Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory

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Political theorists have long considered the question of how constitutional design can respond to the demands of minority nationalism. In this context, Canada has attained considerable prominence as a model, even though the notion of the model came to prominence during the Canadian constitutional crisis of the 1990s, when Quebec nearly seceded. In part, the much-touted Canadian exemplar may be viewed as an intervention by Canadian political theorists in domestic constitutional debates as a way of supporting national unity. However, the Canadian constitutional crisis also points to the limits of a legal approach to the accommodation of minority nationalism. On the one hand, most constitutions contain a process for constitutional amendment, which conceivably might bring about changes sufficient to satisfy the minority nation. On the other, the rules for constitutional amendment may encounter profound difficulties in constituting and regulating moments of constitutive constitutional politics, since it is precisely at those moments that the concept of the political community, which those rules reflect, is placed at issue by the minority nation.

1. Introduction: Brian Barry versus Will Kymlicka

In the past two decades, numerous political theorists have taken up the question of how constitutional design should respond to ethnic, national, and linguistic division. Just as important as that question is the way in which these theorists have responded to it. Some, rather than deriving constitutional strategies and models from abstract principles of political morality, have turned to real-life examples to buttress their proposed solutions. This is hardly surprising, since political theorists write about urgent problems to which they hope to offer principled solutions that actually work. However, in the subsidiary literature concerned with the accommodation of minority nationalism, the models on offer are often much more complex, consisting of a large number of constitutional instruments meant to operate as a whole. It is precisely in this context— and as just such a model—that Canada has attained considerable prominence.

Given this disproportionate prominence, what is striking about Brian Barry's critique of multiculturalism—in *Culture and Equality*—is his attack on Canadian political theorists and on Canada itself.[1] Although Barry draws on examples from a wide range of jurisdictions and on the work of political theorists of many nationalities, only Canadians and Canada are singled out for opprobrium. For example, the first section of chapter 1 ("Losing Our Way") is a sarcastic rejoinder to Will Kymlicka's *Finding Our Way*, a major study of the accommodation of cultural diversity in Canada.[2] On one level, Barry's attack is methodological. He highlights and challenges Kymlicka's heavy reliance on Canada as the basis for the latter's account of the phenomenonology of minority nationalism—that is to say, Kymlicka's position that a culture is synonymous with a nation or people, and that the claims of minority nationalism are, therefore, claims for cultural preservation in the face of assimilative pressures from the majority.[3]

For Barry, Kymlicka universalizes the particular claims of Quebec; hence, his discussion of nationalism "has been skewed" by his understanding of the Canadian case.[4] But Barry's attack extends to the very success and viability of Canada itself. This goes far beyond concerns regarding particular programs. Rather, he argues that since the theoretical defenses for a wide range of Canadian public policies responding to ethnocultural diversity are so deeply deficient and since these defenses are so widely accepted by Canada's political elites, "[i]t may reasonably be asked how it is that Canada does as well as it does."[5] While *Culture and Equality* is a work of political theory, not political economy, Barry nonetheless offers up the notion that Canada succeeds because "'there is a lot of ruin in a nation [as Adam Smith famously remarked]', especially one whose land and coastal waters contain some of the richest natural resources in the world and whose history has been one of permanent peace with the only country with which it shares a land border."[6]

The prominence of Canada is twofold. On the one hand, Canadian political theorists—Joseph Carens, Will Kymlicka, Margaret Moore, Wayne Norman, Allen Patten, Charles Taylor, James Tully, Daniel Weinstock, and others—have

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[1] Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism (Harvard Univ. Press 2001).

[2] Will Kymlicka, Finding Our Way: Rethinking Ethnocultural Relations in Canada (Oxford Univ. Press 1998).

[3] *See, e.g.,* Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford Univ. Press 1995).

[4] Barry, *supra* note 1, at 309.

[5] *Id.* at 313.

[6] *Id.*

set the agenda for normative reflection on the various problems generated by minority nationalism. Indeed, these authors are so prominent it is widely recognized they have come to represent a Canadian "school," one which has profoundly shaped our understanding of these issues. Yet the importance of Canada is more than just a by-product of national academic excellence. The real story is the considerable attention devoted to Canada itself. Not only are Canadians are in the forefront of normative reflection on the problems of minority nationalism but, in the work of these scholars, the Canadian case plays a pivotal role.

This is especially true for Will Kymlicka. *Finding Our Way* celebrates the "Canadian model" of ethnocultural relations.[7] According to Kymlicka, Canada has attracted international attention and is a "world leader … [that] … is now seen as a model by many other countries" because it appears to have coped, successfully, with the diversity arising from immigration, indigenous peoples, and minority nationalism "simultaneously[,] while still managing to live together in peace and civility."[8] There is a particular interest in the Canadian approach to dealing with minority nationalism, according to Kymlicka, because Canada was the first country to use "federalism to accommodate the existence of a regionally concentrated national minority … by creating a political unit within which a linguistically distinct national minority would form a majority and govern itself."[9] Not only does Canada have the longest "experience concerning the relationship between federalism and minority nationalism"[10] but that experience has proved a positive one, since Canadians "have learned to live with a vigorous minority nationalism that in many countries would lead to anarchy or civil war."[11] Because of its evident success, Canada has served and continues to serve as a model for countries that must cope with the pressures of minority nationalism, a trend Kymlicka wholeheartedly endorses. "Canada has relevant experience and expertise to offer the world," he writes, given the lessons Canadians have learned through the lived experience of responding to minority nationalism "over the years—lessons that many other countries want and need to learn if they too are to survive and prosper" and to "avoid unnecessary conflicts and injustices."[12] Since Kymlicka puts the Canadian model into play, Barry's question—how well has this model worked in practice—is entirely fair.

The purpose of this article is to complicate and contextualize the discussion of the Canadian model in political theory. For, contemporaneously with the rise of

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[7] *Supra* note 2, at 3.

[8] *Id.* at 2–3.

[9] *Id.* at 2.

[10] *Id.*

[11] *Id.* at 3.

[12] *Id.* at 3–4.

the Canadian model, Canada went through a period of profound constitutional introspection. Since the 1960s, the country has struggled with the constitutional accommodation of Quebec nationalism. During the early 1990s, these debates reached a crisis point that nearly occasioned the breakup of the country. Because the Canadian example draws on Canada's own national experience, I want to revisit this model, viewing it against the backdrop of the constitutional politics of the last few decades. Not only did the emergence of the Canadian model coincide with Canada's worst constitutional crisis but, as it turned out, promoting Canada's success abroad also was an important intervention in domestic constitutional politics, in an attempt to shore up support for the Canadian model at home. The question is whether this model has worked as well as Kymlicka claims. Quebec nationalist scholar Guy LaForest has suggested that, indeed, Canada's "political system does not measure up to our country's reputation abroad" because it fails to acknowledge, both symbolically and institutionally, Quebec's distinctiveness.[13] The focus here will be different. I will argue that Canada provides a cautionary tale on the limits of constitutional design and its ability to cope with the threat of extralegal secession by minority nations.

2. The Canadian model: Accommodation and integration

When Kymlicka and Barry evoke the Canadian model, they are referring to how constitutional design can and should respond to the relation between constitutionalism and nationalism. The context in which this issue arises is the multinational state. There is a familiar story here.[14] The constitutional problems of multinational states arise because modern states necessarily engage in a process of nation building, which is designed to produce a degree of common identity, shared by all its citizens, across the entire territory of the state. The means to this end include policies centered on language, history, and culture, and on the centralization of legal and political power. The goals of nation building are diverse. David Miller has suggested that one reason for the nation-building process is to provide the necessary motivational element missing from liberal accounts of political legitimacy.[15] A sense of identification with a particular set of liberal democratic institutions and laws induces individuals to make those institutions work and to accept their demands. Ernest Gellner has argued that linguistic homogenization is, in fact, a tool for economic integration and the enhancement

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[13] Guy LaForest, *The True Nature of Sovereignty: Reply to My Critics Concerning Trudeau and the End of a Canadian Dream*, *in* CANADIAN POLITICAL PHILOSOPHY: CONTEMPORARY REFLECTIONS 308 (Ronald Beiner & Wayne Norman eds., Oxford Univ. Press 2001).

[14] *See, e.g.*, WILL KYMLICKA, CULTURALLY RESPONSIVE POLICIES (United Nations Development Programme 2004) (background paper to UNDP Human Development Report 2004).

[15] DAVID MILLER, ON NATIONALITY (Oxford Univ. Press 1995).

of economic opportunity, since it permits citizens to become members of a mobile and flexible workforce throughout the whole of a country.[16]

But many states also contain national minorities whose members once formed complete, functioning societies on their territory, endowed with a considerable degree of self-rule, prior to their incorporation into the larger state. Multinational states are often the legacy of conquest and empire or of voluntary federation or union. Consequently, many national minorities will resist nation-building efforts and engage in minority nation building as a defensive response. In some cases, minority nationalism is a response to the centralization of political and legal power that often has shifted power away from minorities. In other cases, it is a response to linguistic nation building, which can impair the ability of linguistic minorities to participate fully in economic and political life. Minorities respond to majority nation building by conceiving of themselves as nations and making constitutional claims designed both to protect themselves from the majority's nation-building project and to enable them to engage in a parallel process of nation building focused on the territory where they constitute a majority.

There are many multinational states in the world—Canada, the United Kingdom, Belgium, Spain, Russia, Sudan, Sri Lanka, Iraq, Malaysia, and India, to name just a few. In these states, constitutional design matters a great deal, since constitutions were and are the principal sites for the majority nation-building as well as for the national minorities' resistance to the overarching process of nation-state consolidation. In other words, the political sociology of multinational states cannot be fully understood without careful attention to the politics of constitutional design and interpretation. The Canadian model is a conspicuous example of how constitutional design can accommodate these competing nation-building agendas within a single state. Put simply, the Canadian exemplar responds by challenging the equation of nation and state that underlies not only majority nation building but also the defensive response of minority nations, for which the logical response is to resist incorporation into the majority nation and demand states of their own.

Thus, the interesting question is what, precisely, are the constitutional and nonconstitutional instruments Canada employs to realize the ideal implied when nation and state are not treated as synonymous. Surprisingly, and despite widespread comparative interest, the juridical details of the Canadian model have never been set out in comprehensive fashion by constitutional scholars.[17] Nor have political theorists risen to the challenge. This is true even of Kymlicka. Although he extols the virtues of the Canadian model in *Finding Our Way*, he presents it, for the most part, in outline or simply presupposes it in

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[16] ERNEST GELLNER, NATIONS AND NATIONALISM (Cornell Univ. Press 1983).

[17] Stephen Tierney's work is a notable exception. *See, e.g.,* STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM (Oxford Univ. Press 2005).

discussions that are not institutional in their focus—discussions, for example, regarding the political sociology of competing claims of nationhood.

Nonetheless, a useful starting point is what Kymlicka does have to say about the Canadian model in *Finding Our Way:*

> [F]ederalism seems the ideal mechanism for accommodating territorially defined national minorities within a multinational state. Where such a minority is regionally concentrated, the boundaries of federal subunits can be drawn so that it forms a majority in one of the subunits…. Quebec is the paradigmatic example. Under the federal division of powers, the province of Quebec has control over issues that are crucial to the survival of the francophone society, including education, language and culture, as well as significant input into immigration policy.[18]

Kymlicka notes that Quebec has jurisdiction over language, including the language of education and public and private sector employment. Finally, he notes that provincial boundaries and provincial powers are constitutionally entrenched; otherwise, Canada's English majority could evade unilaterally the protection offered to Quebec by federalism.

Thus, for Kymlicka, Canada's constitutional order comes down clearly on the side of accommodation in the well-known accommodationist–integrationist debate, in comparative politics, about how to manage ethnic, linguistic, religious, and cultural diversity through constitutional design. On the one hand, some scholars—most famously, Arend Lijphart—have argued for the need to recognize, institutionalize, and empower differences.[19] There is a range of constitutional instruments available to achieve this goal, such as multinational federalism, legal pluralism (for example, religious personal law), other forms of nonterritorial minority rights (minority language and religious education rights), consociationalism, affirmative action, and legislative quotas. But others, Donald Horowitz for one, have countered that such practices may entrench, perpetuate, and exacerbate the very divisions they are designed to manage.[20] These latter scholars propose a range of alternative strategies, falling under the rubric of "integrationism," that blur or transcend differences. Examples of such strategies include: bills of rights, enshrining universal human rights enforced by judicial review; policies of disestablishment (religious and ethnocultural); federalism; and electoral systems designed specifically to include members of different groups within the same political unit and to disperse members of the same group across different units.

For Kymlicka, Canada adopts an accommodationist stance vis-à-vis minority nationalism through multinational federalism. However, on careful examination,

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[18] Kymlicka, *supra* note 2, at 135.

[19] Arend Lijphart, Democracy in Plural Societies: A Comparative Exploration (Yale Univ. Press 1977).

[20] Donald Horowitz, Ethnic Groups in Conflict (2d ed., Univ. Calif. Press 2000) (1985).

it is apparent that the Canadian model consists of a mixture of accommodationist and integrationist strategies that extends far beyond multinational federalism. Moreover, close scrutiny of the concrete legal and institutional details of the Canadian order pays intellectual dividends, since it adds both conceptual clarity and texture to the debate over the relative merits of integration and accommodation as constitutional techniques for the management of minority nationalism. Such scrutiny is important, and its value extends beyond the Canadian case to other multinational polities. There are four main points:

(1)   The terms accommodation and integration, although helpful, are potentially misleading because they may encourage us to forget that both integration and accommodation are directed toward the same goal—maintaining the territorial integrity and political unity of the state. This is true, certainly, of multinational federalism in Canada, which was designed to keep Canada together by removing Quebec's motive to secede. Thus, integrationist and accommodationist constitutional strategies as alternative means to the same end are not necessarily in opposition.

(2)   Although accommodation and integration are alternatives, they are not mutually exclusive. Indeed, in multinational federations, it makes sense to employ both simultaneously. Multinational federalism carries the risk that—perversely enough—it can fuel secession, rather than enhancing the territorial integrity and political unity of the state. Constitutions thus can use integrationist instruments to offset this danger. The requirement that Quebecers participate in federal institutions is perhaps the best example in the Canadian context.

(3)   The combination of integrationist and accommodationist strategies can be achieved in different ways. One device is to set limits on the scope of accommodation—for example, by forcing certain decisions to be made in common institutions in which a national subunit does not have a veto. This is illustrated by the broad but limited scope accorded to provincial jurisdiction and, on the other hand, by the constitutional entrenchment of provincial participation in common national institutions. Another method is to balance an accommodationist strategy in one area of constitutional design against an integrationist strategy in another; for example, the balancing of multinational federalism against the nation-building aspects of the Canadian Charter of Rights and Freedoms.[21]

(4)   Constitutional strategies that appear to be accommodationist may in reality be integrationist. More specifically, it is important to differentiate accommodation as institutional separateness (for example, multinational

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[21] The Canadian Charter of Rights and Freedoms, part I (§§ 1–34) of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter *Charter*].

federalism) from accommodation designed to facilitate participation in common institutions (federal language policy, for example).

In what follows, I will illustrate these points by reference to various aspects of the Canadian constitutional order.

Canadian federalism, of course, is the best known of these features. Both levels of government—federal and provincial—derive their authority from the Constitution. Federalism is constitutionally entrenched against unilateral modification by either level of government, and the limits on the authority of both the federal and the provincial governments are judicially enforceable.[22] Canada is a multinational federation because the boundaries of the province of Quebec were drawn so that francophones would constitute a majority therein and could not be outvoted by the anglophone majority in Canada as a whole. This remains true today—indeed, the territorialization of linguistic communities is greater now than at the time Quebec was created. Moreover, Quebec has been granted a mix of concurrent and exclusive jurisdiction over a wide range of policy areas that gives it the tools to ensure the survival of a francophone society. These areas of jurisdiction include language and control of primary, secondary, and postsecondary education. Inasmuch as language is the driving force behind Quebec's claims for political autonomy, the Canadian model blunts its force by placing language under provincial jurisdiction.

The adoption of federalism and the creation of Quebec was a direct response to the failed viability of the United Province of Canada, a British colony that resulted from the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), existing between 1840 and 1867. The history here is complex.[23] In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter.[24] The language of government was meant to be English.[25] The goal behind the merger and departure from representation by population was to facilitate the assimilation of francophones—that is, to engage in English-language nation building even before anglophones were a majority. As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by francophones who feared they would be outvoted on matters important to their identity. The result

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[22] *See generally* Constitution Act, 1867, 30 & 31 Vict. Ch. 3. (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985).

[23] Kenneth McRoberts, Misconceiving Canada: The Struggle for National Unity (Oxford Univ. Press 1997).

[24] An Act to Reunite the Provinces of Upper and Lower Canada, and for the Government of Canada, 3 & 4 Vict. ch. 35, § XII (U.K.).

[25] *Id.* § XLI.

was political paralysis. Federalism was the solution—providing for representation by population at the federal level while simultaneously creating a Quebec with jurisdiction over those matters crucial to the survival of the francophone society in that province. Had Quebec not been created, it is likely that the French-speaking areas of Canada eventually would have seceded.

It is important to emphasize that federalism is a mechanism for both accommodation and integration, and, because of this, the provinces have extensive but limited jurisdiction and cannot invade the powers of the federal government. The result is that many important decisions of interest to the citizens of Quebec lie within federal jurisdiction—such as criminal law, immigration policy, international trade, macroeconomic policy (including taxation), foreign policy (including the negotiation of international treaties), and defense.[26] The citizens of the subunit must participate in the institutions of the common state in order to shape important political decisions directly affecting them. The juridical equality of the provinces strengthens these incentives, because provincial equality has the important corollary that federal legislative power applies equally across the country. By contrast, were federal legislative power to apply asymmetrically vis-à-vis Quebec, the incentives for Quebecers to participate in national political life would be diminished.

How are the institutions of shared rule at the federal level structured? Although federal institutions demonstrate a mixture of integrationist and accommodationist elements, they are predominantly integrationist. On the integrationist side, the federal government operates independently from the provinces. The federal House of Commons is directly elected by the citizenry, as opposed to being appointed by provincial governments.[27] The federal Senate is a federally appointed body.[28] Both houses pass bills by simple majority vote; there is no formal role for the Quebec government or even for Quebec MPs or senators in the federal legislative process.[29] Moreover, the constitutional conventions that define a responsible government in a Westminster democracy apply to the House of Commons, with no account taken of Canada's status as a multinational state. In particular, there are no conventions that there be Quebec MPs in the cabinet, that certain portfolios be reserved to Quebec MPs, or that the position of prime minister be held from time to time by a Quebecer.

The lack of any special role for Quebec MPs in the federal House of Commons is in marked contrast to the political practice that had developed in the United Province of Canada. Although the goal of the merger of Upper and Lower Canada

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[26] For powers of the parliament or federal powers, see Constitution Act, 1867, § 91 (Can.); for exclusive areas of provincial jurisdiction, see Constitution Act, 1867, §§ 92–93 (Can.).

[27] Constitution Act, 1867, § 37 (Can.).

[28] Members of the Senate are appointed by the Governor-General, on the advice of the Prime Minister; *id.* § 24.

[29] *Id.* §§ 36 (Senate) & 49 (House of Commons).

was to assimilate its francophone population, what resulted was a form of linguistic dualism within the institutions of the new government. Thus, a practice developed of appointing dual prime ministers—French speaking from Lower Canada and English speaking from Upper Canada. Similarly, cabinets were drawn from both halves of the province. Within the legislature, although English had been enacted as the only official language, French was soon added. Moreover, on occasion, the legislature followed a double-majority rule, in effect, giving the francophone MPs a collective veto. In sum, the United Province of Canada bore some of the characteristics of power sharing we would associate today with consociational democracies such as Northern Ireland and Bosnia-Herzegovina.[30] Thus, the decision to opt for multinational federalism in Canada was not just a decision to accommodate minority nationalism. It was also a decision to reject a consociational method for doing so—with which Canada had had concrete experience—because of the strain created by the demand for representation by population in national institutions. This is an additional lesson to be drawn from the Canadian model.

Nonetheless, there remain elements of accommodation in the design of the Supreme Court and in the range of federal policies on the language of federal institutions. The Supreme Court's membership is capped at nine justices, three of whom must come from Quebec (although it would be entitled to only two on the basis of population).[31] Quebec's representation on the Supreme Court is expressly laid out in statute and may be constitutionally entrenched.[32] Quebec has fought particularly hard to protect its level of representation since the Court is the final arbiter of the federal division of powers, and it is the final court of appeal for matters of provincial law, including Quebec's civil code.[33]

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[30] For the power-sharing arrangement in Northern Ireland, see the section of the Good Friday Agreement that establishes a North/South Ministerial Council including those with executive responsibilities in Northern Ireland and the Irish Government: THE AGREEMENT: AGREEMENT REACHED IN THE MULTI-PARTY NEGOTIATIONS, N. IRELAND – BRITAIN, Apr. 10, 1998, *available at* http://www.nio.gov.uk/agreement.pdf; the power-sharing arrangement in Bosnia-Herzegovina is set forth in THE DAYTON PEACE ACCORDS ON BOSNIA (1995), *available at* http://www.state.gov/www/regions/eur/bosnia/bosagree.html. The Dayton Peace Accords divided Bosnia-Herzegovina into two federal units, the Federation of Bosnia-Herzegovina and Republika Srpska, respectively; however, the former is divided into Croat- and Bosniak-controlled cantons.

[31] Seats on Canada's Supreme Court are allocated on a regional basis. Currently, three judges come from Ontario, one from the Maritime provinces, two from the Western provinces, and three from Quebec. This allotment of seats is merely a practice or tradition that became a convention (with the exception of Quebec; *see infra* note 32); *see* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, ch. 8.3 (5th ed., Thomson Carswell 2007).

[32] Supreme Court Act, R.S.C., ch. S 26, §§ 4 (1985) (requiring nine judges) & 6 (requiring three judges from Quebec) (Can.); Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 41(d) (U.K.) (requiring any changes to the composition of the Supreme Court to have unanimous federal and provincial consent).

[33] Civil Code of Quebec, S.Q. ch. 64 (1991) (Can.).

But it is the question of language that is truly central to making sense of the Canadian constitutional project. In large part, this is a function of history. The goal in creating the United Provinces of Canada was linguistic assimilation, based on the assumption that linguistic homogeneity was necessary to the creation of a unified nation-state capable of democratic self-government—anticipating the views set forth by John Stuart Mill in *Considerations on Representative Government*.[34] This aborted attempt at linguistic nation building on behalf of Canada's anglophone majority, in turn, fueled demands for a province with a French-speaking majority in which the institutions of public, social, and economic life would operate in French. But even without this history, language would be a source of conflict, because the state cannot be neutral in linguistic matters, as it can be, say, with respect to religion. A choice must be made as to which language or languages are to be used by the state. In Canada, where linguistic communities had operated with distinct political, economic, and social institutions prior to creation of the federal state, linguistic conflict was inevitable because the stakes were so high. The users of the chosen language would enjoy immediate advantages in the economic and political sphere.

For the federal government, the background assumption is that English will be the dominant language of government because anglophones constitute an overwhelming majority. The Constitution and the Official Languages Act attempt to ensure that French enjoys some degree of official status alongside English in federal institutions, with the underlying goal of facilitating participation by the francophone minority in common national institutions.[35] Thus, the Constitution declares English and French to be the official languages of Canada.[36] Both languages may be used in debates in the federal Parliament, and statutes must be enacted in both.[37] The Constitution also gives francophones the right to interact with federal institutions in French. Individuals may use either English or French in proceedings before federal courts or tribunals.[38] The Charter of Rights and Freedoms also grants the public the right to communicate with and receive services from the federal government in both English and French, wherever there is sufficient demand and it is reasonable to provide services in both languages.[39] However, federal policies on the internal

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[34] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, ch. 16 (Prometheus Books 1991) (1860).

[35] Official Languages Act, R.S.C., ch. 31 (4th Supp. 1985) (Can.).

[36] *Charter*, § 16.

[37] Constitution Act 1867, § 133; *Charter*, §§ 17(1) & 18(1); Official Languages Act, §§ 4–9.

[38] Constitution Act, 1867, § 133; *Charter*, § 19(1); Official Languages Act, §§ 14–20. Section 133 has been interpreted as giving courts the choice of which language to use in communicating with litigants and in conducting proceedings, not as a language right designed to give choice to the litigants: MacDonald v. City of Montreal, [1986] 1 S.C.R. 449 (Can.). However, this jurisprudence has been thrown into doubt by R. v. Beaulac, [1999] 1 S.C.R. 768 (Can.).

[39] *Charter*, § 20; Official Languages Act, §§ 21–24.

language of government are rather different. Despite the attempt to create bilingual workplaces, English predominates in some areas.[40]

Within Quebec, the Constitution permits the use of both English and French in the Quebec National Assembly and requires statutes to be enacted in both languages. Similarly, English may be used in any court or tribunal in Quebec. But Quebec attempted legislatively to make French "the language of the Government and the law, as well as the normal and everyday language of work, instruction, communication, commerce and business" through the enactment the Charter of the French Language in 1977, shortly after the victory of the Parti Québécois.[41] The Charter of the French Language declares French the official language of Quebec—not merely of the public sector. The goal is to engage in minority nation building by establishing French as the shared language of all Quebecers. To this end, the Charter of the French Language attempted to make French the exclusive language of the National Assembly and the courts; these measures were struck down as unconstitutional.[42] However, two major portions of the Charter of the French Language have withstood constitutional scrutiny. The first concerns the place of French in the public sector, where it is established as the exclusive language of work within the civil service.[43] The second concerns the promotion of French in the private sector, in order to increase the economic opportunities available to francophones. This policy is both in reaction to Quebec's history, which saw economic power concentrated in the hands of anglophones, and is an instrument of linguistic nation building, whereby French becomes the language not only of politics but economic life as well. The goal is to make French the internal working language of medium- and large-sized businesses in the province. From a constitutional perspective, the prevailing view is that these rules lie within the province's jurisdiction regarding intraprovincial economic activity, notwithstanding their obvious impact on interprovincial and international trade, which fall under federal jurisdiction. This degree of latitude reflects the Court's interpretation of the Canadian Constitution as protecting provincial autonomy, and has created considerable policy space for Quebec.

Where linguistic policy has been most controversial is in the area of education. The responsibility for education lies within provincial jurisdiction and encompasses power over the language of instruction and curriculum.[44] This

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[40] Office of the Commissioner of Official Languages, *Making It Real: Promoting Respectful Co-existence of the Two Official Languages at Work* (Apr. 2005) (Can.), *available at* http://www.ocol-clo.gc.ca/docs/e/language_work.pdf; Office of the Commissioner of Official Languages, *Walking the Talk: Language of Work in the Federal Public Service* (Mar. 2004) (Can.), *available at* http://www.ocol-clo.gc.ca/docs/e/work_travail_2004_e.pdf.

[41] Charter of the French Language, R.S.Q. ch. C 11 (2007).

[42] *Id.* §§ 10–13; A.G. Quebec v. Blaikie, [1979] 2 S.C.R. 1016 (Can.).

[43] *Id.* §§ 14–20.

[44] Constitution Act, 1867, § 93 (Can.).

authority has been crucial for Quebec, because the Constitution has permitted the province to establish and operate a primary and secondary educational system that operates in French and is a prime instance of linguistic nation building. Additionally, this control over education has enabled Quebec to create French-language universities, an indispensable support for the use of French in economic and political life—a power that is the source of considerable controversy in other multinational states. At the same time, this arrangement has denied the federal government the ability to set a standard curriculum in a shared national language, a common instrument of nation building in many countries.

However, in spite of this autonomy in linguistic matters, provincial education policies are still subject to provisions in the Charter of Rights and Freedoms guaranteeing the right to minority-language education. These provisions grant certain categories of citizens the right to have their children receive primary and secondary education in their home language where the numbers warrant. The flashpoint of controversy within Quebec has been the right of anglophones who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec.[45] The Charter of the French Language attempted to limit this right to parents who had been educated in English in Quebec; this was struck down as unconstitutional.[46] Another provision of the Charter of Rights and Freedoms, which grants citizens whose children have received their schooling in English anywhere in Canada the right to English-language education in Quebec, also limits Quebec's ability to integrate, linguistically, migrants from other provinces. An attempt to construe this right narrowly was recently found to be unconstitutional.[47] For Quebec, minority-language education rights are very controversial precisely because they limit Quebec's ability to encourage the linguistic integration of those who immigrate there from other parts of Canada, not just that of immigrants from abroad.

The final element of the Canadian model is the Charter of Rights and Freedoms. One of the arguments frequently advanced against the accommodation of minority nationalism through federalism is that it may lead to the creation of local tyrannies. Ethnocultural minorities who constitute a local majority might view the subunit as belonging to them rather than to each one of the subunit's residents. A possible result might be a "sons of the soil" politics encouraging and, perhaps, legitimizing discrimination against internal minorities in the framing of public policy, the delivery of public services, contracting, and public employment. Such discrimination might arise particularly if the

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[45] *Charter*, § 23(1)(b).

[46] Attorney General of Quebec v. Quebec Protestant School Boards, [1984] 2 S.C.R. 66 (Can.).

[47] Solski (Tutor of) v. Quebec (Attorney General), [2005] 1 S.C.R. 201, 2005 SCC 14 (Can.).

internal minorities were members of the national majority. Through its provisions for equality rights and interprovincial mobility rights, the Charter of Rights and Freedoms rules out policies that openly discriminate on the basis of ethnic identity or against recent migrants from other provinces.[48] Not surprisingly, the Charter has generated the most controversy within Quebec in its impact on linguistic nation building. As indicated above, its minority-language rights provisions have limited Quebec's ability to ensure the linguistic integration of migrants' children from other provinces.

On a different front, a portion of the Charter of the French Language that required commercial signage to be in French exclusively was struck down by the Supreme Court as an unjustifiable restriction of freedom of expression.[49] Nonetheless, other aspects of Quebec's language policies—most centrally, the rules governing private sector employment—have remained unscathed.

3. Will Kymlicka and the rise of the Canadian model in political theory

Although the Canadian model continued to evolve well into the 1980s, many of its key features had been in place since the mid-nineteenth century. What, then, explains the sharp rise in academic interest in that model in the mid-1990s? The answer may be found not in Canada but in Eastern and Central Europe. The collapse of the communist dictatorships in the latter region was initially hailed as the "end of history," signifying the near-universal adoption of liberal democracy. Instead, we witnessed the rise of profound ethnic conflict within these democratizing states. Although Kymlicka hardly discussed Eastern and Central Europe in *Multicultural Citizenship*, he made it abundantly clear in his introduction that he was writing against this backdrop:

> [W]e need to supplement traditional human rights principles with a theory of minority rights. The necessity for such a theory has become painfully clear in Eastern Europe and the former Soviet Union. Disputes over local autonomy, the drawing of boundaries, language rights, and naturalization policy have engulfed much of the region in violent conflict. There is little hope that stable peace will be restored, or that basic human rights will be respected, until these minority rights issues are resolved.[50]

As it turned out, many of these states fulfilled the definition of a multinational polity. The political sociology of emergent conflict within multinational polities—the competing projects of majority and minority nation building—fit

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[48] *Charter*, §§ 6(2)–(4) & 15.

[49] Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712.

[50] Kᴍʟɪᴄᴋᴀ, *supra* note 3, at 5.

the unfolding pattern of political conflict in these countries. And it followed, in the search for solutions, that multinational federalism was an obvious candidate.

But the advocates of multinational federalism were confronted with a jarring state of affairs. Three of the former communist dictatorships of Eastern and Central Europe—Yugoslavia, the Soviet Union, and Czechoslovakia—had already been multinational federations, prior to the transition to democracy, and all three began to disintegrate within a period of eighteen months, between June 1991 and December 1992, shortly after the transition. By contrast, unitary states—several with large national minorities (for example, Poland and Hungary)—in which nationalism served as the axis of internal political conflict, did not fall apart. So far from being the solution, a superficial reading of the evidence suggested that federalism, at the very least, did little or nothing to prevent state dissolution. If the ambition of multinational federalism is to manage competing nation-building projects successfully within a single state, then federalism may, in fact, have been a failure in meeting its most basic objective.

Yet the problem went deeper. One explanation for the rapid disintegration of the multinational federations of Eastern and Central Europe was that federalism simply could not do the work expected of it; the "federal structures inscribed in communist constitutions were hardly fully federal in practice."[51] But since only multinational federations broke up—and all of them did—the suspicion emerged that federalism had fueled secession, whereas unitary state structures had prevented it. Carol Leff's analysis of the three multinational federations suggested that, although their breakup had many different causes, federalism did indeed make made things worse for reasons apparently arising from the institutional and political logic of multinational federalism. Following democratization, the opening up of politics facilitated ethnonational mobilization, which was often based on the airing grievances long suppressed during the communist period. This trend was apparent in both unitary states and multinational federations. However, in multinational states, federal subunits were able to provide an institutional power base for national minorities serving as a springboard to statehood. Because they combined both "territoriality and institutional structure [that is, the institutions of governmental power, public services, and in many cases, a constitutional document]," the federal subunits were "states in embryo" that were "available for capture and utilization as electorally and constitutionally legitimated platforms for pressing demands and pursuing authoritative negotiation with the center and with other republics."[52] By contrast, in the unitary states "even a territorially concentrated electoral base

[51] Carol S. Leff, *Democratization and Disintegration in Multinational States: The Breakup of the Communist Federations,* 51 WORLD POL. 205, 210 (1999).

[52] *Id.* at 216.

may do little more than to facilitate minority mobilization and parliamentary representation."[53]

As a result, in Eastern and Central Europe, multinational federalism had the perverse effect of fueling precisely those political forces it was designed to suppress. The region's experience posed a fundamental challenge to multinational federalism as a viable constitutional strategy in that part of the world. The response was despair. As André Liebich wrote, "Federalism has suffered a severe setback in Eastern Europe and all efforts to protect minorities must take account of this fact."[54] The failure of the federations of Eastern and Central Europe also posed a more general challenge to the very idea of multinational federalism, because the accommodation of national minorities was not a problem unique to the region. As Steven Burg suggested, "[t]he disintegration of Yugoslavia has led to a re-evaluation of the idea that a multi-ethnic state is a viable entity."[55]

The best way to respond to the negative examples of Yugoslavia, Czechoslovakia, and the Soviet Union was to identify models where multinational federalism had actually worked—hence the birth of the Canadian model. Canada became one of the central case studies in an ever-broadening comparative discussion. The success or failure of Canada became a critical element in the debate regarding the mere possibility of crafting an accommodation between majority and minority nationalism within a single state.

Among political theorists, Will Kymlicka rose to this challenge with the publication of his landmark *Multicultural Citizenship* in 1995. It is through the evolution of his work that we can best grasp the place of the Canadian model in political theory. At the outset, it is instructive to compare how this multinational exemplar works for Kymlicka with the way in which related models have been dealt with by other scholars of comparative politics. Michael Keating, in his work on "plurinational" states, claims that there are sufficient similarities among enough cases to allow him to refer, plausibly, to this category. However, he carefully observes that "[e]very nationality claim will have a different balance of elements, which may change over time and according to circumstances" because "part of the nationality claim itself is usually based on the supposed uniqueness of the nation."[56] As a consequence, Keating continues, "there is no universal formula for addressing them."[57] By contrast, Kymlicka makes claims in many of his writings about multinational democracies

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[53] *Id.*

[54] André Liebich, *Nations, States, Minorities: Why is Eastern Europe Different?* 42 Dissent 313, 317 (1995).

[55] Steven L. Burg, *Why Yugoslavia Fell Apart*, 92 Current Hist. 357 (1993).

[56] Michael Keating, Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era 6 (Oxford Univ. Press 2001).

[57] *Id.* at 6.

in general, as compared with the specific multinational democracy of a particular state. Yet he clearly is abstracting from the Canadian experience to make his general claims, although being careful not to tie his work to the actual success of the Canadian case.

Kymlicka does not always acknowledge his debt to the Canadian model. In some instances, Canada is offered as an illustration.[58] For example, Canada is clearly the basis for Kymlicka's account of the institutional design of multinational states in *Multicultural Citizenship*. Thus, he famously states "[w]here national minorities are regionally concentrated, the boundaries of federal subunits can be drawn so that the national minority forms a majority in one of the subunits. Under these circumstances, federalism can provide extensive self-government for a national minority, guaranteeing its ability to make decisions in certain areas without being outvoted by the larger society."[59] The only example he gives is that of Quebec. He goes on to say that multinational federalism also entails special representation rights, which provide for guaranteed representation in central institutions. Again, the only example provided is that of Quebec's representation on the Canadian Supreme Court.[60] So, too, with Kymlicka's discussion of language rights.[61]

Furthermore, Kymlicka uses Canada as the basis for many of his claims regarding the political sociology of multinational federations, even though it is here that one should be most careful, given the variations in the precise character of nation-building projects across jurisdictions. Although the argument, namely, that multinational federalism is the most appropriate response to competing majority and minority nation-building projects took center stage in his subsequent work, Kymlicka briefly alludes to this notion in *Multicultural Citizenship*. The one example he provides is that of the failed attempt to assimilate francophones in the United Province of Canada, and the response it sparked. He guesses that "the same story was repeated a hundred times throughout the British Empire."[62] In later work, Kymlicka turned to the character of politics within multinational federations, and again used Canada as his main or only instance. For example, he first analyzes the problems of mixed federations, which combine both nationality-based and territory-based subunits

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[58] The same tendencies can be found in the work of other Canadian political theorists. *See, e.g.,* Wayne Norman & Jim Tully, *Secession and (Constitutional) Democracy, in* Democracy and National Pluralism 84 (Ferran Requejo ed., Routledge 2001); James Tully, *Introduction, in* Multinational Democracies 1 (James Tully & Alain-G. Gagnon eds., Cambridge Univ. Press 2001); Wayne Norman, *Justice and Stability in Multination States, in* Multinational Democracies 90 (James Tully & Alain-G. Gagnon eds., Cambridge Univ. Press 2001).

[59] Kymlicka, *supra* note 3, at 27–28.

[60] *Id.* at 143.

[61] *Id.* at 46.

[62] *Id.* at 55.

where the former seek asymmetrical arrangements while the latter resist decentralization and insist that federalism be on a basis of equality. He then offers Canada as the main example, with only a passing reference to Spain.[63] In other cases, Canada figures as the unnamed source of hypotheticals. Thus, when he describes the difficulty of preventing democratic mobilization for secession within multinational federations—up to and including the formation of separatist parties and the holding of referenda on secession—it is clear that Kymlicka is referring to Canada, even though he does not say so.[64]

In *Multicultural Citizenship*, Kymlicka neither acknowledges that his model of multinational federalism is based on Canada nor does he claim that this model travels. However, in *Finding Our Way* (published in 1998) he refers, openly, to "the Canadian model" for the first time and makes it clear that this was the basis of his earlier account of multinational federalism.[65] In an essay first published in 1996, Kymlicka had previously suggested that successful examples of multinational federalism could serve as models in responding to the difficulties faced by multination states. While he acknowledges the failure of the multinational federations of Eastern and Central Europe, he argues that "[o]n any reasonable criteria, democratic federations (as opposed to Communist federations) have been surprisingly successful in accommodating minority nationalisms" because they "have not only managed the conflicts arising from their competing national identities in a peaceful and democratic way, but have also secured a high degree of economic prosperity and individual freedom for their citizens."[66] Kymlicka observes that the existing multinational federations have spread through a process of emulation—that is, that Canada and Switzerland served as models for Yugoslavia, India, Malaysia, and Nigeria.[67] The barely unstated implication is that this process of emulation should continue.

Over the next decade, Kymlicka's work takes up the theme of constitutional transplants. In a series of edited volumes, he explores whether his model, which is both a theoretical account and a defense of the actual practices of Western democracies, could be useful in understanding and evaluating ethnic conflict in other parts of the world and, beyond that, for devising a response to it.[68] I want to

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[63] Will Kymlicka, *Minority Nationalism and Multination Federalism, in* Politics in the Vernacular 91, 102–110 (Oxford Univ. Press 2001).

[64] Will Kymlicka, *Reply and Conclusion, in* Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe 345, 389–393 (Will Kymlicka & Magda Opalski eds., Oxford Univ. Press 2001).

[65] Kymlicka, *supra* note 2, at 3.

[66] Kymlicka, *supra* note 63, at 92.

[67] *Id.* at 96.

[68] Kymlicka, *supra* note 64; Ethnicity and Democracy in Africa (Bruce Berman, Dickson Eyoh & Will Kymlicka eds., Ohio Univ. Press 2004); Multiculturalism in Asia (Will Kymlicka & Baogang He eds., Oxford Univ. Press 2005).

highlight an important shift in Kymlicka's views. Initially, he is highly optimistic and dismissive of any skepticism regarding the migration of the model of multinational federalism. In his first book on Eastern and Central Europe, in 2001, he confronts the concern regarding the potential security threat posed by national minorities acting in alliance with kin states, and he argues that this does not justify removing multinational federalism from the domestic political agenda. Kymlicka argues that it is doubly unfair to view the issue of minority rights through the lens of security because such an account is not grounded in justice and creates inconsistencies in the treatment of national minorities in the West, on the one hand, and in Eastern and Central Europe, on the other. His goal is nothing less than the adoption of "a universal code of minority rights that would be monitored and applied in an even-handed way to both Western and ECE countries."[69]

But by the time Kymlicka turns his attention, in 2005, to Asia, his tone and analysis have changed. He identifies a variety of factors that explain why, in the West, majorities were willing to accept minority nationalism. These included the "desecuritization" of minority nationalism arising from collective security arrangements between states containing national minorities and neighboring "kin" states in which members of the majority nation constitute the majority, and the liberal democratic consensus among both minorities and majorities, which reduced the fear that territorial autonomy would lead to the oppression of internal minorities. He then offers a nuanced account of the sources of resistance in Asia to territorial autonomy for minorities, such as the colonial divide-and-rule strategies, which empowered ethnic groups; concerns over geopolitical security; fear of petty tyrannies; and the belief that ethnic mobilization would disappear as a result of modernization and development. Kymlicka's conclusion is not that these sources of resistance are irrational or unfair but, rather, that they make clear that Western models "may not suit the specific historical, cultural, demographic, and geopolitical circumstances of the region."[70] In a forthcoming book, Kymlicka has come around to the notion that resistance to the importation of the Canadian model may be reasonable.[71] He openly acknowledges that "liberal multiculturalism has costs, and imposes risks, and these costs vary enormously both within and across societies," and that, in the West, "a fortunate set of circumstances have [sic] lowered the risks of liberal multiculturalism." Thus, a differing set of circumstances could pose high risks.[72] Clearly, Kymlicka's enthusiasm for the transplantation of the Canadian model has dissipated.

[69] Kymlicka, *supra* note 64, at 388.

[70] Boagang He & Will Kymlicka, *Introduction, in* Multiculturalism in Asia, *supra* note 68, at 1.

[71] Will Kymlicka, Multicultural Odysseys: Navigating the New International Politics of Diversity (Oxford Univ. Press 2007) (manuscript on file with the author).

[72] *Id.* at 16–17.

The significant transformation of Kymlicka's view of the viability of constitutional transplants is an interesting story in its own right, although I cannot develop it here. I suspect that what drove this change was an underlying shift in the case Kymlicka made for the accommodating minority nationalism—from an account based on a liberal theory of justice to a stability-based account in which liberal principles operate as a constraint on, rather than as the source of, the particular institutional arrangements he advocates. What bears emphasis is a constant in his discourse: that the Western approach to dealing with minority nationalism—that is, the Canadian model—is essentially sound. Kymlicka's initial claim was that the Canadian model was so exceptional it should be adopted by other multinational states, and it would be unjust to not do so. His subsequent skepticism regarding transplants has nothing to do with any perceived deficiencies in the Canadian model. His position is this: If the Canadian model does not travel, it is because the preconditions that allowed it to succeed at home are absent elsewhere. The difficulties in transplanting Canadian constitutional arrangements to other contexts do not detract from their viability at home. The Canadian model is still a success story, contra Barry.

4. The politics of the Canadian model: Canada in constitutional crisis

In order to recontextualize and complicate the picture, as it stands so far, I want to offer an alternative history of the rise of the Canadian model. While it is true that the interest of political theorists in Canada's multinational federalism coincided with the disintegration of the multinational federations of Eastern and Central Europe, this interest also manifested itself during Canada's own constitutional crisis. This alternate history could begin, therefore, in September 1994, with the resurgence of the Parti Québécois (PQ), which won power on a platform that had as its centerpiece the promise to hold a referendum on sovereignty within its first mandate. The PQ proposed a draft bill on sovereignty in the Quebec National Assembly in December 1994 and announced that it would hold a referendum the following year. A referendum took place in October 1995. The results were extremely close, with the proposal failing by 1 percent. Although the referendum question sought a mandate for Quebec to negotiate a new economic and political partnership with Canada, legislation before the Quebec National Assembly (Bill 1) set a one-year time limit on those negotiations, after which Quebec would have issued a unilateral declaration of independence in outright defiance of the Canadian Constitution. Quebec took this prospect seriously and had laid the groundwork to secure international recognition.[73]

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[73] *See* Robert Young, The Struggle for Quebec: From Referendum to Referendum? (McGill-Queen's Univ. Press 1999).

The near disintegration of the Canadian federation in the mid-1990s was not completely unexpected. From 1990 onward, the secession of Quebec became a topic of widespread political and academic debate. English book titles from this period bear testimony to the tenor and content of these discussions and, indeed, to the mood in English Canada. A series of books made the case that Canada faced a constitutional crisis that threatened its very existence. Their titles hardly conveyed a sense of radiant optimism about the success of the Canadian model in accommodating minority nationalism.[74]

A subliterature appeared that assumed Canada was doomed, and that the country should turn to the difficult question of how secession could occur. Issues such as the debt, borders, citizenship, the rights of aboriginal peoples, the nature of the economic and political relationship between Canada and an independent Quebec, as well as the process of such negotiations (who would participate, how would the public be involved) were debated at countless conferences and workshops. Again, the books that turned to the task of grappling with these hard questions have telling titles, among the most poignant *Can Canada Survive? Under What Terms and Conditions?*[75] In an important respect, English Canada was catching up with Quebec, which had before long turned its mind to the modalities of

[74] *See, e.g.,* DAVID J. BERCUSON & BARRY COOPER, DECONFEDERATION: CANADA WITHOUT QUEBEC (Key Porter 1991); THE COLLAPSE OF CANADA? (R. Kent Weaver ed., Brookings Inst. 1992); CONSTITUTIONAL PREDICAMENT: CANADA AFTER THE REFERENDUM OF 1992 (Curtis Cook ed., McGill-Queen's Univ. Press 1994); ROBERT BOTHWELL, CANADA AND QUEBEC: ONE COUNTRY AND TWO HISTORIES (Univ. Brit. Colum. Press 1995); DAVID M. THOMAS, WHISTLING PAST THE GRAVEYARD: CONSTITUTIONAL ABEYANCES, QUEBEC AND THE FUTURE OF CANADA (Oxford Univ. Press 1997); PAUL ROMNEY, GETTING IT WRONG: HOW CANADIANS FORGOT THEIR PAST AND IMPERILLED CONFEDERATION (Univ. Toronto Press 1999); REED SCOWEN, TIME TO SAY GOODBYE: THE CASE FOR GETTING QUEBEC OUT OF CANADA (McLelland & Stewart 1999).

[75] CAN CANADA SURVIVE? UNDER WHAT TERMS AND CONDITIONS? 29 (David M. Hayne ed., Univ. Toronto Press 1997). *See also* YOUNG, *supra* note 73 ; THE REFERENDUM PAPERS: ESSAYS ON SECESSION AND NATIONAL UNITY (David R. Cameron ed., Univ. Toronto Press 1999); TWO NATIONS, ONE MONEY? (David E.W. Laidler & William B.P. Robson eds., C.D. Howe Inst. 1991); CLOSING THE BOOKS: DIVIDING FEDERAL ASSETS AND DEBT IF CANADA BREAKS UP (Paul M. Boothe ed., C.D. Howe Inst. 1991); GORDON RITCHIE ET AL., BROKEN LINKS: TRADE RELATIONS AFTER A QUEBEC SECESSION (C.D. Howe Inst. 1991); NEGOTIATING WITH A SOVEREIGN QUEBEC (Daniel Drache & Roberto Perrin eds., James Lorimer 1992); STANLEY H. HARTT ET AL, TANGLED WEB: LEGAL ASPECTS OF DECONFEDERATION (John McCallum ed., C.D. Howe Inst. 1992); ALAN FREEMAN & PATRICK GRADY, DIVIDING THE HOUSE: PLANNING FOR A CANADA WITHOUT QUEBEC (Harper Collins 1995); TREVOR MCALPINE, THE PARTITION PRINCIPLE: REMAPPING QUEBEC AFTER SEPARATION (ECW Press 1996); RICHARD JANDA, DUAL INDEPENDENCE: THE BIRTH OF A NEW CANADA AND THE RE-BIRTH OF LOWER CANADA (Varia Press 1998); ECONOMIC DIMENSIONS OF CONSTITUTIONAL CHANGE (Robin W. Boadway, Thomas J. Courchene & Douglas D. Purvis eds., John Deutsch Inst. Stud. Econ. Pol. 1991); MARCEL CÔTÉ, IF QUEBEC GOES … THE REAL COSTS OF SEPARATION (Stoddart 1995); GORDON GIBSON, PLAN B: THE FUTURE OF THE REST OF CANADA (Fraser Inst. 1994); QUÉBEC-CANADA: WHAT IS THE PATH AHEAD? (John E. Trent, Robert Young & Guy Lachapelle eds., Univ. Ottawa Press 1996); This genre of scholarship is not new. For an earlier example, published in the wake of the 1976 election of the Parti Québecois, see MUST CANADA FAIL? (Richard Simeon ed., McGill-Queen's Univ. Press 1977).

secession. In the wake of the failure of the Meech Lake Accord,[76] the Quebec government created the Commission on the Political and Constitutional Future of Quebec.[77] One of the commission's principal contributions to public debate within the province consisted of a large number of original research studies that examined both the substance and process of Quebec secession. Moreover, these studies received widespread media coverage and were debated widely in the national press. In fact, a large reason for the surge of interest in English Canada was precisely because these issues had long since been discussed in Quebec.

Two important questions arise. The first: Why was Canada in constitutional crisis for much of the 1990s and, more precisely, what was the exact character of the Canadian constitutional crisis? I turn to this issue below. The second: What was the connection between this debate—in which the future prospects for Canada looked dim indeed—and the rise of the Canadian model? The titles of the books on this subject bear witness to the fact that the discussion concerning Canada's future and the mechanics of taking the country apart was far from marginal.[78] On the contrary, these issues were at the very center of academic and political discourse. In fact, the country seemed able to talk about little else, and no Canadian could ever forget the near dissolution of the federation in 1995. Thus, it is inconceivable that the proponents of the Canadian model could have been unaware of the immediate drama. On the contrary, many proponents of the Canadian model not only recognized the crisis gripping the Canadian constitutional order but viewed the international promotion of the Canadian model as an important element in resolving problems at home.

This link was first made by Pierre Trudeau, in an essay published in 1962, long before the near constitutional collapse of the 1990s.[79] Responding to an argument made by supporters of Quebec independence—that every nation must necessarily have a state—Trudeau asserts that Canadian federalism should be preserved as something precious. For Trudeau, one of the reasons for retaining multinational federalism is not only that it is right for Canada but also that it is right for the world. Canadians should strive to ensure the survival of Canada so it can serve as an international role model, a city on the hill, for countries facing the same linguistic and

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[76] The Meech Lake Accord was a package of failed constitutional amendments which included a proposed addition to the Constitution that recognizes Quebec as a "distinct society": 1987 CONSTITUTIONAL ACCORD (Can.), sched. Constitution Amendment, 1987 (Can.).

[77] Act to Establish the Commission on the Political and Constitutional Future of Quebec, S.Q. 1990, ch. 34, & subsequent amendments, S.Q. 1990, ch. 45 (Can.).

[78] *See supra* notes 74 & 75 .

[79] PIERRE E .TRUDEAU, *The New Treason of the Intellectuals, in* FEDERALISM AND THE FRENCH CANADIANS 151 (Macmillan 1968).

ethnonational divisions that led to creation of the Canadian model in the first place. He writes:

> It would seem, in fact, a matter of considerable urgency for world peace and the success of the new states that the form of good government known as democratic federalism should be perfected and promoted, in the hope of solving to some extent the world-wide problems of ethnic pluralism…. Canada should be called upon to serve as mentor, provided she has sense enough to conceive her own future on a grand scale…. Canada could become the envied seat of a form of federalism that belongs to tomorrow's world…. Canadian federalism is an experiment of major proportions; it could become a brilliant prototype for the moulding of tomorrow's civilization.[80]

Clearly, Trudeau is doing much more than simply emphasizing a positive if incidental side effect of the success of the Canadian model. Rather, he is making the stronger claim that Canada's success matters internationally because other countries face problems similar to Canada's, and that Canada's potential influence as an international role model should serve not only as a source of pride to Canadians but also as a reason for them to make its constitutional arrangements work.

These themes were picked up and further developed, nearly thirty years later, by Charles Taylor.[81] In an essay published in 1991, he argues that Canada's constitutional difficulties may be traced to a clash between two different visions of citizenship. In the one, its nature captured and fueled by the Charter, citizens consider themselves the bearers of constitutional rights and as equal members in the Canadian political community, unmediated by membership in any intermediate provincial political communities. In the other, Quebecers view their membership in the Canadian political community as stemming from their membership in a constituent nation of Canada. For Taylor, the solution is to reject a model of uniform citizenship, opting, instead, for "deep diversity" as "the only formula on which a united federal Canada can be rebuilt."[82] However, the case for deep diversity goes well beyond Canada because "in many parts of the world today the degree and nature of the differences resemble those of Canada" and hence "the world needs other models [such as deep diversity] to be legitimated in order to allow for more humane and less constraining modes of political cohabitation."[83] Consequently, Canada "would do our own and some other peoples a favour by exploring the space of deep diversity."[84]

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[80] *Id.* at 154, 178, 179.

[81] CHARLES TAYLOR, *Shared and Divergent Values, in* RECONCILING THE SOLITUDES 155 (McGill-Queen's Univ. Press 1993).

[82] *Id.* at 183.

[83] *Id.* (emphasis added).

[84] *Id.*

After the failure of the Charlottetown Accord,[85] and the near miss in the 1995 referendum, Taylor continued to press the same themes, albeit with a greater sense of urgency and an acute awareness of the peril that Canada faced.[86] Thus, "the principal threat" to Canada's existence "comes from a problem which is in a sense everyone's in this day and age"—namely, that there are many more nations than states; that it would be impossible for each nation to have its own state; and that there needs to be some way for national groups to exist within the same state.[87] Taylor continues: "Canada's inability to solve this problem, after what seemed like a promising start in favourable conditions, naturally causes consternation, and depressed spirits, abroad."[88] If the Canadian model cannot work in Canada, it cannot work in circumstances that are far more difficult. According to Taylor, Canada needs to try to make it work for the sake of the world. This is political theory doubling as constitutional therapy.

Arguing for the success—the necessary success—of the Canadian model was not just an academic endeavor. It was a political intervention in two different but interrelated arenas. It was an intervention in international politics—to offer a practical, viable model dealing with the issue of minority nationalism, which had become a source of political instability in Eastern and Central Europe and beyond. It was also an intervention in domestic constitutional politics—to argue that Canada had hit upon one of the few workable solutions to the accommodation of minority nationalism within a liberal democratic constitutional order. Moreover, there were multiple links between the two agendas. There was the argument, made by Trudeau and Taylor, that Canada should make its constitutional arrangements work to help other countries. Foreign observers have often made this point. American political scientist Charles Doran, writing on why Canadian unity should matter to the United States, asserts that the "failure of the Canadian federal experiment … does not bode well for the ability of other democracies to establish political harmony among their own regional communities," while, conversely, success in Canada "will help to preserve democratic pluralism worldwide."[89] Kofi Annan and Mikhail Gorbachev's public interventions in the Canadian national unity debate demonstrated how important the success of the Canadian

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[85] This is another set of failed constitutional amendments: Consensus Report of the Constitution (Can.), pt. I, § A(1) Canada Clause (1992) (also known as the Charlottetown Accord).

[86] Charles Taylor, *Deep Diversity and the Future of Canada, in* Can Canada Survive, *supra* note 75.

[87] *Id.* at 30.

[88] *Id.*

[89] Charles F. Doran, Why Canadian Unity Matters and Why Americans Care: Democratic Pluralism at Risk xiv, xv (Univ. Toronto Press 2001).

model was to the international community struggling with the destructive potential of nationalism.[90]

There are other links between the domestic and international political agendas. The promotion of the Canadian model abroad should be understood, at least in part, as an attempt to reinforce support for the Canadian model at home by instilling national pride. Thus, Canada's politicians have sought to place the Canadian model and example at the heart of its foreign policy by offering it as a pillar of development assistance to deeply divided societies. The previous Liberal government's *International Policy Statement* stated that development assistance should be focused on a few key areas, including the promotion of good governance, with "Canada's commitment … to a federal system that accommodates diversity" as part of that agenda.[91] Liberal MP Michael Ignatieff, in a speech to the Canadian Department of Foreign Affairs and International Trade, in 2004, stated that Canada has "more institutional memory about the legislative and legal requirements for the accommodation of linguistic and religious diversity than any other mature democracy in the world" and has a "comparative advantage in the politics of managing divided societies"; it should translate its institutional experience into advice for other countries struggling with similar issues.[92] Part of the motivation, no doubt, is to increase Canada's influence abroad. Promoting the Canadian model is an exercise in what Joseph Nye has termed "soft power," whereby a country "may obtain the outcomes it wants in world politics because other countries want to follow it, admiring its values, emulating its example, aspiring to its level of prosperity and openness."[93] Jennifer Welsh has written that simply being a bilingual, federal state should be regarded as a core element of Canadian foreign policy.[94] However, there is a domestic agenda at work here, as well. As the prestige of the Canadian model is enhanced abroad, so, too, is its prestige at home. This convergence of the domestic and the international is best summed up by the marketing phrase

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[90] For Kofi Annan's intervention, see Louise Leduc, *Entrevue avec le secrétaire général de l'ONU* [*Interview with the Secretary General of the UN*], Le Devoir (Montreal), Oct. 5, 1998, at A4; for Mikhail Gorbachev's intervention, see Miro Cernetig, *Stay United, Bush tells Canada, Gorbachev Cites Fractured USSR,* Globe & Mail, Oct. 10, 1995, at A1.

[91] A Role of Pride and Influence in the World: Development 12 (Can. Int'l Dev. Agency 2005). For an earlier statement of this position, see Paul Martin, former Prime Minister of Canada, Address on the occasion of his visit to Washington, D.C. (Apr. 29, 2004), *available at* http://www.uofaweb. ualberta.ca/govrel//pdfs/MartinApril29Washington.pdf.

[92] Michael Ignatieff, Peace, Order and Good Government: A Foreign Policy Agenda for Canada 8, 10 (Foreign Aff. & Int'l Trade Can. 2006).

[93] Joseph S. Nye Jr., The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone 8 (Oxford Univ. Press 2002).

[94] Jennifer Welsh, At Home in the World: Canada's Global Vision for the 21st Century 189 (Harper Collins 2004).

used by a leading Canadian bookseller to promote Canadian literature: "The World Needs More Canada." Thus does the international reputation of Canadian authors provide an additional reason for Canadians to value that work.

There is a final link between the international and the domestic. The violent collapse of the multinational federations of Eastern and Central Europe appeared to challenge the viability of multinational federalism not only in that region but in Canada as well. Canadians stared into the constitutional abyss in the 1990s and asked themselves whether the same fate awaited Canada. Philip Resnick, writing in anticipation of the referendum on sovereignty, saw clearly the Canadian crisis in this broader comparative context.[95] For example, in discussing the prospect of violent resistance by aboriginal peoples in northern Quebec to secession, he observed "[w]e do not have to summon up Ossetia, Nagorno-Karabakh or Krajina, but we would be fools not to draw some lessons from what has occurred elsewhere."[96] Moreover, in making the case for transforming Canada from a federation into a confederation, Resnick argued that this was preferable to the alternative of breaking up, as illustrated by the failed multinational federations of Eastern and Central Europe:

> [A] confederal union … would still be preferable to the out and out break-up of Canada. We have the examples of the Soviet Union and Yugoslavia to ponder—multinational federations that have splintered into pieces with major ethnic conflicts and unresolved border disputes carrying over into the post-break-up period. Would the people of ex-Yugoslavia not have been better off for having continued to live in a loose confederation with largely autonomous republics and a shared citizenship rather than in successor republics bought at the price of bitter wars and ethnic cleansing?[97]

So international models—or anti-models—of multinational federalism became part of domestic politics. However, rather than merging the international and the domestic, the response was to deflect these comparisons and keep them out. Here, we return to Will Kymlicka in *Finding Our Way*, which was directed at a domestic audience that, in his view, too quickly compared Canada with developments abroad. Commentators had relied on "apocalyptic scenarios of segregation and violence" that "point ominously to Bosnia or South Africa, as if we were on some slippery slope to civil war or apartheid," he wrote, when in fact those dangers were not genuinely present.[98] *Finding Our Way* was a

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[95] Philip Resnick, *Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives, in* Seeking a New Canadian Partnership: Asymmetrical and Confederal Options 71 (Leslie Seidle ed., Inst. for Res. on Pub. Pol. 1994).

[96] *Id.* at 85.

[97] *Id.*

[98] Kymlicka, *supra* note 2, at 4.

"reality check" to show that, in fact, the Canadian model was working well.[99] But since he also defended the applicability of the Canadian model abroad, Kymlicka was trying to shut a door that he and others previously had opened.

5. Lessons from the Canadian model in crisis: A procedural and a substantive crisis

A great deal of ink has been spilled over the constitutional difficulties encountered by the Canadian model in the 1990s. Will Kymlicka, Charles Taylor, Alan Cairns, Kenneth McRoberts, and others have traced the origins of the Canadian constitutional crisis to competing constitutional logics, flowing variously from the intertwining and mutual reinforcement of constitutional text and constitutional politics.[100] Put simply, the different parts of the Canadian Constitution are at war with each other; these are, specifically, the accommodation of Quebec, the Charter, and provincial equality. The reason Canada is a federation is because of the existence of a French-speaking population increasingly centered in Quebec. Quebecers refract their nationalist claims through the lens of federalism, assessing the institutions of federalism in terms of their impact on the ability of Quebec to maintain and promote its linguistic distinctiveness. On the other hand, the Charter embodies a notion of Canada as a nation of equal citizens endowed with identical constitutional rights, regardless of which province they inhabit. Finally, Quebec notwithstanding, Canada is a mixed federation, combining a nationality-based subunit with territory-based subunits whose members share the same language, and who do not see themselves as members of different nations. Federalism treats every province on a basis of juridical equality, granting each identical powers.

These different constitutional logics have come into conflict over two issues: asymmetrical powers for Quebec and the constitutional recognition of Quebec as a distinct society. The former position is advanced by Quebec as necessary in order to give it the jurisdictional tools to preserve and promote its identity in economic and social circumstances that have changed dramatically since 1867. It is resisted in English Canada, both by those who want to centralize greater power in Ottawa, as part of a nation-building exercise, and by those who believe that special arrangements for any one province are a form of discrimination. Asymmetry, if taken far enough, also creates severe problems of representation at the center, because it poses serious challenges to the conventions of responsible government. As for the second issue, constitutional recognition of Quebec as

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[99] *Id.* at 5.

[100] *See, e.g.,* KYMLICKA, *supra* note 2; KYMLICKA, *supra* note 3; KYMLICKA, *supra* note 14; Kymlicka, *supra* note 63; KYMLICKA, *supra* note 71; TAYLOR, *supra* note 81; Taylor, *supra* note 86; ALAN CAIRNS, RECONFIGURATIONS: CANADIAN CITIZENSHIP AND CONSTITUTIONAL CHANGE (Douglas E. Williams ed., McLelland and Stewart 1995); McROBERTS, *supra* note 23.

a distinct society, if designed to augment Quebec's powers alone, raises similar objections. To the extent that such recognition would give greater scope to Quebec to limit Charter rights legitimately—in order to preserve and promote its linguistic identity—so would it come into conflict with the concept of the Charter as the essential foundation of equal citizenship, providing for equal enjoyment of constitutional rights throughout Canada.

There are important comparative lessons here for the debate between integration and accommodation. If the Charter and provincial equality reflect integrationist impulses, and the creation of Quebec represents an accommodationist perspective, combining both elements within the same constitutional system fuels further demands and additional rounds of constitutional politics, all in the name of perfecting the constitutional text. As a consequence, the conventional wisdom is that the Canadian constitutional crisis is *substantive*—that is to say, it is about what the terms of the Constitution should be. However, I want to challenge the conventional wisdom by offering a *procedural* account of the constitutional crisis, in which the near-collapse of the Canadian constitutional system can be traced to the lack of a shared understanding regarding the constitutional procedures within which substantive constitutional politics could occur. Indeed, without such a procedural account, we cannot fully make sense of the Canadian constitutional crisis.

To understand the need for a procedural account, consider the following argument. In politics, we frequently disagree about the substance of public policies. A basic ambition of constitutionalism is to channel disagreements into institutions that reach decisions members of the political community will accept as authoritative. But for institutional decisions to yield political settlements, the decision-making procedures of those institutions must be viewed as constituting and regulating political life without forming part of it—as being indifferent among competing political positions. Were the mechanisms by which political disagreement is managed themselves subject to political contestation in the course of their operation, it would be difficult for institutional settlement to translate into political settlement. The rules for constitutional amendment and their relationship to substantive constitutional politics can be conceptualized in like manner. For example, constitutional drafters probably will agree that constitutions should allow for the possibility of amendment. Thus, in addition to creating the procedural framework for normal politics, constitutions also create the procedural framework for constitutional politics. If the rules of constitutional amendment are to operate effectively, they, too, must be accepted as constituting and regulating constitutional politics—and not forming part of it. They must be seen as operating indifferently among the competing constitutional positions in play.

The problem with this highly simplified picture is that political procedures—both for normal and constitutional politics—are far from substantively neutral themselves. Rather, as Jeremy Waldron has argued, political procedures reflect competing conceptions of the very sorts of values that are the customary fare

of both normal and constitutional politics.[101] For example, by determining which individuals and communities can participate in political decision making, and what role those individuals and communities may play, decisional rules reflect substantive judgments about the locus of political sovereignty and, by extension, the very identity of a political community. Thus, the boundary between substantive political disputes and the procedural frameworks within which those disputes are worked out is highly artificial. Liberal democratic constitutionalism depends on the *suspension* of political judgment with regard to institutions and institutional decision-making procedures precisely in order to gain the prospect of political settlements.

The suspension of political judgment with respect to political procedures will become exceedingly difficult to sustain when the substantive dispute challenges the very conception of political community that underlies the decision-making framework within which that debate occurs. With respect to the rules of normal politics, the consequence will be to shift the terrain of disagreement up one level, from normal politics to constitutional politics, which, in turn, is regulated by its own set of procedures, the rules governing constitutional amendment.

The ability of the rules governing constitutional amendment to create and regulate constitutional politics depends on the nature of the issue at hand. We need to distinguish between two varieties of constitutional politics. First, there are rounds of ordinary constitutional politics, which are fairly common in states that are not multinational polities. In these states, the existence of a single national political community is a widely shared assumption that is presupposed by political actors. Accordingly, for liberal democrats the basic question of constitutional design would be how this political community should grapple with the task of democratic self-government, striking the right balance between democratic rule and individual rights. Constitutional politics would focus on the creation and allocation of power to governmental institutions in order to enable democratic decision making. Such politics would also address whether and to what extent the constitution should disable those institutions through the design of decisional rules (such as veto powers, or supermajority requirements), as well as through outright substantive limits on government conduct (for example, constitutional bills of rights).

But for national minorities in multinational polities, the basic questions of constitutional politics are rather different. The issue is not simply how a national political community should structure its decision-making institutions and constrain itself through constitutional mechanisms. Additionally, there is the existential question of whether a multinational polity should exist at all as a unified, national political community comprising the various nations (majority and minority) and, if so, on what terms. Put another way, this means that, in multinational polities,

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[101] Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. Pol. Phil. 335 (1998).

constitutional politics takes place on two levels. On the one hand, there is the sort of constitutional politics that presupposes the existence of a national political community. But in parallel—and simultaneously—multinational polities also engage in constitutive constitutional politics, which concern existential questions that go to the very identity, even existence, of the political community as a multinational political entity. In practice, it is hard to disentangle these two sorts of constitutional politics, because they often touch on similar sorts of issues—the structure of national institutions, federalism, and bills of rights—and often occur at the same time. For example, in Canada, proposals to entrench the Supreme Court of Canada constitutionally—to recognize its unique responsibility as an independent organ of government and final arbiter charged with enforcing the Canadian Charter— were accompanied by demands by Quebec that, given the Court's role as the final judicial arbiter in federal-provincial disputes three of its seats should be constitutionally guaranteed for judges from that province,.

The problem is that it be can be very difficult, if not impossible, to suspend substantive political judgment regarding the procedures for constitutional amendment at moments of constitutive constitutional politics because these procedures might reflect one of the competing constitutional positions at play. And there is no higher level to which the dispute can be shifted. Even if one designed a constitution that created a special set of rules to regulate amendments to the rules for constitutional amendment, the same problem might arise with respect to those rules. It is impossible to continue this strategy ad infinitum. In the absence of agreed-upon procedures for constitutional decision making, institutional settlement cannot yield political settlement. The result may be that the constitutional system itself comes tumbling down.

This, in a nutshell, is what happened in Canada in the mid-1990s. For alongside disagreement on the substantive questions of how Quebec's claims should be accommodated within the Canadian constitutional order and whether Quebec should remain a part of Canada, there was a procedural disagreement over whether the rules governing constitutional amendment should govern the process of secession.[102]

As a strictly legal matter, the Canadian Constitution creates the province of Quebec and defines its territory, erecting its governing institutions and endowing

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[102] *See generally* Sujit Choudhry, *Referendum? What Referendum?*, 15 Lit. Rev. Canada 7 (2007); Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 Int'l J. Const. L. (I•CON) (forthcoming 2008); Sujit Choudhry & Jean-François Gaudreault-DesBiens, *Frank Iacobucci as Constitution Maker: From the Quebec Veto Reference, to the Meech Lake Accord and the Quebec Secession Reference*, 57 Univ. Toronto L.J. 165 (2007); Sujit Choudhry, *Popular Revolution or Popular Constitutionalism? Reflections on the Constitutional Politics of Quebec Secession, in* Legislatures and Constitutionalism: The Role of Legislatures in the Constitutional State 480 (Tsvi Kahana & Richard Bauman eds., Cambridge Univ. Press 2006); Sujit Choudhry, *Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities*, 37 Conn. L. Rev. 933 (2005).

them with limited legal authority over the province. Since unilateral secession clearly does not lie within provincial jurisdiction, provincial legislation purporting to declare independence would be unconstitutional. But the Constitution neither explicitly permits nor prohibits the secession of a province. So a change in Quebec's status from province to independent nation could, in principle, be achieved through constitutional amendment—for example, by terminating the authority of federal institutions over Quebec. Secession through constitutional amendment would necessitate the use of amending procedures that require the consent of the federal government and most of the provinces; unilateral secession would be unconstitutional.

Quebec sovereignists responded by challenging the assumption that Quebec's achievement of sovereignty could be governed by the rules governing constitutional amendment. In one sense, this disagreement has deep roots in Canadian constitutional history and, hence, in reasons specific to Canada. An important theme in Canadian constitutional history has been the search for an amending procedure in which some combination of Canadian political actors would hold the power to amend the Canadian Constitution. This search was driven by the absence of a procedure for constitutional amendment in the Constitution Act, 1867, since the power of amendment, by default, rested with the imperial Parliament. When Canada attained independence, the lack of a domestic amending formula became a constitutional anomaly. Canadian constitutional politics were driven by the search for a domestic amending formula for over fifty years.[103] This proved to be enormously difficult. In order to shift ultimate sovereignty back to Canada, Canadian political actors had to agree on where the locus of sovereignty should lie or, more accurately, on who the constituent actors in a domestic amending procedure should be—the federal government, provincial governments, the national population, or various provincial populations. Answering this question, in turn, required the political actors grapple with the basic question of what constituted the terms of political association in Canada—that is, the very nature of the Canadian political community. On that basic question, there was a lack of consensus. The constitutional politics of constitutional amendment, accordingly, took place on two levels. On the one hand, it was intimately concerned with practical questions of constitutional design. On the other, it was a symbolic politics, a struggle over the very meaning of the country.

The inextricable link between the politics of constitutional process and substantive constitutional politics provides the means by which to understand the failure of the procedures for constitutional amendment to regulate the constitutional politics of secession in the mid-1990s. Quebec was a central player in the constitutional politics of constitutional amendment and pushed consistently for a constitutional veto; its position was informed by a vision of the Canadian political community as

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[103] Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? (2d ed., Univ. Toronto Press 1993) (1992).

a multinational federation. But in 1982, the amending procedures now in force were adopted as part of a package of constitutional amendments agreed to by the federal government and the nine provinces over the objections of Quebec. The debate quickly turned to process. Quebec unsuccessfully argued—both in politics and in the courts[104]—that as matter of constitutional convention, it had a right of veto over constitutional amendments affecting its powers, and that this veto applied to the adoption of new amending rules. Quebec's official response to its defeat in this regard was bitter; it viewed the amendments as illegitimate, setting the stage for arguments in the mid-1990s that Quebec was not bound by these rules.

History aside, it was entirely predictable that Quebec would walk away from the amending rules, for the simple reason that those rules beg the question. The rules presuppose that Quebec is a constituent component of the Canadian federation, functioning as a subnational political community with extensive but limited rights of self-government within Canada. Quebec is a constitutionally recognized actor in the process of constitutional amendment with the power to consent, or not, to constitutional amendments; however, its consent is not absolutely required in all circumstances. But it is *precisely* this constitutional vision that the Quebec sovereignty movement challenges, in raising the substantive question of whether Quebec should remain a part of Canada or become an independent state. Not surprisingly the sovereignists rejected the amending rules as a neutral framework within which the question of Quebec's independence could be resolved. To put the point another way, since the sovereignists wished to make a radical break from the Canadian constitutional order, it is hard to imagine they would have subscribed to a process governed by it.

In short, both constitutional history and constitutional theory explain why the procedures for constitutional amendment were perceived by many Quebecers as far from neutral. As a result, the implicit suspension of political judgment necessary for procedural decisions to be made—under the rules for constitutional amendment and for the sake of achieving political settlement—was no longer possible. Those rules had become part of the constitutional politics and were not thought capable of performing their regulatory function to constrain and channel constitutional politics, since they were perceived as openly favoring one side in constitutional debate. The substantive accounts of the Canadian constitutional crisis may explain how the country arrived at that crisis. But they do not explain why the amending rules were unable to regulate that process.[105]

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[104] Reference re Amendment of Canadian Constitution, [1982] 2.S.C.R. 793.

[105] The flip side to this point may be that the constitutional amending rules reflect the substantive view that the federal government is the national government that represents all parts of Canada, including Quebec. In the event of negotiations regarding secession, the mind-set reflected in, and reinforced by, those rules would make it hard for the federal government to see itself as the representative of the rest of Canada in those negotiations. *See* Cairns, *supra* note 100, at 307, 313.

6. Conclusion: The lesson of the Canadian model for multinational polities

There is, of course, a great deal more to the Canadian story, which cannot be developed here.[106] For the time being, I want to conclude by suggesting that the Canadian problem is a common problem. The constitutional politics of rules for amending are a common point of conflict in multinational polities. These rules are where the most fundamental clashes in nation building occur. By assigning the power of constitutional amendment to certain populations and/or institutions—in various combinations—the rules governing constitutional amendment stipulate the ultimate locus of political sovereignty and are the most basic statement of a community's political identity. The ability to reconfigure the most basic terms of social life must lie with the fundamental agents of political life. By looking to the amending rules, we see who these basic agents are. In multinational polities, assigning roles to national minorities as part of the procedure for constitutional change accordingly acknowledges the fundamental multinational character of the political community. On the other hand, the refusal to acknowledge this translates into a preference for constitutional amending rules that do not recognize and empower the constituent nations of a multinational polity. So it is far from surprising that, recently, in both Iraq and Sri Lanka, a principal arena of constitutional conflict has concerned the design of rules governing constitutional amendment.

The lesson for multinational polities at various stages of constitutional transition may be this. Canada is, indeed, a success story—it is one of the oldest countries in the world, has wrestled with and responded imaginatively to forces that have torn other countries apart, and has achieved a remarkable degree of prosperity and freedom. In large part, the Canadian model operates under law. But, as the Canadian constitutional crisis shows us, a legal approach to the accommodation of minority nationalism has both its strengths and weaknesses. The main problem lies in meeting demands for constitutional change from minority nations. On the one hand, every constitution contains within it a process for constitutional amendment, as does the Canadian Constitution. But rules for constitutional amendment face genuine difficulty in constituting and regulating moments of constitutive constitutional politics, because at those moments, the very concept of political community those rules reflect is placed in contention by the minority nation.

It is, perhaps, at this point in the story that we come up against the limitations inherent in constitutionalism itself, at least with regard to its ability to accommodate minority nationalism.

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[106] *See supra* note 102.