees for members of the national minority and for members of the Quebec provincial minority. Section 93 states that "all the Powers, Privileges, and Duties " conferred and imposed on minority groups in Upper Canada "shall be and the same are hereby extended to " minority groups in Quebec. As expressed by Lord Carnarvon upon introducing the bill into the British House of Lords, the object of the latter provision was

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156 This section applies to the four original provinces - Ontario, Quebec, New Brunswick, and Nova Scotia, as well as to British Columbia and Prince Edward Island (for the latter, see British Columbia Terms of Union, R.S.C. 1985, App.II, No.10, s.10; Prince Edward Island Terms of Union, R.S.C. 1985, App.II, No.12, second-last numbered par.) Protections similar to that of section 93 were negotiated upon creation of the other provinces and are included in their constituting statutes (Manitoba Act, 1870, R.S.C. 1985, App.II, no.8, s.22; Alberta Act, R.S.C. 1985, App.II, no.20 s.17; Saskatchewan Act, R.S.C. 1985, App.II, no.21, s.17) and in the Terms of Union of Newfoundland (schedule to Newfoundland Act, R.S.C. 1985, App.II, no.32; s.17)

"to secure to the religious minority of one province the same rights, privileges, and protection which the religious minority of another province may enjoy..."158. "It has been framed to place all these minorities, of whatever religion, on precisely the same footing, and that whether the minorities were in esse or in posse."159

Thus, even if this was not fully articulated at the time, the system of interlocking and reciprocal minority protections provided in the 1867 Act evidence a certain respect for the equality, autonomy, and dignity of the individual members of the new polity. It might therefore be said that our constitutional arrangements embodied an attempt to express the underlying values of the English constitutional tradition in the unique circumstances of British North America.160 This is notwithstanding the fact that acquiescence in these arrangements was primarily a matter of political expediency. What is politically expedient will depend largely on what is seen as legitimate; and it is submitted that, because of values deeply embedded in our tradition, these arrangements, which best respected the dignity of British North Americans, were intuitively viewed as legitimate by those instrumental in their adoption.

3. The Canadian Continuation of this Tradition

158 Speechees on Canadian Affairs, debates of 19 February, 1867, p.105, quoted in Arès supra, note 150, p.233 note 23.
159 Ibid., p.133, quoted in Ibid., note 24.
160 Nevertheless, while our 'Confederation compact' may be said to constitute a recognition of the equality of two colonial linguistic-cultural groups and thus to respect the dignity of their members, such recognition was largely denied the Aboriginal peoples who were prior occupants of the territories now comprising Canada. This contradiction between our constitutional values and our constitutional history is only now being addressed with the emerging doctrine of aboriginal rights - which embodies an attempt to reconcile that prior occupancy with the assertion of Crown sovereignty over these territories. (R. v. Van der Peet, [1996] 2 S.C.R. 507) Discussion of this is beyond the scope of this paper. Suffice it to note that such a reconciliation is necessary.
With the reception of the common law in colonial British North America, and then adoption of a constitution similar in principle to that of the United Kingdom, the body of principles, procedures and remedies which had been developed over the centuries to express certain constitutional values was transplanted to British North American soil. The principles first enacted in the Act of Settlement of 1701 were included in the Judicature provisions of the British North America Act, 1867; legislative institutions modeled on the Parliament at Westminster were provided therein. The slow process of creating a legal framework within which the equal dignity and autonomy of individuals might be realized then continued in the Canadian courts and in the Canadian political sphere.

**Legislative Supremacy**

As described above, from the time of the Magna Carta it has been the role of the judiciary to protect individual liberty. For centuries, this meant ensuring that the Crown obey the law; that incursions on liberty be authorized by law - whether common law or statute. Protection of liberty was thus an incident of the courts' role as guardians of the rule of law. But with the development of the doctrine of legislative sovereignty, the lawmaker itself became a potential threat to liberty. In the decades following Confederation the Canadian judiciary had limited means by which to protect individual liberties from legislative encroachment. Even so, its record in using these was mixed: judges were too willing to subscribe to the doctrine of legislative supremacy, considered a cornerstone of our inherited tradition.

One potential method of protecting our constitutional values against legislative infringement was to find that laws which denied individual equality also offended the division of powers in the British North America Act. Thus the Judicial Committee of the
Privy Council struck down a British Columbia law that prohibited anyone of Chinese origin from working in mines: the law was found to be within federal jurisdiction over 'naturalization and aliens'. Nevertheless, three years later the Judicial Committee upheld a British Columbia law denying the vote to Canadians of Asiatic origin, refusing to consider "the policy or impolicy of such enactment". According to the judges, the doctrine of legislative supremacy prohibited such an active judicial role.

Another route was to find an "implied bill of rights" in the British North America Act. Duff C.J.C. first articulated the idea that the Act implicitly guarantees the conditions necessary to the effective functioning of the parliamentary institutions it establishes; thus freedom of the press, freedom of expression, freedom of conscience, upon which parliamentary democracy depend, operate as implicit restraints on legislative action. This argument was reiterated in a number of judgments - but always in obiter; it was never adopted by a majority of the Court due to the difficulty of

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161 Union Colliery Co. of B.C. Ltd. v. Bryden, [1899] A.C. 580 (P.C.)
162 Cunningham v. Tomey Homma, [1902] A.C. 151 (P.C.)
163 Re: Alta. Statutes, [1938] S.C.R. 100 (hereinafter, The Alberta Press Case). There the Supreme Court of Canada held that the provincial government could not require newspapers to give it a right of reply to criticism of its policies. The "Alberta Press Bill", part of a package of legislation intended to put Social Credit theory into effect, was held invalid for invading federal jurisdiction over banking, interest and legal tender. However, three judges, led by Chief Justice Lyman Duff, in additional reasons, found the legislation contrary to the freedom of expression which is assumed in parliamentary institutions, thus implicitly forbidden in the Constitution Act, 1867:

"The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives." (pp.133-134)
reconciling a notion of implicit limits on legislative action with the doctrine of legislative supremacy.\textsuperscript{164}

As noted above, this doctrine, in which the sovereignty of Parliament knows no limits and thus "any of the civil liberties, including freedom of political speech, can be abolished by the Parliament at Westminster at any time"\textsuperscript{165} evolved in a manner inconsistent with its original intent - as a means to limit power in the name of individual liberty. As such, it creates only contradictions in our constitutional tradition. Not only does it mean that a legislature can undermine or destroy itself by removing that which is essential to its proper functioning; it also means that democratic decision-making needn't be true to itself: it can be used to subvert the values which form its premises.

As discussed above, in our constitutional tradition individual dignity is realized in part through self governance and in part through individual liberty. 'Fundamental freedoms'

\textsuperscript{164} In \textit{Saumer v. City of Quebec}, [1953] 2 S.C.R. 299 a majority of the Court struck down a by-law which limited religious freedom; however, they differed in their reasons. Only two judges, quoting Duff C.J.C.'s statement in the \textit{Alberta Press Case}, suggested the possibility of implied rights - in this case freedom of conscience: Kellock J. at 353-4 and Locke J. at 363, 373-4. Rand J. also quoted Duff C.J.C.'s statement at 331. In \textit{Switzman v. Elbling} (\textit{supra}, note 143) where the Court held that a law prohibiting the propagation of communism was \textit{ultra vires} the provincial legislature, Abbott J. stated, \textit{in obiter}, that neither Parliament nor the legislatures could abrogate the right of discussion and debate necessary to the functioning of democracy. (p.328)

The idea of an 'implied bill of rights' seemed to finally receive its death blow when, in 1978, Beetz J., speaking for a majority of the Court, held that no fundamental freedoms are beyond the reach of competent legislation. \textit{A.G. Can. and Dupond v. Montreal}, [1978] 2 S.C.R. 770, at 796. This case involved a Montreal City by-law that authorized the banning of public demonstrations. The by-law was upheld by the Court. Since the enactment of the Charter, there has been a sea-change in judicial attitude to implied rights. Beetz J. himself revived the notion when, in the post-Charter case of \textit{OPSEU v. Ontario (A.G.)} [1987] 2 S.C.R. 2 he spoke of political freedoms as "basic structural imperatives", "quite apart from Charter considerations", which the legislatures "can in no way override" (at p.57). In the recent \textit{Manitoba Provincial Judges Assn. supra}, note 68, the Court expressly approved the reasoning in the implied bill of rights cases and found that judicial independence is one of several unwritten principles forming part of the "basic structure" of the Constitution.

\textsuperscript{165} Hogg, \textit{supra}, note 66, p.31-12.
such as those of expression and conscience are not only essential to the functioning of
democracy; they are considered necessary for individual self-realization and thus
essential to human dignity. Unjustified incursion on the freedom to express one's ideas
or to practice one's beliefs is a statement by society that one's thoughts and beliefs are
not worthy of the same respect and concern as those of others; that one is not an equal
member of society. To deny freedom of expression is thus to deny the equality,
autonomy, and dignity of those who are thereby silenced. Legislation which
unjustifiably infringes liberty is thus contrary to democracy's own premises.

Commenting on the reasoning in the implied bill of rights judgments - that
establishment of representative parliamentary institutions in the Constitution Act,
1867 must have been accompanied by a guarantee of the conditions, such as freedom of
political speech, necessary to their effective functioning, thus limiting legislative
sovereignty accordingly - Peter Hogg writes that it is "ironic" that the very fact of
establishing institutions in a written constitution would cause them to be different in a
crucial respect from those upon which they were modeled. But perhaps, far from
ironic, the fact that we have a written constitution provided us with an opportunity to
free ourselves from the tyranny of that doctrine, inconsistent with the values which
were its genesis - and thus to interpret our constitution in such a way as to be more

166Simeon C.R. McIntosh, "Fundamental Rights and Democratic Governance in the
167That it is a notion of equal human dignity that has provided the basis for freedom of
expression in our constitutional tradition, is evident from the limitations which have
always been placed on that right. As noted by Rand J., in Switzman v. Elbling,
protection of this freedom has stopped at such things as obscenity and criminal libel,
"where the foundation of the freedom itself is threatened". Supra, note 143, at p.304.
For a post-Charter example of this, see R. v. Keegstra, supra, note 147, where the
Supreme Court found that prohibition of hate propaganda was justified because such
expression has a severely negative impact on the sense of human dignity and self-worth
of members of the targeted group, (see pp.746-747) implying that they are not human
beings equally deserving of concern, respect and consideration (p.756).
168That is, "radically" different from the United Kingdom Parliament, which has no
legal limitations on its sovereignty. Hogg, supra, note 66, at p.31-13 note 61.
coherent than that upon which it was modeled. In any case, judges were unwilling to take that evolutionary step; and it was left to the Canadian populace to create a constitutional document which would limit legislative supremacy, rendering our constitution more consistent with its underlying values.

**Evolving Political Consciousness**

It was many years before this was possible - that is, before the implications of our constitutional values were sufficiently apprehended by Canadians. These values were only very impartially realized in Canadian society in the decades following Confederation. The franchise provides one indicator of the limited extent to which the ideal of equal human dignity informed Canadian political life. As historian Reg Whitaker notes, in the first federal election following Confederation in 1867, only about fifteen percent of the total population was eligible to vote. This increased only very gradually: it was following World War I, when women were admitted to the franchise, that the electorate finally accounted for more than half (50.6%) of the population.¹⁶⁹ The female population of Quebec was not permitted to vote in provincial elections until 1940. Canadians of Japanese origin were permitted to vote in federal elections in 1948, and Native Canadians were enfranchised only in 1960.¹⁷⁰ Changes in one area of society were slow to have repercussions in other areas: even once moves were being made to amend legislation and change social institutions which denied the equality of men and women, we had difficulty generalizing the underlying principle of equal human dignity - as the forced internment and deportation of Canadians of Japanese origin during and immediately after the Second World War, or the treatment of Aboriginal Canadians, bear testimony.

¹⁷⁰Ibid. p.210
Largely in response to atrocities committed in Nazi Germany, the post-war years saw the creation of a number of international rights protecting documents - largely aspirational, yet with incalculable educative value. Within Canada also, a similar movement resulted in the enactment of statutory rights-protecting instruments in a number of jurisdictions. Several provinces enacted legislative bills of rights: the Saskatchewan Bill of Rights Act was enacted 1947\(^1\); in 1971 Alberta enacted the Alberta Bill of Rights\(^2\) and in 1975 Quebec enacted the Quebec Charter of Human Rights and Freedoms\(^3\), each of which guaranteed a range of civil liberties. Amid much public support, the Diefenbaker government enacted the Canadian Bill of Rights in 1960.\(^4\)

The Canadian Bill of Rights was enacted with the ambitious aim of "ensuring protection" of individual rights and freedoms across the country.\(^5\) Section 1 declares that certain enumerated "human rights and fundamental freedoms" "have existed and shall continue to exist in Canada without discrimination by reason of race, national origin, colour, religion or sex". Section 2 stipulates that every law\(^6\), unless it expressly declares that it shall operate notwithstanding the Bill, shall "be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognized and declared." But this provision is rife with ambiguities and theoretical difficulties: Does

\(^{2}\)S.A. 1972 c.1
\(^{3}\)S.Q. 1975 c.6.
\(^{4}\)S.C. 1960, c.44.
\(^{5}\)The preamble reads, "... And being desirous of enshrining these principles [the supremacy of God; the dignity and worth of the human person; the position of the family in a society of free men and free institutions] and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada...".
\(^{6}\)The Bill was made applicable only to federal laws - s.5(2).
it provide a mere rule of construction, enjoining courts to interpret laws as consistent with the rights recognized therein insofar as they may be so sensibly construed? 177 Or does the Bill purport to confer a mandate to actually declare otherwise valid legislation inoperative for infringing the rights and freedoms recognized therein? 178 If the latter, how is it possible that Parliament has bound itself as to the content of future legislation, in direct contravention of the principle of Parliamentary sovereignty 179 and its doctrine of implied repeal? 180 What could be said to be the constitutional basis for


178 In R. v. Drybones, supra, note 177, six of nine judges found that section 2 means that if a federal law cannot be "sensibly construed and applied" so that it does not abrogate or infringe one of the rights and freedoms recognized in the Bill, then it is inoperative unless the 'notwithstanding' clause is invoked. Nevertheless, in Curr v. The Queen, [1972] S.C.R. 889 Laskin J. (as he then was) speaking for the majority, cautioned that "compelling reasons ought to be advanced to justify the Court ... to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act."

(at 899). In that case, the Court refused to deny operative effect to Criminal Code provisions requiring compliance to a demand for a breathalyzer sample and providing for the admissibility of evidence of refusal. See also R. v. Burnshne, [1975] 1 S.C.R. 693 at 707 where Martland J. quoted this passage with approval.

In Hogan v. The Queen, [1975] 2 S.C.R. 574, Laskin J., citing the decision in Drybones as to the impact of the Canadian Bill of Rights, described the Bill as a "half-way house between a purely common law regime and a constitutional one; ...a quasi-constitutional instrument." (at 579). But what exactly is the constitutional role of a court in applying a "quasi-constitutional instrument"?

179 As stated by Dicey, "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."

(emphasis added)

A.V. Dicey, supra, note 69, p.39.

180 See Ellen Street Estates Ltd. v. Minister of Health [1934] 1 K.B. 590: "Parliament can alter an Act previously passed, and it can do so by ... enacting a provision which is clearly inconsistent with the previous Act." (per Scrutton L.J. at p.596.) Moreover, it is impossible for Parliament to enact that in a subsequent statute dealing with the same
such a judicial mandate? Not surprisingly, judges approached the Bill with "some uncertainty and ambivalence" and only once did the Supreme Court use it to render a discriminatory statute inoperative. As this experience showed, Canadians could not merely legislate away the incoherence in Canadian constitutional law discussed in the previous section. Nevertheless, the Canadian Bill of Rights and its provincial counterparts were testimony to, and in turn contributed to, the development of a political culture within which unjustified infringement of individual liberty and denial of equal dignity were increasingly viewed as illegitimate, and in this way can be seen as an important step in our constitutional evolution - in which our foundational constitutional values are ever more reflected in our laws and institutions.

Popular support for entrenched rights and recognition of the constitutional limitations of statutory bills of rights culminated in the enactment of the Canadian Charter of Rights and Freedoms in 1982. Many of the rights guaranteed in the Charter are more recent formulations of those which, as outlined above, have reappeared in numerous enactments, judgments and utterances throughout our constitutional tradition to give

subject-matter there can be no implied repeal." (per Maugham L.J. at p.597).
According to this doctrine, then, any statute enacted subsequent to the Canadian Bill of Rights and inconsistent with its terms would merely repeal the Bill to the extent of this inconsistency.
In Drybones this did not arise, as the Indian Act was the earlier of the two statutes.
Some commentators have suggested that s.2 of the Canadian Bill of Rights be considered as a manner and form limitation: Parliament has bound itself to enact laws consistent with the Bill unless it has included an express declaration that the statute shall operate notwithstanding the Bill. See Peter Hogg, Constitutional Law of Canada, supra, note 66, p.32-8 and 32-9; Walter Surma Tarnapolsky, The Canadian Bill of Rights, (Montreal: MacMillan, 1978) at p.143.

181 Per Le Dain J., R. v. Therens, [1985] 1 S.C.R. 613 at 639: "on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament". He contrasts this with the "new constitutional mandate" provided by the Charter.

182 R. v. Drybones, supra, note 177, A majority of the Supreme Court held that section 94(b) of the Indian Act (R.S.C. 1952, c.149), which made it an offence for an Indian to be intoxicated off a reserve, infringed the right of equality before the law provided in s. 1 of the Bill of Rights and was thus rendered inoperative by section 2 of that Act.
legal expression to its underlying ideals of individual autonomy, equality, and dignity.\textsuperscript{183} The result of changing political morality, the Charter has in turn had profound effect upon this morality, enormously influencing what is now viewed by the Canadian populace to be politically legitimate action.\textsuperscript{184}

Since the enactment of the Charter and the evolution in political consciousness both evidenced in and aided by its adoption, the Court has revived the reasoning in the implied bill of rights cases, finding certain rights implicit in foundational principles of our constitutional tradition which form the "basic structure" of the Constitution.\textsuperscript{185} Thus the judiciary and the Canadian populace continue the dialogue in which the implications of our constitutional premises are increasingly discovered, in a move toward greater constitutional coherence.

At this point one can imagine an objection similar to that addressed in the previous chapter: While the Charter enjoys much popularity in the rest of Canada, in Quebec it is only resented as an impediment to the realization of important social goals. The priority of 'the right' over 'the good' which informs the Charter is alien to Quebec society, where the collective goal of the survival of the Quebecois 'nation' and culture

\textsuperscript{183}These include: freedom of conscience, expression, and association (s.2); democratic rights (ss.3-5); mobility rights (s.6); the right not to be deprived of life, liberty or security except in accordance with the principles of fundamental justice developed over the centuries to maintain individual dignity (s.7 ff.)- including the right not to be arbitrarily detained (s.9), or subjected to cruel and unusual punishment (s.12).

\textsuperscript{184}This was evidenced recently when Ralph Klein's government introduced legislation restricting compensation to persons sterilized under old provincial policies, invoking the override to block Charter challenges. After a barrage of angry protest from across the country, the government retreated from the bill. Klein's interpretation of the events: "to individuals in this country ... the Charter of Rights and Freedoms is paramount, and the use of any tool, ie. the notwithstanding clause, to undermine the [Charter] is something you use only very, very rarely." He explained, "My political sense probably didn't click into gear. ...It came home loud and clear that there were some political considerations and, yes, I was out of tune here." "Klein Retreats in Rights Scrap", The Globe and Mail, Thursday, March 12, 1998, p.A-1.

\textsuperscript{185}OPSEU v. Ontario (A.G.) supra, note 164; Manitoba Provincial Judges Assn. supra, note 68.
take precedence over individual rights. To such an objection two responses might be made. The first, which will be elaborated infra this chapter, is that the Charter does not merely mean that individual liberty trumps collective goals. The second is that Quebec society is indeed committed to the values of equality and autonomy which inform the Charter's provisions.

As noted above, Quebec was one of the first jurisdictions to enact a statutory bill of rights. The Quebec Charter of Human Rights and Freedoms, containing provisions substantially the same as those of the Canadian Charter, was enacted amidst broad public support and continues to enjoy a tremendous degree of legitimacy.186 Quebeckers' distaste for the Canadian Charter of Rights has little to do with its content, but rather, with the perceived exclusion of then Premier René Lévesque from the patriation process. Quebec society's commitment to liberal values, and the extent to which this may even take precedence over the crucially important goal of cultural survival, might be evidenced in its refugee policy. Concerned to maintain Quebec's proportionate share of the Canadian population, anxious about a very low birthrate and the tendency of immigrants to assimilate into Anglo-Canadian culture, Quebeckers have long viewed immigration as key to cultural survival and have fought to gain greater control over this area. Nevertheless, Quebec's struggles with Ottawa with respect to immigration contrast markedly187 with the absence of any effort to gain control over refugee determination, despite the fact that successful refugee claimants represent a significant, as well as rapidly increasing, proportion of total landed immigrants.188 Quebec has actively supported admission of refugees - the criteria for which have been set by Ottawa (in accordance with international standards) and reflect the values of autonomy, equality and

186 For discussion of the Quebec Charter see Henri Brun, "The Quebec Charter on Human Rights" in MacDonald and Humphrey eds. The Practice of Freedom, p.384 ff.
187 Howard Adelman, "Canada, Quebec, and Refugee Claimants", in Is Quebec Nationalism Just? Perspectives from Anglophone Canada, Joseph Carens ed. supra, note 50, p.82 ff.
188 That is, 15% in 1990. See Ibid. p.90.
individual dignity which inform our shared constitutional tradition. Quebec continues to do so even though the majority of successful claimants have been drawn toward the anglophone culture and increased the proportion of anglophones in Canada.\textsuperscript{189} The refugee issue shows that no blanket statements can be made about the good trumping the right in Quebec culture - even where the goal of cultural survival is at issue; and evidences Quebec society's continuing commitment to liberal values.

**Liberty and Democracy**

Section 1 of the *Canadian Charter*, which both guarantees individual rights and establishes limitations on those rights, proclaims that Canada is a free and democratic society. As articulated by the Supreme Court of Canada, this phrase refers to the fact that Canadian society is founded on a coherent set of values which places primary importance on the equality and inherent dignity of individual citizens.\textsuperscript{190} Individual dignity is realized both in democratic governance and in individual liberty. Both are therefore promoted and protected within the constitution.

Rather than a competition between individual liberty and group goals involving a balancing of the former against the latter, the limited rights guaranteed in section 1 of the *Charter* - as interpreted by the Supreme Court of Canada - describe a relation between the individual and the state in which both individual liberty and collective goals might be furthered to the greatest extent possible.\textsuperscript{191} Rights are not absolute; and

\textsuperscript{189}Ibid. p.85. Adelman notes that this was true of the Hungarians in 1956, the Czechs in 1968, the American draft dodgers and deserters through the late 1960's and early 1970's, the Ugandan Asians and Chileans in 1973, the Indochinese beginning after 1975, and the Central Americans through the 1980's.


\textsuperscript{191}Ibid. As stipulated by the Court at pp.138-139, in order that a law qualify as a reasonable limit demonstrably justified in a free and democratic society, it must pursue an objective that is sufficiently important to justify limiting a Charter right; its provisions must be rationally connected to that objective; it must impair the right as
policies which limit or infringe guaranteed rights are not precluded. Rather, an
obligation is imposed upon the lawmaker not to limit or infringe rights any more than is
absolutely necessary to accomplish valid collective goals. Thus democratic governance
is limited only by the obligation to pursue legitimate policies - that is, ones which are
not inconsistent with our constitutional values - in the manner least restrictive of
liberty; conversely, individual liberty is limited only by justifiable law.

This relation maximizes both aspects of individual autonomy: that which can be realized
only in democratic governance, and that of individual liberty. Individual liberty, limited
by justifiable law, and democratic governance, limited by the obligation to respect
liberty, may thus be viewed as two aspects of a coherent structure in which individual
dignity is maintained and furthered. Section 1 of the Charter, which guarantees rights
subject to such legal limits as can be demonstrably justified in a free and democratic
society, thus integrates all the essential features of our constitutional tradition.192

The apprehension of the relation between liberty and democratic governance in which
both may be realized to the greatest possible extent, might be viewed as a benchmark of
our constitutional maturity. Continuing the constitutional journey begun centuries ago
in England would mean that this relation is ever more closely reflected in our laws -

192 As noted by Wilson J.: "Section 1 (...) embodies, through its reference to a free and
democratic society, the essential features of our constitution including the separation of
powers, responsible government and the rule of law." Operation Dismantle Inc. v. R.,
both because of a judiciary increasingly cognizant of it and adept in determining whether it is present; and because this understanding will, in time, influence what is viewed as politically legitimate. Thus our continued constitutional evolution would be a striving toward greater coherence, in the creation of a legal/political structure within which both democratic self-governance and individual liberty - that is, both aspects of individual autonomy essential to dignity - are promoted.

4. Conclusions

In the previous chapter I suggested that our constitution is in essence a tradition - composed of institutions, procedures and principles defining and limiting governmental power, developed over the centuries under the rubric of the 'rule of law'. In this chapter I have traced the evolution of this tradition - from its beginnings in the customary laws of England to the enactment of the Canadian Charter of Rights and Freedoms - and have shown that a common set of values provides the thread of continuity throughout. Informing the various remedies and procedures that comprise the rule of law is a conception of individuals as equal in dignity and requiring a certain measure of autonomy in order to flourish. These same ideas underlie the democratic principle - which developed along with the rule of law, the two principles mutually reinforcing. On this understanding, both self-government and individual liberty are essential to individual dignity; thus the development of democratic institutions and the limitation of governmental power to preserve liberty, implied by the rule of law, must be seen as two aspects of the same aim. Individual dignity can be realized only in a society where both democracy and liberty are promoted. This means that democratic governance must be limited by an obligation to respect individual liberty.
Our constitutional history - both in England and on Canadian soil - has consisted in the gradual creation of institutions and laws within which the dignity of individuals might be better realized. Such an aim must take into account changing social circumstances. The arrangements which comprise the 'Confederation compact' may be seen in this light, as an attempt to realize our constitutional values in the particular circumstances of colonial British North America: to preserve the dignity and autonomy of the members of two 'founding' linguistic-cultural groups within the framework of a new polity. Adoption of the federal principle and the principle of minority protection might thus be seen as a natural evolution of this tradition on Canadian soil.

Our constitutional evolution might be described as a slow working out of the implications of our constitutional premises both by jurists and by the populace at large. In this, legal developments and evolving political consciousness have been mutually reinforcing. Enactment of the Charter removed some of the contradiction generated by the inherited doctrine of parliamentary supremacy, rendering our constitution arguably more coherent and more consistent with its origins than that upon which it was modeled. It also allowed for the articulation of the relationship between democratic governance and individual liberty which maximizes both these principles. Our continued constitutional evolution would mean a movement toward greater coherence as our constitutional values are ever more consistently reflected in our laws - including our supreme law; and the constant readjustment of our constitutional structure to ensure that it continues to promote these values in changing social circumstances.

The central conclusion of this chapter - that the democratic principle as well as the other principles, remedies and enacted provisions comprising our constitutional structure, developed in order to preserve and promote a certain understanding of individual dignity - has certain significance for the secession debate. Those appealing to
'democracy' and those appealing to 'the rule of law' are in fact invoking the same set of fundamental values. If so, then it should be possible to determine criteria for legitimate constitutional change acceptable to both sides. To this I now turn.
Chapter 4: Constitutional Change

In the previous chapters I suggested that the Constitution of Canada is in essence a tradition, the continuity of which is provided by a particular set of values embodied in principles, institutions and remedies. I showed that these are informed by a certain conception of the individual, and argued that they were developed over the centuries in order to further a certain understanding of individual dignity. I submitted that Canadians were shaped as a people within this tradition and that political and legal legitimacy therefore depend upon continued conformity to its underlying values. In this chapter I discuss the implications of the above for legal and legitimate constitutional change.

In the first section I discuss the notion of continuity, showing how legal continuity furthers our constitutional values, and arguing that a deeper continuity is provided by an inter-generational obligation to respect these values. In order that this obligation be fulfilled, the constitution must be capable of change in order to continue to realize our constitutional goals in changing social circumstances. Conversely, only changes in accordance with our constitutional values will be legitimate.

In the second section I examine whether it is possible to formulate a legal argument that constitutional change must be in accordance with our constitutional values. While no Canadian court has considered this question, it has been raised in other jurisdictions. I look at the treatment given this issue by courts in other countries and examine to what extent similar arguments might be made in the Canadian context.
The aim of this chapter is to posit a theory of legitimate - and arguably, legal - constitutional change which might be applied to the question of secession.

1. Continuity and Legitimate Constitutional Change

As I showed in the previous chapter, an essential element of the rule of law as it developed in our constitutional tradition was the notion of equal application of the law of the land. This referred both to laws enacted by Parliament and to the common law developed by the courts. Equal application of laws therefore meant not only that statutes be generally applied, but that similar cases be decided alike. Thus the doctrine of precedent, essential to the common law. The idea that like cases be treated alike means that when one case is like another in relevant aspects except for the fact that it happens to arise at a later point in time, it should be decided in the same way as the earlier one. Precedent is thus a means of treating individuals as equals with those who precede and follow them in time. Thus legal continuity, expressed in the common law method of deciding cases by appeal to precedent, is itself a fulfilment of the requirement of equal application of laws: society's members are treated as equals not only contemporaneously, but across time.

As shown above, another essential element of the rule of law is legal certainty and stability. This also is furthered by maintaining legal continuity. Again, this might be illustrated with the doctrine of precedent: by looking at how previous cases have been decided, individuals can predict how a similar case will be decided today; and can act on this knowledge. The consistent application of legal principles means that society's

193 With all the difficulties that concept entails, discussion of which is outside the scope of this paper.
195 Ibid.
members can develop general expectations as to standards of correct behaviour and can pursue their own ends with greater freedom, making choices based upon reasonable belief about the likely consequences of their actions and the probable actions of others. Thus consistency - both contemporaneous and over time - means predictability, required in order that individuals may exercise the autonomy essential to dignity.

In Chapter 2 of this paper I argued that legal continuity is essential to constitutional legitimacy in Canada. The reasons for this might now be understood: continuity upholds the values of autonomy and equality from which legitimacy is ultimately derived in our tradition.

But continuity means more than that the positive law be applied consistently. In the previous chapter I suggested that the constitution be viewed as a consensus through time that certain values be expressed in society's institutions and laws. It might be said that essential continuity in our tradition is provided by an inter-generational obligation to respect these values. This obligation is owed not only to our contemporaries but to our forebears and heirs.\(^{196}\) It entails that we maintain that which we have enjoyed, as well as improve upon this inheritance by continuing the dialogue within which the implications of our constitutional premises are increasingly understood.

\(^{196}\) For the idea of a tradition as an inter-generational obligation, see Anthony T. Kronman, "Precedent and Tradition", 99 [1990] Yale Law Journal 1029 at p.1067: "We are indebted to those who came before us, for it is through their efforts that the world of culture we inhabit now exists. But by the same token, they are indebted to us, for it is only through our efforts that their achievements can be saved from ruin. Our relationship with our predecessors is therefore one of mutual indebtedness, and so, of course, is our relationship with our successors, though the debts in that case are reversed. All these debts, moreover, are connected, for the very acts by which we satisfy our obligations to the past put the future in debt to us, and force us to depend upon the future for the preservation of whatever contributions we in turn make to the world of culture during our trusteeship."
Maintaining our inheritance does not mean resisting change. Quite the contrary: the constitution must continually evolve in order to realize its generative values in changing social circumstances. As expressed by the Judicial Committee of the Privy Council, the constitution must be as a living organism, incorporating change, allowing development; it must be able to adapt in response to new circumstances while yet maintaining the essential continuity provided by its foundational principles and ideals. As argued above, adoption of the federal principle and the principle of minority protection at Confederation might be seen in this light as developments which better expressed our tradition's values in the particular social circumstances of colonial British North America. Similarly, it might be argued that only by relinquishing its sovereignty over Canada was the British Crown able to respect the dignity of Canadians - as expressed in their capacity for self-government. In both cases, change was necessary in order that essential continuity be preserved.

The corollary of the notion that the constitution must change in order to further our tradition's values in changing social circumstances, is that legitimate constitutional change must always be in accordance with these values. Any change subversive of these values means a break in the essential continuity which maintains our tradition; it means revolution as opposed to evolution of our constitution.

The argument that constitutional change must be in accordance with constitutional values has been made by American jurists with respect to the Constitution of the United States.

197 "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits." Edwards v. Attorney-General for Canada, supra, note 102. See also Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 155: "A constitution [...] must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."
These writers do not invoke tradition and continuity; rather, a similar notion of coherent development of an idea.

John Rawls suggests that the American constitution is animated by certain fundamental values and that legitimate constitutional change must be in accordance with these. Valid constitutional amendments either adjust basic constitutional values to changing political circumstances or "incorporate into the constitution a broader and more inclusive understanding of those values" - for example, the three amendments relating to the Civil War or the Nineteenth Amendment extending the vote to women. In contrast, a change which contradicts or reverses fundamental constitutional values - for example, repeal of the First Amendment - is "constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution."198

Walter Murphy also writes that the American Constitution should be viewed as a coherent whole and suggests that human dignity is the primary value animating this whole.199 The constitution cannot be amended so as to violate human dignity. He imagines a scenario in which an ideology of repressive racism sweeps the country and an amendment is adopted with provisions (such as denial of the franchise, segregation, etc.) that deny the human dignity of non-whites. Murphy argues that judges would have to hold such an amendment invalid as it would be a violation of the principle value of the American constitution. Such an amendment does not merely make adjustments within constitutional norms but repudiates the system itself, substituting another one based solely on majority rule. The constitution makes no provision for such complete change.

As far back as 1893 Thomas Cooley argued\textsuperscript{200} that amendments must be in harmony with the Constitution; they must not be so entirely incongruous as to constitute a revolution rather than amendment. He noted that thus far all the amendments (1 to 15) had been in the direction of further extending the democratic principles which underlie the American Constitution, increasing equality and popular rights; all were therefore in harmony with the general principles of the Constitution. He wrote,

"I assert then .. that we have created a constitution of a democratic republic for the protection and perpetuation of popular rights, and on an assumption that whatever is done under it will be done in conformity with the principles which underlie that constitution. Of nothing is that more especially true than of the provision respecting amendments."\textsuperscript{201}

If, as I have argued in the preceding chapters, the various principles and institutions comprising the Constitution of Canada developed over the centuries in order to protect and promote a certain understanding of individual dignity, then in readjusting our constitutional arrangements we cannot legitimately introduce changes subversive of this goal. This means that no elements which contradict our constitutional values may be introduced; and that nothing essential to the promotion of these values be removed. Thus, for example, individual rights may not be amended away - for, as argued in the previous chapter, our constitutional tradition has always protected liberty as essential to individual dignity. As expressed by Edmund Burke,

"From the Magna Carta to the Declaration of Rights it has been the uniform policy of our constitution to claim and assert our liberties as an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity ... By


\textsuperscript{201}Ibid.
this means our constitution preserves a unity in so great a diversity of its parts."202

We have an obligation to maintain that which we have enjoyed. While the particular expression of these liberties enshrined in the Charter may be reformulated or revised - and it is not inconceivable that this may be required to ensure that the values which animate its provisions continue to be furthered in changing social circumstances - their core protections cannot legitimately be destroyed. Our constitution must continue to protect the equal liberty of individuals against unjustified infringement.

Moreover, fulfilment of the obligation to maintain our inheritance means that there may be no lapse in the continued commitment to uphold our constitutional values. Constitutions are intended to be abiding, and any change is made with a view to the future; nevertheless, the immediate effects of amendments cannot be ignored. Our constitutional values cannot be denied in the short term - even if this would permit them to be better realized later on. The immediate effects of any change must thus be proportional to the ends sought: among other things, valid constitutional goals must be effected by the means least restrictive of individual liberty. Maintaining continuity means that constitutional change must always respect the balance between individual liberty and democratic governance within which dignity is best realized. As will be elaborated in chapter 5, this has important implications for the question of secession.

2. Legal Limitations on Constitutional Change

The above is an argument about consistency and constitutional legitimacy; but is it a legal argument? To what extent would it be possible to convince a court to accept that

202Reflections on the Revolution in France, Works, v.77-8 cited in Pallister, supra, note 121, p.82, emphasis in the original.
constitutional change must be in accordance with our constitutional values? The Constitution of Canada may be in essence a tradition; nevertheless, we do have a constitutional text, which confers an amending power. To what extent does this text support such an argument?

There has been very little litigation in Canada about the scope of the amending power. Two cases have challenged a proposed constitutional amendment as being contrary to the *Canadian Charter of Rights and Freedoms. Penikett v. The Queen* 203 and *Sibbeston v. Canada* 204 involved claims that the proposed Meech Lake Accord violated the rights of Yukon and Northwest Territory residents under section 3, 205, 7, and 15 206 of the *Charter*. In both cases the courts held that constitutional amendment is not subject to the *Charter*: it is not a 'matter' within the authority of Parliament or the provincial legislatures within the meaning of section 32(1). But this does not answer the deeper question of whether there are any intrinsic limitations on constitutional change. 207

No Canadian court has dealt with this issue.

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204 (1988), 48 D.L.R. (4th) 691 (NWTCA)
205 It was argued that denying the Yukon and Northwest Territory governments any voice in constitutional matters was inconsistent with the right of every citizen to vote and rendered votes to elect the governments in these territories ineffective.
206 It was claimed that the Accord was inconsistent with the rights of Yukon and NWT residents to equal protection and benefit of the law because of the restriction of Supreme Court appointments from the provincial bars; the appointment of senators on the recommendations of provincial governments; the requirement of unanimous consent of all eleven governments to establish any new provinces; the failure to include the consent of the Yukon or NWT in the proposed amending process; and not including an elected representative of the Yukon or NWT at the First Ministers' Conference. The section 7 claim was similar.
My conclusions in this chapter - that legitimate constitutional amendment must be in accordance with the values which inform the *Charter* - imply that such claims deserve careful attention, and must be adequately addressed in any future amendment project.
207 In both cases statements made *in obiter* seem to imply a limitless amending power. In *Sibbeston* the court said, "...it is the people of Canada, expressing their political will through the joint constitutional authority of the Parliament of Canada and the elected legislative assemblies of the provinces, who are sovereign in the delineation of federal-provincial power-sharing under the Constitution of Canada." (at p. 696.) The court added, "In principle, the question of whether Canada and the provinces repatriated the Constitution from the Imperial Parliament only to concurrently shackle its timely and
The question of intrinsic limitations on constitutional change has been raised in other countries. The Constitutional Court of the Federal Republic of Germany has held that the German Basic Law is a coherent entity, informed by the principles of a higher law. In the *Southwest case* 208, its first major decision, the Federal Constitutional Court stated that implicit in the Basic Law are certain constitutional principles paramount not only to ordinary laws but to provisions of the constitution itself. These principles are so fundamental they can be said to bind even the framer of the constitution - that is, to dictate the limits of permissible constitutional change.

"...An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate. (...) Thus this Court agrees with the statement of the Bavarian Constitutional Court:

"That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles...."209

necessary modification to endless judicial review must be answered in the negative." (at p.697.)

In *Penikett* the court said: "We find no limitations in the 1982 Act upon the scope of the power to amend the Constitution conferred by ss.38 to 43. To decide otherwise would be to deny to the elected representatives of Parliament and the several legislatures the ultimate power of amending the Constitution." (at p.114.) But this statement should be read in the context of that case to mean only that the amending process is not subject to the *Charter*.


In a second early decision, the Article 117 case (1953)\textsuperscript{210}, the Court stated that individual constitutional provisions may be reviewed for compatibility with this higher law. Although its comments were \textit{in obiter}, the Court clearly recognized the possibility of an 'unconstitutional' constitutional amendment. There the Court had to decide whether a time limit for remedying legislation that conflicts with the equality provision in the Constitution\textsuperscript{211} should be declared invalid in order to prevent the legal insecurity which would arise when those laws lost their force\textsuperscript{212}. It was argued that such insecurity would conflict with the principle of the Rule of Law as laid down in the Basic Law. The Court held the provision to be valid, but added:

"Legal security is one of the essential elements of ... the Rechtsstaat. ... Therefore, even the constitution-maker can be permitted \textit{only to a certain degree} to neglect legal security. If a norm should deny, falsify, or disregard \textit{to an unbearable degree} the function of preserving peace, which emanates from the law, it could, even if it was an original constitutional norm, be void."

Referring to recent German history, the Court stated that "\textit{[e]ven an original constitution-maker is not necessarily immune from the danger of transcending the extreme limits of justice.}"

"The fact that the maker of the Basic Law included, and therefore, positivized into his fundamental decision norms which are often called supra-legal (for instance, in Article 1, but also in Article 20), does not deprive them of their special quality. Their detailed elaboration, especially with respect to the degree to which exceptions from them are permitted, is at the free disposition of the

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\textsuperscript{210}\textsuperscript{3} BVerfGE 225 (1953)

\textsuperscript{211}art.3(2) of the Basic Law provides that men and women shall have equal rights; article 117(1) provides: "any law which conflicts with Article 3 paragraph (2) shall remain in force until it is adjusted to the provision of the Basic Law, but not beyond 31 March 1953."

\textsuperscript{212}By the set date no law adjusting the old laws to Article 3 had been passed.
According to the Constitutional Court, an individual constitutional provision may conflict with a fundamental constitutional principle - *but only to a certain extent*, after which it becomes unconstitutional. The idea that a constitutional provision may not disregard a fundamental constitutional principle "to an unbearable degree" seems to be an extension of two principles of constitutional interpretation used by the Court: that of 'practical concordance' - a logical corollary of the concept of the Constitution as a structural unity;214 and the related principle of 'proportionality'. 'Practical concordance' means that constitutionally protected legal values must be harmonized when they conflict: "One constitutional value may not be realized at the expense of a competing constitutional value. In short, constitutional interpretation is not a zero-sum game."215 Rather, competing principles must be limited "so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values."216 This is reminiscent of the proportionality requirement expressed by the Supreme Court of Canada in *Oakes*: the constitution is a coherent entity; the constitutionally protected principles of liberty and democracy must each be limited so that both can attain their optimal effect.

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213 The Court added, "However, the probability that a liberty-loving constitution maker might transcend those limits is so minute that a theoretical possibility of 'unconstitutional constitutional norms' comes close to a practical impossibility." Quoted in Dietze, "Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany", 42 Va.L.Rev. 1 (1956), pp.17-19. (emphasis added)

214 Both the Court and constitutional scholars have consistently emphasized the internal coherence and structural unity of the Basic Law. See the discussion in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1997, Duke Univ. Press, pp.45ff.


216 Konrad Hesse, *Grundzüge des Verfassungsrechts für die Bundesrepublik Deutschland*, 16th ed. (Karlsruhe: Verlag C.F. Muller, 1988) p.27, quoted in *Ibid.*
Another approach to finding that constitutional change is limited by constitutional values, has been to find limitations implicit in the term 'amendment' used in the provision conferring the amending power. In an early American case involving a proposed change of the capital of the State of California, the Supreme Court of California considered the terms 'amendment' and 'constitution' used in the constitution of that State. The Court observed,

"The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed." 217

A similar argument was attempted in the National Prohibition Cases 218 with little success. While these challenges to the Eighteenth Amendment of the American Constitution focused mainly on procedural issues, Herbert A. Rice, for the State of Rhode Island also submitted that,

"The doctrine that any and every change may be introduced in guise of amendment is a novelty subversive of fundamental principles. (...) It is 'This Constitution' that may be amended. 'This Constitution' is not a code of transient laws but a framework of government and an embodiment of fundamental principles. By an amendment, the identity or purpose of the instrument is not to be changed; its defects may be cured, but 'This Constitution' must remain." 219

217 Livermore v. Waite 102 Cal. 113; 36 Pac. 424 (1894) at p.426 Pac.
218 253 U.S. 350 (1920)
219 p.355
The Supreme Court dismissed this argument without really addressing it. No reasons were given for any of the Court's conclusions in this case.

The Indian Supreme Court has been much more open to such an interpretation of the scope of an amending power. In Kesavananda's case, the Court held that the basic identity and 'fundamental features' of the constitution could not be changed or removed under the amending power. The legal context of this case is interesting, forming part of a struggle between the Indira Ghandi government, intent upon aggrandizing power, and a judiciary concerned with upholding individual liberty and the power of judicial review: in other words, 'democracy' - in the form of Parliamentary power, was pitted against 'the rule of law' in the context of constitutional change.

The struggle began when, in Golak Nath's Case, the Supreme Court held that an Act amending the constitution (pursuant to s.368) was a 'law' as per s.13(2) and therefore could not take away or abridge fundamental rights. The Indian Parliament passed an amendment to supercede this decision, empowering itself to amend any provisions of the Constitution including those relating to fundamental rights. Under the principles enunciated in Golak Nath's case, this amendment was itself invalid, being...

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220 The Court merely stated: "The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beaverage purposes ... is within the power to amend reserved by Article V of the Constitution." p.386

221 In a concurring judgment, Chief Justice White remarked, "I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached." at p.388 The Chief Justice, in his reasons, did not address the issue of substantive limits.

224 Article 13(2) read: "The State shall not make any law which takes away or abridges the rights conferred by this Part [Part III - Fundamental Rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void."
an amendment which had the effect of abridging fundamental rights. The issue before the Court in Kesavananda's case was thus whether or not to uphold the Golak Nath ruling. The Court overruled Golak Nath's case, and held the amendment valid; fundamental rights were not immune from amendment; they could be repealed or curtailed. Nevertheless, a majority held that certain 'basic features' of the constitution could not be changed or removed under the power conferred in art.368. Limits on the amending power were implicit in the term 'amendment'. 'Amendment' of the Constitution does not include its subversion or destruction; while changes may be made within the Constitution, the old Constitution must survive in its basic identity; its basic structure and framework cannot be abrogated.

This case was upheld in Indira v. Rajnarain, where the Court invalidated an amendment for contravening the principles of free and fair elections and the rule of law. After these two cases art.368 was amended again with the insertion of provisions making it absolutely clear that on no ground can any court invalidate any constitutional amendment. However, the Supreme Court invalidated these provisions on the ground

226Six out of thirteen judges held that the amending power is plenary and without limits; any change is possible (including complete repeal of the Constitution as long as a mechanism is provided by which the new State may be constituted and organized - per Ray, Mathew J.J.). One of the judges who formed part of the majority on the broader question of amendment, nevertheless found that even the 'core' of fundamental rights are not immune from amendment, tipping the balance on this issue; thus, while the case stands for the proposition that fundamental features and the basic structure of the Constitution cannot be amended, this does not include fundamental rights, the very essence of which may be changed. The incoherence of this result is discussed infra.

227As one judge phrased it, the amending provision does not "embody the death wish of the Constitution". (per Khanna J.)
228A. 1975 S.C. 2299
229Constitution (42nd Amendment) Act, 1976
230Subsections (4) and (5) were added, reading: "(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (42nd Amendment) Act, 1976] shall be called in question in any court on any ground"; "(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."
that they contravened the principle of judicial review, which had been held in Kesavananda to be a 'basic feature' of the Constitution\textsuperscript{231}. In a subsequent case the doctrine enunciated in Kesavananda was stated to be 'well settled'.\textsuperscript{232} The set of 'basic features' suggested in that case has been expanded.\textsuperscript{233}

Applying reasoning similar to that in the Canadian 'implied bill of rights' cases, one commentator notes that the holding in Kesavananda - that 'basic features' of the Constitution cannot be amended away but that fundamental rights can - is incoherent: many of the 'basic features' listed as unamendable are intrinsically bound up with basic rights.\textsuperscript{234} In subsequent cases the holding in Kesavananda has been qualified: it pertains only to property rights; other fundamental rights can be treated as part of the 'basic structure' of the constitution.\textsuperscript{235} In a later case the principle was restated: the question as to whether the basic structure of the Constitution is damaged or destroyed in any given case depends upon which right is at issue and whether what is withdrawn by the amendment is "quintessential" to this basic structure.\textsuperscript{236}

This balance achieved by the Indian Court is again reminiscent of that articulated by the Supreme Court of Canada in Oakes: rights may be encroached upon, but not to the point

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\textsuperscript{231}Minerva Mills v. Union of India A. 1980 S.C. 1789 paras.17, 22.
\textsuperscript{233}As set out by Basu, these now include: judicial review; independence of the judiciary; the federal system; secularism; parliamentary system of government; the objectives specified in the preamble of the Constitution; supremacy of the Constitution; Rule of Law; the principle of free and fair elections; the sovereign, democratic, and republican structure; the principle of the separation of powers; the principle of equality; the concept of social and economic justice; balance and harmony between fundamental rights and directive principles; equality before the law; certain fundamental freedoms; the dignity and freedom of the individual; unity and integrity of the nation; limited nature of the amending power. See Durga Das Basu, Comparative Constitutional Law, (New Delhi: Prentice Hall, 1984)
\textsuperscript{234}ibid.
\textsuperscript{235}Indira v. Rajnarain, A. 1975 S.C. 2299 per Khanna J. (who had cast the deciding vote in terms of amendability of fundamental rights in Kesavananda.)
\textsuperscript{236}Waman v. Union of India 1981 S.C. 271.
where individual dignity is denied, resulting in 'damage' to the constitution. It might be said that in refusing to relinquish the power of judicial review over the substance of constitutional amendment, the Indian Court preserved its capacity to ensure that the proper relationship between democratic decision-making and individual liberty, implied by the rule of law in the Anglo-Indian constitutional tradition, is maintained even in the context of constitutional change.

To what extent can the arguments made in these cases be applied in the Canadian context?

Each of the approaches described above begins with a notion of coherence. In the German case, this coherence is reflective of a higher law; in the Indian and American approaches, coherence allows one to identify the fundamental features of the constitution, the removal of which is not contemplated in the term, 'amendment'. The Supreme Court of Canada has stated that the Constitution of Canada is a coherent entity, structured by certain foundational principles.237 In words reminiscent of the German Constitutional Court, the Supreme Court of Canada has recently stated,

"the preamble [of the Constitution Act, 1867] recognizes and affirms the basic principles which are the very source of the substantive provisions of [that Act]. (...) [T]hose provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble (...) is the means by which the underlying logic of the Act can be given the force of law.238

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237 In addition to the statement cited in the next note, see *R v. Oakes*, [1986] 1 S.C.R. 121 at p.136, and Wilson J. in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 491: "Section 1 (...) embodies, through its reference to a free and democratic society, the essential features of our constitution including the separation of powers, responsible government and the rule of law."

238 *Manitoba Provincial Judges Assn.*, supra, note 68, p.69, emphasis added.
The German Court found that the provisions of the Basic Law are merely elaborations of the principles of a 'higher law'. The approach of the Supreme Court of Canada involves no claims to 'higher truths', but rather, that the provisions of our written constitution must be understood as elaborations of the foundational principles of a particular constitutional tradition. Individual constitutional provisions must be interpreted in light of these principles, understood in the context of the tradition as a whole; moreover, these principles may be relied upon to fill the gaps in our constitutional text.\textsuperscript{239}

To the German Court, the primacy of the constitution's organizing principles means that courts might even review individual provisions for compatibility therewith. Might the Supreme Court of Canada be persuaded to take this step?

The German Court's willingness to review the constitutionality of a constitutional provision might be seen as part of a jurisprudential revolution in the years following World War II. After the extreme legal positivism which had reached its heights under Hitler, there was a reaction in the opposite direction: a revival of the idea that there is a law above the lawmaker. Decrees and statutes could be declared invalid for being contrary to natural law. Thus for example, in a case tried immediately after the war, a Jewish woman was able to sue successfully for the restitution of her dead parents' furniture: the laws confiscating Jewish property had been incompatible with natural law and thus were void from the moment they were enacted; her parents had never lost ownership of the furniture.\textsuperscript{240} From the idea that statutes could be void for incompatibility with natural law it was not so great a leap to recognize that constitutional provisions could also be reviewed for a similar compatibility.\textsuperscript{241}

\textsuperscript{239}ibid.
\textsuperscript{240}Discussed in Dietze, supra, note 213.
\textsuperscript{241}See ibid. for a discussion of lower court judgments in the post-war years in which the possibility of an unconstitutional constitutional amendment was recognized.
contrast, Canadian courts have shown enormous reluctance to declare validly enacted legislation null and void - as was evidenced in the civil liberties cases reviewed in the previous chapter. An argument based upon structural coherence alone is less likely to be accepted by a Canadian court; any claim that constitutional change is limited by constitutional values would need to be rooted in our constitutional text.

The Indian Supreme Court found limitations implicit in the provision conferring the amending power. A similar type of argument might be attempted with respect to section 52(3) of the Constitution Act, 1982. Indeed, the wording of this provision suggests a limited power. Section 52(3) reads:

"Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."242

The phrase, "only in accordance with the authority contained in the Constitution of Canada" has received little attention; those who have considered it at all have assumed it refers to the procedures for amendment contained in Part V.243 But if so, it might be asked what section 52(3) adds that is not already implicit from the terms of Part V itself.244 From the title of Part V alone it is clear that the procedures for amending the Constitution of Canada are provided in that Part,245 and this is reinforced by the wording of the provisions.246 One must presume247 that section 52(3) does more than

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242The French text reads: "La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle."
245"Procedure for amending constitution of Canada"
246Certain types of amendment are to be made "exclusively" by Parliament (s.44) or by a provincial legislature(s.45); others are to be made "only" in accordance with the unanimity formula (s.41) or with the general amending formula (per s.42); any other
merely reiterate what is already evident in Part V itself - that the Constitution is to be amended according to the procedures set out in that Part. Moreover, if section 52(3) were intended to refer only to Part V, why use the broader phrase "Constitution of Canada"? It seems evident that the phrase "in accordance with the authority contained in the Constitution of Canada" contemplates the entirety of the 'Constitution of Canada' as defined in the subsection immediately previous. It might therefore be argued that the power to amend conferred in section 52(3) is a limited one; and the scope of this power is defined by the Constitution as a whole - that is, its "organizing principles" of which the written provisions are a mere "elaboration".

Analogy might be made to the now abundant caselaw in which the Court has held that powers conferred under the constitution cannot be used so as to run counter to or destroy its foundational constitutional principles: In the implied bill of rights cases, the reasoning of which has now been accepted by the Court, it was suggested that legislatures cannot legislate so as to abrogate the freedom of expression necessary for the continued existence of parliamentary institutions. In OPSEU v. Ontario (A.G.),

type of amendment is caught by the terms of s.38 and may be made by the general formula. Indeed, the court in Sibbeston held that Part V is a complete code (supra, note 204, p.697).

247 The basic principle of statutory construction that no provision of an enactment is to be read as superfluous, is especially strong in a constitutional document where each clause has been subject to extensive debate and words are chosen with utmost care. Certainly a provision as weighty as section 52 - which at subsection (1) proclaims the primacy of the Constitution and at subsection (2) provides a definition of what the Constitution of Canada comprises - could not at subsection (3) dwindle into a meaningless or unnecessary statement.

248 52.(2) The Constitution of Canada includes
   (a) the Canada Act 1982, including this Act
   (b) the Acts and orders referred to in the schedule; and
   (c) any amendment to any Act or order referred to in paragraph (a) or (b).

As noted above, the Court has held that this definition includes the basic principles which are the very source of the substantive provisions: Manitoba Provincial Judges Assn., supra, note 68; New Brunswick Broadcasting Co. v. Nova Scotia supra, note 73.

249 Manitoba Provincial Judges Assn., supra, note 68.

250 Alberta Press Case, supra, note 163, where Duff C.J. suggested that implicit in the British North America Act as a whole is the prohibition against legislatures curtailing
the Court held that the power of a legislature to reconstitute itself cannot be used to remove the principle of responsible government underlying parliamentary institutions.\textsuperscript{251} In other words, constitutional powers cannot be used to subvert the democratic principle presupposed in the very provisions conferring these powers. In \textit{Manitoba Provincial Judges Assn.}, the Court found that legislative powers cannot be used to undermine the fundamental principle of judicial independence.\textsuperscript{252} In the \textit{Manitoba Language Reference} the Supreme Court held that the Constitution, which has as its fundamental postulate the principle of the Rule of Law\textsuperscript{253}, cannot be used to create that principle's antithesis - disorder and chaos;\textsuperscript{254} in other words, powers of judicial review conferred in the constitution cannot be exercised so as to have the effect of subverting its animating principles. The common theme in all these decisions is that powers conferred under the constitution cannot be used in violation of its structuring principles.

Inspired by \textit{Kesavananda}, one might argue that the Constitution does not contain the principle of its own destruction.\textsuperscript{255} Thus, while it confers the power to make free political speech, which is "the breath of life for parliamentary institutions" (p.133-134) See supra, note 163 for full quote. See also note 164.

\textsuperscript{251} supra, note 164 per Beetz J. at pp.46-47:

"The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. (...) [T]he power of constitutional amendment given to the provinces does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system.

\textsuperscript{252} Supra, note 68.

\textsuperscript{253} Re \textit{Manitoba Language Rights} supra, note 83, p.752: "In the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. (...) In the present case it is the principle of rule of law. See also, \textit{Roncarelli v. Duplessis}, supra, note 135 at p.142 per Rand J.: "The Rule of Law is a fundamental postulate of our constitutional structure."

\textsuperscript{254} \textit{Manitoba Language Reference}, \textit{Ibid.}, p.766

\textsuperscript{255} In \textit{Manitoba Provincial Judges Assn.}, Lamer CJC spoke of "the preservation of the basic structure" of the Constitution as a "constitutional imperative" (supra, note 68, at par.108), quoting with approval a similar statement by Beetz J. in \textit{OPSEU} supra, note
amendments over the whole of the written constitution, the essential identity of the constitution - the animating principles and fundamental features which comprise its "basic structure" must be preserved intact. Section 52(3) does not confer a power to undermine the rule of law or the democratic principle, or to negate fundamental values such as human dignity and equality.

Given the Court's demonstrated reluctance to interfere in the democratic process - even to give full force to the Charter's protections, it is somewhat optimistic to believe it would find that a constitutional amendment which conforms to the formal requirements of Part V is nevertheless unconstitutional for incompatibility with certain unwritten constitutional values. Nevertheless, one might wish to point out to a court that such an

164, p.57. One might also rely on similar statements in the implied bill of rights cases. In Alberta Statutes, supra, note 163, Duff CJC stated that "the powers requisite for the protection of the constitution itself arise by necessary implication from The British North America Act as a whole." p.133-134. In Saumur v. City of Quebec & A.G. Que (supra, note 164) at p.670, Rand J. rephrased this as: "the principle that the powers requisite for the preservation of the constitution arise by necessary implication of the Confederation Act as a whole."

256 Manitoba Provincial Judges Assn., Ibid.; OPSEU Ibid.

257 That the amending formula was never intended to be used to destroy the fundamentals of the Constitution might be supported by its documentary history. The federal White Paper, The Amendment of the Constitution of Canada, The Honourable Guy Favreau, Minister of Justice, Ottawa, Ontario, February 1965 contained the following statements:

"It is a matter of profound satisfaction that the result of such prolonged effort by so many public men has been agreement at last on a formula [the Fulton-Favreau formula, agreed to at Federal-Provincial Conference on Oct. 14, 1964] that all the governments regard as an acceptable balance between the need to protect the essentials of our constitutional system from disruption and the necessity of making it adaptable to the changing conditions of our national life."

(...)

The Government of Canada believes that, with the tolerance and political capacity of which the Canadian people have shown themselves capable, the proposed formula can work over the years to adapt the framework of our government to essential changes, while at the same time protecting the fundamentals on which our Confederation rests."


The White Paper, issued by the federal government, was approved by all provincial governments. (see Commons Debates, 1965 at p.11574).
argument could be supported with reference to our constitutional text, read in light of Canadian constitutional jurisprudence.

3. Conclusions

In previous chapters I have argued that the Constitution of Canada is in essence a tradition and that its essential features developed in order to realize certain fundamental constitutional values. Our constitution might be seen as a consensus through time that individual autonomy and equal human dignity should be protected and promoted in society’s institutions and laws.

This means that our constitution cannot remain static but must allow for change in order to realize this goal in changing social circumstances. It means also that legitimate change must be in accordance with our constitutional values. Among other things, rights cannot be amended away; nor can individual dignity be denied in the process of carrying out otherwise valid change. Constitutional change must always respect the relation between individual liberty and democratic governance within which dignity is best realized.

This is an argument about consistency and coherence. It is submitted that it could also form the basis for a legal argument. The claim that constitutional change must be in accordance with a constitution's fundamental principles and values has been accepted by courts in other jurisdictions. Inspired by the approach taken in these cases, one might argue that the power to amend the Constitution of Canada conferred in section 52(3) of the Constitution Act, 1982 is a limited one: amendment must be in accordance with the constitution as a whole - that is, its structuring principles and fundamental values. While Canadian courts might be reluctant to adopt this approach, such an argument is
supported by our constitutional text and is consistent with Canadian constitutional jurisprudence.

In previous chapters I argued that Canadians have been shaped as a people within a particular constitutional tradition and that political and legal legitimacy in Canada therefore depend upon conformity to its underlying values. I believe that, regardless of whether a Canadian court can be persuaded to accept the argument suggested in the preceding paragraphs, only if constitutional change is in accordance with our constitutional values will it be perceived as legitimate by all Canadians. As will be discussed in the next chapter, this has important implications for the secession issue.
In the debate on Quebec secession, a number of separatist leaders have made statements implying that the dissolution or partial dissolution of a political community is in some sense prior to law or principle; that it is a question only of the unfettered 'will of the people'.258 In this paper I have tried to counter this, suggesting that secession of a province, like any other kind of constitutional change, takes place within a particular legal and political tradition and is thus subject to the normative constraints imposed by the tradition itself. I have argued that Canadians, including Quebeckers, share a certain common set of values - those which underlie the principles, procedures and institutions which together comprise our constitutional structure. I have suggested that only action in accordance with these values will enjoy abiding legitimacy - whatever may be said in the romantic fervor of the moment.

In the previous chapter I argued that our constitutional values of autonomy and equal dignity imply legal continuity. Legitimate constitutional change would involve no rupture in the legal order; but rather, continuous application of law and legal principle. I suggested that our constitutional tradition be viewed as an inter-generational commitment to continuously uphold our constitutional values in changing social circumstances; and argued that legitimate constitutional change would neither remove anything essential to promotion of these values nor include anything subversive of them. Moreover, valid constitutional goals must be pursued in such a way as to respect the equal dignity of individuals; therefore, any infringement of individual liberty in the short term must be proportional to the long term goals sought. In this chapter I discuss the implications of this for secession.

258See statements quoted at note 25, supra.
I begin by examining how secession might be achieved so as to preserve the legal continuity essential to constitutional legitimacy. I argue that legitimate secession would involve a transfer of sovereignty from the Canadian people to the seceding population, effected in such a way as to create no gaps in the legal order. I then suggest how this might be effected. Within our tradition lawmaking is carried out by representative institutions and not by 'the people'; the legal change involved in secession would need to be effected by state institutions, acting upon a clear mandate. Thus, the transfer of sovereignty involved in secession necessitates direct action by the state.

I then argue that, in accordance with our constitutional values, the transfer of sovereignty involved in secession must maintain the relationship between collective goals and individual liberty in which individual dignity is best promoted. Until now the debate on secession has focused almost exclusively on issues of justice among groups: between 'two nations', between one province and the rest of the country, among provinces, among 'peoples'. There has been very little discussion of the rights of individuals or of the obligations of the state to individual Canadians in the context of a legal secession - one in which legal continuity is maintained. I wish to begin to redress this, by urging that the focus of the debate be changed. While I agree that the rights and interests of groups within Canada are of unquestionable importance, I believe that

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259 Again, I wish to emphasize that full treatment of the secession issue would entail consideration of the claims of Aboriginal peoples with respect to large portions of Quebec territory. As I noted in Chapter 1, proper consideration of these claims would mean analyzing the implications of our constitutional values with respect to Canada's Aboriginal peoples generally, and is beyond the scope of this paper. Until the nature and extent of Canada's obligations to Aboriginal groups have been ascertained, no lands claimed by them may be the subject of a transfer of sovereignty. The discussion in this chapter of how a transfer of sovereignty might be effected legally under the Constitution, thus applies only to those portions of Quebec which are not subject to claims by Aboriginal groups.
secession is primarily a question of the proper relationship between the state - even when in flux - and the individuals of which it is comprised.

In the second section of this chapter I suggest how the debate might be structured to address the issue which I believe is central: is secession justifiable given the severe infringement upon individual liberty and dignity thereby entailed? I begin by arguing that, at very best, secession involves severe restriction of an aspect of liberty which is protected throughout our constitution as essential to human dignity. In order that this not constitute a denial of the equal dignity of the citizens concerned, secession must be justifiable: it must be the necessary means to a constitutional goal so serious and pressing as to justify this impact upon individual citizens. The reasons commonly invoked in favour of secession must be examined according to this standard.

The central aim of this chapter is thus to suggest a framework within which the constitutional legitimacy of Quebec secession may be debated.

1. Secession within the Constitution

I have argued above that legal and political legitimacy for Canadians depends upon adherence to the values and principles which underlie our shared constitutional tradition. Secession, occurring within this tradition, is subject to these normative constraints.

Among these is the requirement that legal continuity be preserved in the course of constitutional change. This means that secession must not involve the repudiation or disregard of any applicable legal rules or principles; it must be effected in a manner that is in accordance with tradition. It also means that the new state must be established
in such a way that it becomes the legal successor of the current sovereign authority so that there are no gaps in the continuity of the legal order.

Lawful secession would involve a transfer of sovereignty over a particular portion of Canadian territory from the Canadian people to a seceding population. As I explained in chapter 2, in our constitutional tradition, sovereignty - except that of the United Kingdom Parliament - is not a political fact functioning as a first principle of the legal order; but rather, has a legal explanation: it must have been derived from an entity which itself was possessed of legal sovereignty. Any transfer of sovereignty must be effected in such a way that there is no gap between that of the people of Canada and their successors - for such a gap, even momentary, would mean that the new sovereignty becomes the first principle of a new legal order instead of the lawful continuation of the old; continuity would have been ruptured. Moreover, even if the new regime were to re-establish the norms, principles and rules of the former, there would have been a period, albeit brief, of chaos and lawlessness inconsistent with our constitutional values. Sovereignty must therefore be transferred from the Canadian people in a manner which preserves legal continuity.

Under our constitution sovereignty has its basis in the will of the people\textsuperscript{260}, thus a valid transfer of sovereignty would involve an act of voluntary relinquishment on the part of the people of Canada and a corresponding act of voluntary acceptance by the seceding population. That the people as a whole must democratically express their will to transfer sovereignty to a seceding population, was articulated in the Western Australia case, discussed in text accompanying notes 103-107, supra. See also Manitoba Language Reference supra, note 83, p.145.

\textsuperscript{260}The Constitution of a country is a \textit{statement of the will of the people} to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.
case, discussed in Chapter 2. According to the Special Joint Committee of the United Kingdom Parliament, secession could not legitimately occur "except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole."261

Ours is a representative democracy, and the requirements of the democratic principle are ordinarily fulfilled without the necessity for referenda. Nevertheless, I submit that the wish to transfer sovereignty must be clearly expressed by the people in a referendum, because the general mandate given to a government in an election would not be sufficient to effect a change of this magnitude. The mandate granted in an election is to *legislate* for a specified period in the interests of the national community, and then to go before the people again; it is not to dissolve that community. It is to exercise jurisdiction *over* Canadian territory; not to alienate that territory. Both the people of Canada as a whole and the population of the seceding unit must separately manifest the democratic will to transfer sovereignty. This is distinct from any prior expression on the part of the seceding unit of the *desire* to become a sovereign state - such as that contemplated in the 'referendum on sovereignty' held in Quebec in 1995. A second plebiscite would need to be held in order to manifest consent to accept the transfer according to its specified terms.262

To so argue is not to claim that these manifestations of popular consent would *effect a change in the law* - that is, that a positive vote in the two plebiscites would actually have the effect of transferring sovereignty. In our tradition, referenda do not effect legal change. As discussed above, democracy evolved within parliamentary institutions.

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261 Report by the Joint Committee of the House of Lords and the House of Commons on the Petition of the State of Western Australia (1934-35), *supra*, note 106, par.13, emphasis added.
262 Such a second plebiscite would also serve to further clarify the issues, and to preclude strategic voting.
Ours is a deliberative, representative democracy in which laws are not made directly by the people but by their elected representatives. Any doubts about the capacity of 'the people' to effect a change in the law through manifestation of popular will was formally put to rest by the Manitoba Court of Appeal and the Privy Council in *Re Initiative and Referendum Act*, where it was held that a statute which provided for laws to take effect when approved of by referendum was beyond the powers of the provincial legislature. While the legislature had the power to amend its own constitution, it could not amend it so as to substitute direct expression of popular will for the deliberative legislative process. To do so "would be wholly opposed to the spirit and principles of the Canadian constitution and of the constitution of the United Kingdom." As noted by one judge, the effect of the proposed procedure

"would be to do away with the debate and deliberation which a bill receives in the Legislative Assembly on the floor of the house and in committee. Under the new system a proposed law would be submitted to a vote of the electors who must either accept it or reject it intact. No opportunity is permitted for changing or amending anything in the measure submitted. This, I think, would not only be contrary to the spirit of the constitution, but would be subversive of it." In the Canadian constitutional tradition, lawmaking is not an exercise of saying yea or nay to a particular proposal as is contemplated in direct democracy. The legitimacy of law derives not from a momentary expression of general will; but rather, from a slow process of deliberation and reformulation in which the end product reflects the combined wisdom of those entrusted with governance. In a sense, this process, in which laws grow only slowly out of the interaction of a large number of participants and undergo a continual process of adjustment, mirrors the formation of tradition itself. Referenda,

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264 at p.1029.  
265 ibid.
lacking this crucial aspect of deliberation, cannot be a means of effecting legal change within our constitutional tradition. Thus, a national plebiscite on sovereignty and a corresponding plebiscite in the seceding unit, while necessary to satisfy the requirements of the democratic principle, would not in themselves effect a change in legal sovereignty. The actual transfer of sovereignty from the Canadian people to a seceding community must be carried out by representative institutions with the capacity to act in the name of the political communities in question.

Thus, in order to preserve legal continuity essential to constitutional legitimacy for Canadians, the secession of Quebec would involve a transfer of sovereignty from the Canadian people to the people of Quebec. This would be carried out by the elected representatives of the two populations, following manifestations of popular will to effect the change according to its agreed upon terms. In other words, secession involves direct action by the state.

In chapter 3 I argued that in order to uphold our constitutional values, state action must maintain the relationship between collective goals and individual liberty within which individual dignity is best promoted. Both democratic governance and individual liberty are to be maximized: collective goals which are in keeping with the equal autonomy and dignity of individuals must be limited by a respect for individual liberty, imposing a requirement to pursue these goals using the means least restrictive of liberty. In chapter 4 I argued that this relation between collective goals and individual liberty must be maintained in the context of constitutional change. Secession, like any other state action, and like any other constitutional change, must respect this relation. The goals to be accomplished by secession must be proportional to any restriction on individual liberty thereby entailed. Thus, the requirement that legal continuity be preserved and
that the populations concerned democratically express their will that sovereignty be
transferred, are only part of the equation.

This highlights a central mistake informing separatist rhetoric. The position of many
separatist leaders is that secession would be legitimate as long as it is 'the will of the
people'. This seems to be based on a notion that anything decided by a majority is
'democratic' and thus ipso facto legitimate. But as I have argued in the preceding
chapters, to Canadians 'democracy' does not mean unconstrained majoritarianism. The
democratic principle evolved within a tradition which, until the nineteenth century,
permitted no concept of limitless power. Even the doctrine of Parliamentary
sovereignty, which developed in a manner inconsistent with its origins, was kept in
check in England by a tradition of respect for liberty which ensured it remain, for the
most part, "a theory which has no relation to realities" 266. Canadians, inheriting this
aberrant doctrine along with the political values with which it is incompatible, have
increasingly insisted upon limits to majoritarian power as the implications of our
constitutional values have been slowly worked out by the judiciary and the populace at
large. Thus it can be said that for Canadians, democracy does not imply limitless power
but rather, decision-making that is constrained by respect for individual liberty and
equal dignity. Even if the peoples concerned clearly express their wills that sovereignty
be transferred, secession will be legitimate only if it does not constitute a denial of the
equal dignity of Canadians.

Strangely, there has been very little discussion of the rights of individual Quebeckers in
the debate over secession. The focus is almost solely on the claims of groups: the people
of Quebec, the 'rest of Canada', other provinces, Aboriginal peoples, provincial
minorities. Quebec lawyer Guy Bertrand has introduced individual rights into the

266 British Coal Corporation v. The King supra, note 100, at p.520.
debate, claiming that the attempts by the PQ government to effect the secession of Quebec unilaterally threaten his rights under the Charter and those of all Quebec residents. He seeks a declaration that a unilateral declaration of sovereignty on the part of Quebec would be unconstitutional, and an injunction enjoining the Quebec government from taking any action aimed at realizing the secession of Quebec outside the Canadian Constitution.\footnote{Bertrand v. Bégin No. 200-05-002117-955 (C.S. Que). On 8 September, 1995, Lesage, J. denied an interlocutory injunction preventing the 1995 referendum on sovereignty, but granted a declaration that the Act Respecting the Future of Quebec (tabled in the National Assembly on December 6, 1994) constitutes a serious threat to the rights and freedoms of the plaintiff, as guaranteed by the Canadian Charter of Rights and Freedoms. (1995), 127 D.L.R. (4th) 408; [1995] R.J.Q. 2500. On 30 August, 1996, Pidgeon J. rejected Quebec's motion to dismiss the action for a permanent injunction, dismissing claims that the issue is purely political and that it is academic; and holding that questions of parliamentary privilege, primacy of international or Canadian constitutional law, and validity of the Constitution Act, 1982 given that there is no official French version, should be decided by the judge who hears the action on the merits. [1996] R.J.Q. 2393.\footnote{For good reason: this is what has been proposed by the Quebec government against which he is claiming.}} But Bertrand's claim is limited to unilateral secession.\footnote{Me. Bertrand requests declarations that the National Assembly does not have the constitutional authority to unilaterally declare the sovereignty of Quebec without following the amending procedures provided in Part V of the Constitution Act, 1982; and that any bill which contemplates the separation of Quebec in contradiction to these amending procedures jeopardizes his rights and freedoms guaranteed under the Charter. The declaration granted by Lesage J. (see previous note) is similarly focused on unilateral secession: "Bill 1 (...) which would grant the National Assembly of Quebec the power to proclaim that Quebec will become a sovereign country without the need to follow the amending procedure provided in Part V of the Constitution Act, 1982, constitutes a serious threat to the rights and freedoms of the plaintiff (...)" (emphasis added). In his reasons the judge states that the actions taken by the Quebec government in view of unilateral sovereignty "are a repudiation of the Constitution of Canada" which "would result in a break in continuity of the legal order". (at p.428 D.L.R.)} In effect, his argument is that because Quebec is not proceeding by way of the amending formula his rights are being infringed.\footnote{The implication is that, were secession to be achieved by the elected representatives of the Canadian people under the amending formula, individual rights would not be an issue. Aside from this case, there has been very little discussion of the rights of individual Quebeckers in the event of secession. Participants in the debate seem to assume that if secession were to be carried out in a manner that preserves legal continuity - if the Canadian people, acting through their...
elected representatives, were to effect a transfer of sovereignty to the people of Quebec according to the applicable legal rules, then the rights of individual Quebeckers would not pose difficulties for the legitimacy of the project. A central aim of this paper has been to challenge this assumption.

Far from being peripheral to the debate, the rights of those Quebec residents who do not wish to secede must be central to any analysis of the legitimacy of secession. Argument about secession must be framed in these terms: The reasons given by those in favour of secession - that is, the collective goals which may be realized thereby - must be proportional to any infringement of the liberty or equal dignity of individual Canadians. Only if secession can be shown to be necessary to accomplish a valid constitutional goal sufficiently important to justify any infringement of individual equality and liberty thereby entailed, would it be legitimate according to our constitutional values. What follows is an illustration of how I believe the debate must be structured.

2. Justifying Secession

If Canadians were to effect the secession of Quebec, this would entail severe infringement of the liberty and equality of those Quebeckers who do not wish to form part of a sovereign Quebec. Assuming a period of free mobility prior to any transfer of sovereignty within which all those who wish to remain Canadian may leave Quebec, secession would present these individuals with a difficult choice: lose all rights and benefits of Canadian citizenship; or move in order to retain them. Of course, this choice might be more apparent than real. The enormous costs involved may make such a move impossible in practice, even though legally permissible. If the conditions of retaining rights of citizenship are impossible to fulfil, then in effect these rights are being amended away. Nevertheless, in the strict sense it could not be said that secession would
cause rights of citizenship to be amended away; but rather, that very severe restrictions would be placed on their continued enjoyment.

Forced migration is no small burden. For most Quebec residents moving to another province would involve enormous economic costs - such as selling property, likely at a loss, leaving jobs (with the uncertain prospect of finding new ones in a market influenced by this exodus) and abandoning business ties and goodwill that may have been built up over decades. Greater still would be the emotional costs. The ties which bind one to one's own home and community often develop over a lifetime and cannot be recreated. Moving means separation from friends and often family; it means abandoning an established lifestyle with its habits and haunts and particular joys; it means uprooting children - removing them from their schools and playmates and familiar neighbourhoods and forcing them to find their way in a strange place.

Evidenced throughout our constitution is an understanding that the ability to establish roots in a particular place, to create and maintain ties to a particular community, is essential to individual dignity and flourishing. This can be seen to underlie the linguistic and cultural guarantees, discussed in chapter 3, which ensured not only that two languages and cultures would flourish in Canada, but that particular regional communities that existed at Confederation be preserved. A similar affirmation of the value of existing regional communities might be found in the provisions aimed at regional equalization. As discussed in chapter 2, the commitment enshrined in section 36 and the exception to mobility rights in section 6(4) of the Constitution Act, 1982 are informed by the belief that Canadians should not be forced for economic reasons to move away from the regions within which they have established ties; instead, opportunities should be increased in underdeveloped areas in order that the communities situated there may be preserved.
This recognition of the essential connection between place, community and individual dignity can be seen to provide the basis for the mobility rights long considered "a constituent element of citizenship status"\(^\text{270}\) and now enshrined in our constitutional text. As observed by Rand J., the right to move to another province is merely a consequence of the right to live and remain in any province:

"...[A] province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. [...] It follows, *a fortiori*, that a province cannot prevent a Canadian from entering it [*...*]."\(^\text{271}\)

To be able to remain in one's home and community if one so chooses is a crucial aspect of individual liberty, long protected under the Constitution.

The forced migration of those Quebec residents who do not wish to lose their Canadian citizenship would severely infringe an essential attribute of liberty protected under our constitution as essential to individual dignity: the right to remain in a place where one has established roots. It would constitute a severe restriction on the enjoyment by some Canadians of their equal rights of citizenship. In order that this not constitute a *denial* of the equal dignity of these citizens, secession must be justifiable. It must be the necessary means to a constitutional goal so serious and pressing as to justify this impact upon individual citizens. The reasons commonly invoked in favour of secession must be examined according to this standard.

\(^{270}\) *Winner*, *supra*, note 56, at p.919
\(^{271}\) At pp. 919-920, emphasis added.
Separatists often appeal to the 'self-determination' of Quebeckers as justification for secession. Many argue that as a distinct 'people' Quebeckers have a right to form their own state. In Chapter 2 I noted the difficulties encountered by separatists in defining the 'Quebecois people' for whom this is claimed; a difficulty which seems to stem from the fact that while a right to self-determination is considered by many to be possessed solely by ethnic French Canadians, to so claim is viewed as politically improper in Canadian society. Perhaps the reason for this perception of impropriety may now be understood: the idea that ethnicity be a basis not merely for minority cultural guarantees but for certain political rights is anathema to the understanding of political equality informing our constitution as a whole. Within our constitutional tradition, statehood cannot be based upon ethnicity.

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272 This concept more properly belongs to international law; but due to the general confusion which characterizes the secession debate, is also appealed to in terms of domestic legitimacy. For one of numerous examples of references by separatist leaders to a right of 'self-determination' of Quebeckers, see statement of Mr. Bouchard to the National Assembly Journal des Débats, vol. 35-24 (22 May, 1996) at 1247. See also Bill 1, An Act respecting the future of Quebec, (1st Sess., 35th Leg. Quebec 1995): section 1, authorizing the National Assembly to proclaim the sovereignty of Quebec, is entitled, "Self Determination". The belief that Quebeckers have a right to 'self-determination' is held not only by separatists. Quebec Liberal Leader Daniel Johnson is on record repeatedly as supporting 'Quebec's right to self-determination', and even tried (unsuccessfully) to table a motion in the National Assembly "reaffirming" this right (but adding that this right was exercised in the most recent referendum and that efforts should be made now to renew Canadian federalism).

273 In the months prior to the 1995 referendum on sovereignty Bloc Québécois MP Phillipe Paré expressed the view that only "Québécois de souche" should vote in the referendum. See P. April, "Un député du Bloc veut exclure les ethnies du débat réféendaire", La Presse, February 27, 1995, at A-1; "Ethnic Quebecers shouldn't vote: MP", The Gazette, February 27, 1995, at A-4. Paré was forced to recant his statement the next day after being reprimanded by then BQ leader Lucien Bouchard. See discussion in Sovereign Injustice, supra, note 43, at p.22. See similarly the position of sovereigntist jurist Jacques Brossard, discussed in Chapter 2 in text accompanying note 45.

274 As Allen Buchanan observes, most of the ethnic 'peoples' of the world live not in homogeneous territorial units but intermingled with other groups; these 'potential nations' could become ethnically homogeneous only by killing, expelling or assimilating all non-nationals. Thus the idea that ethnicity be a basis for statehood is not only impracticable, its implementation would necessitate acts contrary to our deepest values.
citizenship, of full membership in a polity, are afforded to individuals regardless of race or cultural heritage. 'Self-determination' within our constitutional tradition means full participation in the democratic governance of the polity; such rights are afforded to all members equally. I believe it is this idea of fundamental political equality which prompted the general outrage following former Quebec premier Parizeau's derogatory statement about the illegitimacy of the 'ethnic' vote in the 1995 Quebec referendum\(^{275}\); and which explains the political impossibility ruled by Jacques Brossard of holding a referendum on sovereignty in which only ethnic French Canadians could vote.\(^{276}\) 'Self-determination' of ethnic French Canadians cannot form a justification for secession, as it is contrary to the notion of political equality informing our constitution as a whole.

Another reason often given for secession is that it is necessary to ensure the cultural survival of the French Canadian people.\(^{277}\) This is a valid and important constitutional goal; as discussed in chapters 2 and 3, a commitment to preserve this minority culture formed the genesis of many of our constitutional arrangements. Many Quebeckers believe that these arrangements are no longer sufficient to achieve this goal. They believe that French-Canadian culture is threatened with extinction or erosion and that it may be better preserved in a Quebec state. These are empirical claims which must be verified. In order to even begin to justify severely restricting individual liberty or rights of citizenship, there must be very good reason to believe that this culture is in fact imperilled, and that secession is rationally connected - indeed, necessary to its

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\(^{275}\) See Chapter 2, note 44.

\(^{276}\) See discussion in chapter 2 in text accompanying note 45.

\(^{277}\) For example, PQ Minister of Education Jean Garon states that secession is necessary because Quebecers need to ensure their "cultural security". "Les Inuit Disent Non", *La Presse*, March 3, 1995, at B1, quoted in *Sovereign Injustice*, supra, note 43 at p.121.
preservation: that no means less restrictive of liberty may be available\textsuperscript{278} to do so. The onus is upon those advocating secession to establish that it is the only way to ensure that French Canadian culture may be preserved. If so, then this may provide sufficient reason for overriding individual rights. As yet, this is far from having been established.\textsuperscript{279}

Whether or not independence is necessary to ensuring the survival of the French Canadian culture, many Quebeckers feel they would like to take full responsibility for its protection. This forms part of a very different type of justification for secession: that it is the desire of many Quebeckers to secede; and our values of freedom and autonomy mandate that we respect this choice. In a speech to the House of Commons, former Federal Justice Minister Alan Rock recently stated,

"The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebeckers clearly expressed. And this government agrees with that statement. This position arises partly out of our traditions of tolerance and mutual respect, but also because we know instinctively that the quality and the functioning of our democracy requires the broad consent of all Canadians."\textsuperscript{280}

\textsuperscript{278}Of course, the availability of alternate means depends in large part upon the political will in the rest of the country to implement them; consideration of these alternatives must take into account the likelihood of their realization.

\textsuperscript{279}Members of Quebec's artistic community strongly question whether a distinctive Quebecois culture would be better preserved in an independent Quebec. K. Yakabuski, "La souveraineté ne garantit pas la survie de la culture", \textit{Le Devoir}, March 25-26, 1995, at A-1. Indeed, a significant number of Quebec artists feel that having both federal and provincial sources of funding has been a great advantage to them. R. Macdonell, "One Hand Clapping", \textit{The Gazette}, April 22, 1995 at B2. Macdonell provides figures for 1992-3 showing that federal funding in the area of the literary arts, film and video, and broadcasting has far surpassed that of the Quebec government. Quoted in \textit{Sovereign Injustice}, supra note 43 at p.121.

\textsuperscript{280}Remarks made by federal Justice Minister Allan Rock to the House of Commons on Thurs. Sept. 27, 1996, Quoted in \textit{The Globe and Mail}, Friday, Sept. 27, A-21, emphasis added.
The idea that individual autonomy is essential to human dignity creates a presumption in our constitution in favour of liberty and therefore of tolerance - of respecting the choices of others. This might be evidenced in the religious protections long afforded by the Constitution. One might assume, with Rock, that if the members of a provincial community within Canada choose to no longer belong to the Canadian polity, this choice should be respected. As Alan Buchanan writes, a "presumption in favour of tolerance and liberty grounds a presumption in favour of secession". But the notion of equality foundational to our constitutional tradition means that our constitution protects not just liberty, but equal liberty: the choices of some members of society may not be acted upon so as to cause harm to the protected interests of others. As I argued above, the freedom to remain in a place where one has established ties is a constitutionally protected interest. Thus, the fact that some Canadians choose to establish a new state on what is currently Canadian territory, cannot justify state action forcing other Canadians either to lose all rights of citizenship or to move elsewhere. Again, it must be emphasized that the secession of a province involves positive action on the part of the state. Secession is not merely a question of tolerating choice - as Rock seems to suggest, but of acting so as to realize the preferences of some of society's members. To override rights of some citizens in order to realize the preferences of others would constitute a denial of those rights and of the equal dignity of their holders. Thus, respect for the preference of those Quebeckers who wish to secede cannot form a valid justification for secession.

In the passage quoted above, Rock also states that "the quality and the functioning of our democracy requires the broad consent of all Canadians" and suggests that this provides

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281 Buchanannote a number of considerations which may rebut a presumption in favour of secession - the most important of which being the interest of the state or of its people in preserving its territory and the resources contained within it (a consideration which he argues is not applicable in the Canadian case, where historical claims to territory are conflicting and weak) - but among these is no mention of harm to the rights of individual citizens to remain resident in the seceding province. Supra note 273, p.31.
good reason for allowing secession if Quebeckers "clearly express" the will to no longer form part of Canada. This rather vague notion of what our democracy requires raises numerous questions. Is Rock suggesting that lack of consent on the part of Quebeckers\(^2\) (how many?) would impair the quality and functioning of our democracy because this represents a significant proportion of the Canadian democratic community? If so, then whatever the proportion of Canadians need vote to secede in order to impair the quality and functioning of Canadian democracy, this has nothing to do with whether this number represents the majority of the population of a province. Any (territorially concentrated) group might decide to secede. One might then question the rational connection between allowing secession and preserving a functioning democratic polity. Quite the contrary, it would seem that once a precedent were established that any disaffected group within Canada might revoke consent to form part of the Canadian state and then secede from it, democratic government would become nearly impossible. The threat of secession by groups within society would mean instability and likely strategic behaviour completely at odds with the long term commitment to govern in the interests of the whole that is essential to democratic governance.\(^3\) Thus, it is difficult to see how allowing the secession of Quebec might be considered necessary to preserving a healthy democratic polity in the event that a majority of Quebeckers express the will to secede. The rather hazy reasoning offered by Rock cannot serve to justify overriding the rights of those citizens who would be adversely affected by secession.

The preceding paragraphs are not an attempt to provide a complete survey or conclusive analysis of the arguments in favour of Quebec secession; but rather, to illustrate the manner in which I believe the issue must be approached. Vague, speculative or superficially plausible arguments in favour of secession must be abandoned. Only if

\(^2\)And this assumes a referendum question drafted clearly enough to ascertain this.
secession can be shown to be absolutely necessary to accomplish a valid constitutional goal sufficiently important to justify the infringement of individual dignity thereby entailed, would it be legitimate according to our constitutional values. No looser standard of justification may be permitted by Canadians.

3. Conclusions

Legal and political legitimacy for Canadians depends upon adherence to the values and principles which underlie our shared constitutional tradition. Secession of a province, like any other constitutional change occurring within this tradition, is subject to the constraints imposed by these values.

Among these is the requirement that legal continuity be preserved in the process of constitutional change. Thus, assuming that any secession project passes the standard of justification imposed by our constitutional values, a lawful secession would involve a voluntary transfer of sovereignty effected jointly by the representatives of the people of Canada and those of the seceding population, following decisive popular mandate by each group. This would allow the new state to become the successor of the old, creating no gaps in the continuous application of legal principles.

Secession necessitates direct action on the part of the state. As such, it must maintain the relationship between collective goals and individual liberty in which individual dignity is best promoted. The goals to be accomplished by secession must be proportional to any restriction on individual liberty thereby entailed. The debate over secession must be framed in these terms.
Secession of Quebec would infringe the liberty and equality of those Quebec residents who do not wish to form part of the new state. At best, it would involve forced migration in order to retain the rights and protections of Canadian citizenship. This would constitute a severe restriction on the enjoyment by these Canadians of their equal rights of citizenship; and an infringement of an aspect of liberty long protected under the constitution: the right to remain in a place where one has established ties. In order that secession not constitute a denial of the equal dignity of these citizens, it must be justified. Secession must be the necessary means to a constitutional goal so serious and pressing as to justify this impact on individual citizens. The vague, speculative, or superficially plausible arguments often advanced in favour of secession must be rejected as insufficient to meet this standard.
Chapter 6: Conclusion

The Constitution of Canada is in essence a tradition: begun in Britain, transplanted to North American soil, and adapted to suit the particular conditions of Canadian social life. The Canadian people, Quebeckers included, was created as a democratic people within this constitutional tradition and has been shaped by its values. What will be perceived by Canadians as legitimate exercise of sovereign power depends upon conformity to these values.

Informing the various remedies and procedures that comprise 'the rule of law' in this tradition is a conception of individuals as equal in dignity and requiring a certain measure of autonomy in order to flourish. These same ideas underlie the democratic principle - which developed along with the rule of law, the two principles mutually reinforcing. Both self-government and individual liberty are essential to individual dignity as understood in this tradition; thus the development of democratic institutions and the limitation of governmental power to preserve liberty, implied by the rule of law, must be seen as two aspects of the same aim. On this understanding, individual dignity can be realized only in a society where both democracy and liberty are promoted. This means that democratic governance must be limited by an obligation to respect individual liberty.

For Canadians, democracy does not mean unfettered majoritarianism but rather, decision-making that is constrained by respect for individual liberty and equal dignity. The democratic principle evolved within a tradition which, until the nineteenth century, permitted no concept of limitless power. Even the doctrine of Parliamentary sovereignty, which developed in a manner inconsistent with its origins, was kept in
check in England by a tradition of respect for liberty which ensured it remain, for the most part, "a theory which has no relation to realities"284. Canadians, inheriting this aberrant legal doctrine along with the political values with which it is incompatible, have increasingly insisted upon limits to majoritarian power as the implications of our constitutional values have been slowly worked out by the judiciary and the populace at large. Enactment of the Canadian Charter of Rights and Freedoms removed some of the contradiction generated by the doctrine of parliamentary supremacy, rendering our constitution more coherent and more consistent with its origins. It also allowed for the articulation of the relationship between democratic governance and individual liberty which maximizes both these principles: valid collective goals must be pursued in the manner least restrictive of individual liberty.

Our constitution might be seen as a consensus through time that individual autonomy and equal human dignity should be protected and promoted in society's institutions and laws. This means that our constitution cannot remain static but must allow for change in order to realize this goal in changing social circumstances. It means also that legitimate change must be in accordance with our constitutional values. Among other things, rights cannot be amended away; nor can individual dignity be denied in the process of carrying out otherwise valid change. Constitutional change must always respect the relation between individual liberty and democratic governance within which dignity is best realized. Only such change will be in accordance with our constitutional values and thus perceived as legitimate by all Canadians.

Secession of a province, like any other constitutional change occurring within this tradition, is subject to the constraints imposed by Canadian constitutional values. As such, it must maintain the relationship between collective goals and individual liberty in

284British Coal Corporation v. The King supra, note 100.
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Because the principles appealed to by separatists and federalists are premised on a common set of values - a certain understanding of equal individual dignity - a true debate on the secession issue is possible. Vague, speculative, or purely emotive assertions can be abandoned in favour of thoughtful argument conducted on common terms.