

Bruce A. Ackerman  
Robert E. Charney\*

CANADA AT THE  
CONSTITUTIONAL CROSSROADS†

Canada has, of course, been at the constitutional crossroads for some time. As Dicey put it in 1885: 'The preamble of the British North America Act, 1867, asserts with official mendacity that the Provinces of the present Dominion have expressed their desire to be united into one Dominion "with a constitution similar in principle to that of the United Kingdom." If preambles were intended to express the truth, for the word "Kingdom" ought to have been substituted "States."' <sup>1</sup> But Dicey was exaggerating. In dropping this line, he principally had in mind the Canadians' adoption of a most un-British system of federal government, in which powers were divided between the dominion and its provinces. <sup>2</sup>

When viewed from a southern exposure however, the act of 1867 remained a *British* North America Act, most notably in its adoption of the un-American principle of parliamentary sovereignty. In our view, <sup>3</sup> the very nerve of American constitutional law is its insistence that no body of regularly elected representatives speaks unproblematically for the People all of the time. To be sure, Congress and the president exercise normal lawmaking authority, as do their counterparts in the fifty states. But their decisions are not ordinarily granted the special constitutional legitimacy accorded the rare political judgment rendered by We the People of the United States. If statesmen hope for this higher form of democratic legitimacy, they cannot content themselves with the simple enactment of a statute after a single burst of legislative activity. Instead, they must transcend the normal legislative process and overcome the specially

\* Bruce A. Ackerman, Beekman Professor of Law and Philosophy, Columbia University; Robert E. Charney, LL.B., University of Windsor, 1981; LL.M., Columbia University, 1983

† We are indebted to Professors Henry Monaghan and Bryan Schwartz for help in refining several important points. An earlier version of this essay was delivered as one of the 1983 Cambridge Lectures presented to the Canadian Institute for Advanced Legal Studies. Professor Ackerman wishes to thank the members of the institute for their many thoughtful responses to his initial presentation.

1 Dicey *Law of the Constitution* (1885), at 152 (emphasis in original). In later editions of the book, Dicey modified this paragraph, replacing 'official mendacity' with 'diplomatic inaccuracy' (9th ed., 1959).

2 Ibid (9th ed., 1959), at 166, note 1

3 The view of the American Constitution adumbrated in the following paragraphs is elaborated at greater length in Ackerman, *The Storrs Lectures, 1983: Discovering the Constitution* (1984) 93 *Yale L.J.*

onerous obstacle course imposed by a special system for constitutional lawmaking.<sup>4</sup> Under article v of the American Constitution, a political movement is allowed to enact a constitutional amendment only if it can successfully convince a large number of legislative assemblies, on both federal and state levels, of the merit of its higher lawmaking proposals.<sup>5</sup> Only then may it claim the constitutional authority to enact a constitutional amendment in the name of We the People of the United States. The American Constitution, in short, establishes a dualistic system of lawmaking: for most purposes, normally elected assemblies are allowed to exercise their problematic political authority in a legally unchallengeable way; however, if a political leadership wishes to speak with the full authority of *the People themselves*, it must take to a special lawmaking track, one designed to test the depth of democratic support for its lawmaking proposals in a specially probing fashion.

In contrast, the modern British parliamentary system is the epitome of single-track thinking. Under this system, there is no democratic authority higher than a normally elected Parliament. The House of Commons is not a problematic representative of the People, but the People's only genuine representative. If the voters don't like what Parliament is saying, let them vote the rascals out of office. But that is the only way the People have of expressing their will in a single-track system of parliamentary democracy.<sup>6</sup> No special mechanism, like the American constitutional amendment, exists to express higher lawmaking conclusions reached by the British People after wide-ranging debate and extraordinary levels of political activity.<sup>7</sup>

4 The United States Constitution explicitly rejects the first principles of parliamentary sovereignty as elaborated by Dicey: 'First, There is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character' (Dicey, *supra* note 2, at 88, 89).

Instead, article v of the Constitution explicitly limits Congress' role in higher lawmaking: 'The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress ...'

5 The philosophical foundations and historical evolution of article v is a subject of central concern in the project described in Ackerman, *supra* note 3.

6 'The sole legal right of electors under the English constitution is to elect members of Parliament. No court will consider for a moment the argument that a law is invalid as being opposed to the opinion of the electorate; their opinion can be legally expressed through Parliament, and through Parliament alone' (Dicey, *supra* note 2, at 59).

7 While the text reports the received British theory, modern British practice is evolving in a direction that may well portend an emergent recognition of a two-level lawmaking

This difference in constitutional theory is deeply rooted in the very different historical experience of the American and British peoples. The greatest achievements of American constitutional law have not been achieved through the normal operation of regular institutions. They have instead been won through a long hard struggle, in which mobilized groups of citizens expressed their will through legally anomalous institutions. The most notable example was the Philadelphia Convention of 1787. Rather than handing the Constitution down from the legal majesty of unquestionable parliamentary authority, the Convention assumed powers far beyond those legally delegated to it by the sovereign states and the Congress of the existing American Confederacy.<sup>8</sup> As a consequence, the Convention could do no more than propose a constitution to their fellow citizens and call upon them to ratify it in a series of legally irregular conventions meeting in the several states.<sup>9</sup>

system. Referenda have been held on three occasions in Britain, all within the last decade. In 1973 a referendum was held in Northern Ireland to determine whether the province wished to remain within the United Kingdom. In 1975 a referendum held throughout the United Kingdom endorsed Britain's continued membership in the European Economic Community; in 1979 the voters of Scotland and Wales rejected government proposals for devolution of political authority.

Although the results of these 'advisory' referenda were not technically binding on Parliament, they were generally perceived as expressions of popular will that were more authoritative than normal parliamentary modes of lawmaking. Given the role of precedent in British legal argument, it is quite possible that these past referenda can be expected to shape the future of British constitutional development. Indeed, in 1978 a Conservative Committee on the Referendum recommended the introduction of a Constitution (Fundamental Provisions) Bill 'which would provide for a referendum before any fundamental change in the Constitution occurs' (Norton *The Constitution in Flux* [1982], at 215). This recommendation failed to gain general support among members of Parliament, in part because the lack of a written constitution presented the problem of determining the criteria by which to assess whether or not a measure is fundamental or constitutional (see *supra* note 4). In 1981 the House of Lords gave second reading to a Constitutional Referendum Bill which would make obligatory the holding of a referendum before a bill containing provisions to abolish the House of Lords or to diminish its legislative powers could proceed beyond third reading in the House of Commons. See generally Norton, *ibid.*, at 213-25.

For a historical analysis of the introduction of the referendum into British politics see Bogdanor *The People and the Party System* (1981), at 1-93.

- 8 Despite the Articles of Confederation's explicit requirement that amendments be ratified unanimously by the legislatures of all thirteen states, the Philadelphia Convention declared that nine state conventions would be sufficient to ratify the Constitution (United States Constitution, art VII). The technical illegality of this proposal was explicitly conceded by James Madison in *The Federalist* no. 40, at 251 (New American Library 1961).
- 9 Indeed, the practice of holding legally irregular conventions has a very different meaning in American and British constitutional law. In seventeenth- and eighteenth-century England, conventions were regarded as 'legally deficient bodies existing outside of the regularly constituted authority,' most notably when Parliament convened without the consent of the king (Wood *The Creation of the American Republic 1776-1787* [1972], at 312). In contrast, revolutionary Americans saw the convention as

It was only after emerging victorious from this extraordinary series of popular assemblies that the American Constitution gained its higher law status in the popular mind. Similarly, the great Civil War Amendments were proposed by a Congress, and ratified by procedures, of a highly irregular character. It was only through the use of military coercion, for example, that the Reconstruction Congress forced the South to give its consent to the Fourteenth Amendment, guaranteeing equal protection of the laws for all citizens. Without coerced Southern consent, the Amendment would have failed to obtain ratification by three-fourths of the states as required by the Constitution.<sup>10</sup> And yet, in retrospect, the Amendment is seen as one of the greatest triumphs of the American constitutional tradition – the codification, after a long and hard struggle, of the highest principles of American political identity.

In contrast, the British constitution has developed in a very different way. Moments of chaotic mobilization and rhetorical excitement are not associated with legal creativity, but with constitutional failure. Most notably, the great republican revolution in English history ends in Cromwell's death and the Crown's Restoration, rather than in the promulgation of a new democratic constitution in the name of We the People.<sup>11</sup> The British paradigm of a successful constitutional change is something like the disintegration of the Crown's Prerogative, a transformation that occurs over the course of centuries during which nobody quite knows where the law stands at any particular moment. Within this tradition of incremental change, the point of good leadership is not to mobilize, and give legal shape to, popular movements for self-conscious constitutional transformation. Instead, good leaders anticipate popular discontents before they erupt into mass dissatisfaction, and try to fashion sensible solutions before the political élite loses control of a democratic polity to the chaos of mass politics.<sup>12</sup> It is this different

something more than a legally deficient legislature. It 'became an extraordinary constitution-making body that was considered ... superior to the ordinary legislature' expressing the will of the people themselves on constitutional matters. See generally Wood, *ibid*, at 310–19.

<sup>10</sup> See Fairman *Reconstruction and Reunion* (1971), at 509–10.

<sup>11</sup> This is not to suggest that the Restoration in 1660 actually restored the British constitution to its prerevolutionary condition. To the contrary, a great deal of pulling and hauling was required to establish new working principles. Even the most notable single event in this adaptive process, the Glorious Revolution of 1688, was hardly the product of mass mobilization, in the manner of the Cromwellians before or the Americans after. Instead, it was more the product of élite agitation than a mass upheaval. See Miller, *The Glorious Revolution: 'Contract' and 'abdication' reconsidered* (1982) 25 *Historical J.* 541.

<sup>12</sup> This tradition is exemplified in Canadian history by the British reaction to the rebellions of 1837 in Upper and Lower Canada. Rather than resulting in an indigenous expression of constitutional principles, the rebellions precipitated the effort by Lord Durham to anticipate the future status of Canadian government. The

conception of democratic leadership that drives the single-track British system: merely because a normal election does not provoke widespread mobilization amongst the citizenry, this is no reason to say that the prime minister is a problematic representative of the People. Indeed, it is only if a prime minister succeeded in gaining office through excited appeals to the mobilized masses that the British tradition would begin to suggest doubts about the representative character of all this demagogic rabble-rousing. In contrast, the American constitutional lawyer can never forget that he owes the Constitution itself and the Civil War amendments precisely to leaders who indulged in such overheated populist rhetoric – insisting that they spoke for the People in a way that gave their lawmaking activities a *higher* form of democratic legitimacy than that vouchsafed to politicians or political processes characteristic of quieter times.

We may now return to Canada at the crossroads. Dicey notwithstanding, it has been the British conception of the constitution that has historically dominated the Canadian experience. By saying this, we do not merely have in mind the ascendancy of British single-track thinking amongst Canadian constitutional lawyers. No less important, the modern Canadian consciousness has been shaped by the fifty thousand Loyalists who came to Canada during and after the American Revolution. This Loyalist migration did more than lead to the partition of Nova Scotia and Quebec in order to accommodate the influx of English-speaking Britishers.<sup>13</sup> It shaped Canadian perceptions about the proper way to go about the lawmaking exercise. For the Americans, the Philadelphia

Durham Report, which served as a basic blueprint for the next twenty-seven years, is a paradigmatic example of far-sighted elite statesmanship, in the British tradition, rather than populist mobilization in the American tradition. See generally *New Lord Durham's Mission to Canada* (1963) and *McInnis Canada, A Political and Social History* (3d ed, 1969), at 263–80.

Even the British North America Act, which originated in Canada as the Quebec Resolutions of 1864, represents the product of elite statesmanship rather than the result of mass politics. Although the Quebec Resolutions were used in London as the basis of the proposals submitted to the imperial government, the details of the BNA Act were left to the imperial authorities with the counsel and assistance of colonial delegates. 'The Canadian [United Provinces of Upper and Lower Canada] Legislature had accepted the Quebec Resolutions, but was not given an opportunity to consider the changes made at the London Conference. The provinces of New Brunswick and Nova Scotia had expressed their desire to be federally united, but approval of the terms of union was expressed not by the legislatures or by the people, but by the Governments of these provinces. The only legislative authority or approval behind the Canadian Constitution was that of the Imperial Parliament' (Rogers, *The compact theory of confederation* (1931) 9 *Can. Bar Rev.* 395, at 408).

<sup>13</sup> See generally *McInnis*, supra note 12, at 181–99. The effect of the Loyalist and subsequent British migrations on Canadian political culture is examined in Horowitz, *Conservatism, liberalism and socialism in Canada: An interpretation* (1966) 32 *Can. J. of Econ. Pol. Sci.* 143.

Convention's appeal to the People, over the heads of their governments, symbolizes the creation of a democratically legitimate higher lawmaking track. For the Loyalists, this very act served as a paradigmatic counter-example: whatever else Canada was, it wasn't a place where statesmen mobilized mass movements to challenge the representative character of the King in Parliament.

And yet, for all this, Dicey was quite right in pointing out something very un-British in the British North America Act. Indeed, it is the BNA Act's creation of a federal dominion that, a century onward, would provide Canadians with a vocabulary and institutions for questioning their British single-track inheritance. To see why, begin by considering the matter abstractly. What federalism means is that there is not one, but many, parliaments sitting in Canada at the very same time, each of which claims the democratic right to speak for its constituents. These parliaments will, moreover, sometimes be controlled by very different political forces. Using their power for very different purposes, they will inevitably come into conflict. And when this happens, both sides will predictably call into question the representative character of their rivals. Thus provincial premiers may challenge the federal prime minister when he says that he speaks for the People – or is it the Peoples? – of Canada; in turn, the federal prime minister will assert that the premiers are so impressed with their narrow provincial problems that they have lost sight of the fundamental issues; and on and on in the all-too-familiar way. Moreover, the impact of all this mutual recrimination upon public opinion may well be very different from the one intended by any of the primary participants. Rather than leading the general public to conclude that the premiers are right about the prime minister, or that the prime minister is right about the premiers, the conversation may only serve to reinforce the problematic character of both sides' claim to speak for the People. In short: federalism problematicizes representation.

In contrast, when there is only one parliament sitting in Westminster, no other assembly can meet, under colour of law, to challenge its claim to represent the desires of the People. Indeed, the convocation of a counter-parliament is the paradigmatic revolutionary act, inaugurating all-out civil war. Rather than this simple dichotomy between unproblematic representation and all-out revolution, the existence of a federal system prepared the way for dualistic complexity in Canadian constitutional understanding. On the one hand, both provincial and federal parliaments speak for the People on ordinary matters within their respective jurisdictions; on the other hand, when they conflict with one another, perhaps *neither* is speaking for the People and we must do something special to learn what the People really think. In short: by

problematicizing parliamentary representation, federalism generates perceived need for a special higher lawmaking system to elaborate the considered judgments of We the People when competing parliaments disagree.

The first century of political practice under the BNA Act, moreover, gave Canadians the precious opportunity to develop dualistic habits of mind and practice that would ultimately permit them a thoroughgoing critique of single-track parliamentary lawmaking. Not, mind you, that they would be much aided in this effort by a Canadian legal profession obliged, until 1949, to look upon the Privy Council as the ultimate authority on matters of constitutional law. For the English judges merely suppressed self-conscious legal reflection upon the extent to which federalism rendered problematic British principles of parliamentary sovereignty. This was done by the formalist expedient of dividing Canadian sovereignty into neat spheres and treating one or another Canadian parliament as if it were absolutely supreme within its assigned area of authority.<sup>14</sup>

Despite these legal pronouncements, however, Canadians soon recognized that more complex forms of interparliamentary co-ordination were necessary in a responsive federal system. From early on, the struggle between Ottawa and the provinces over their respective lawmaking powers generated a perceived need for extraconstitutional conferences through which these ongoing conflicts might be resolved.<sup>15</sup> Rather than a

<sup>14</sup> *Hodge v The Queen* (1883) 9 App. Cas. 117 (P.C.) at 132. The insensitivity of the Privy Council serves as a *leitmotiv* of commentators through the generations: 'The basic overt doctrine of the court was to eschew considerations of policy and to analyse the BNA Act by the standard canons for the technical construction of ordinary statutes' (Cairns, *The Judicial Committee and its critics* (1971) 4 *Can. J. of Pol. Sci.* 301, at 327); 'It is not reasonable to expect that the members of the Judicial Committee of the Privy Council would interpret the [BNA] Act in any way different from that adopted in the interpretation of other statutes. The Act is an ordinary statute, passed by [the British] Parliament at the request of certain rather troublesome and very remote colonists on the other side of the world. The judges did not think of themselves as determining the constitutional development of a great nation' (Jennings, *Constitutional interpretation: The experience of Canada* [1937] 5 *Har. L.R.* 1, at 3).

In contrast, the United States Supreme Court, from the beginning of American constitutional jurisprudence, has recognized that the Constitution represented the 'original and supreme will' of the People, which required a different approach from ordinary laws: 'We must never forget that it is a *constitution* we are expounding' (per Marshall CJ, *McCulloch v Maryland*, 4 Wheaton 316, 407; 4 L. Ed. 579, 602 [1819] [emphasis in the original]).

<sup>15</sup> See generally Simeon *Federal-Provincial Diplomacy* (1972) and Smiley *Canada in Question: Federalism in the Eighties* (3d ed, 1980) ch 4. The process of direct negotiation between the executives of the central and provincial governments has been termed 'executive federalism' by Smiley.

single parliamentary sovereign handing down the law from on high, the federal-provincial conference suggested a different approach to lawmaking – one in which representatives from rival parliaments struggled with one another over lengthy periods of time before coming to any conclusions. Despite their departure from the clean lines of classical federalism, these conferences began to take on an important role in the evolving system of Canadian government. Notwithstanding the best efforts of the Fathers of Confederation,<sup>16</sup> Canadians were grappling with the hard fact that special forms of legal thought and process were required to reconcile the interparliamentary conflicts endemic to a federal system.

And yet, until very recently, Canada's emerging dualistic consciousness differed in one vital respect from the American form. For Americans, the higher lawmaking system is not only institutionally distinct from the normal processes of parliamentary legislation; it also carries a different symbolic meaning. While very few political movements in American history have managed to transcend the complex institutional obstacle course confronting them on the higher lawmaking track, the American Constitution does give these few successes special symbolic status. By enduring the rigours of the higher lawmaking system, these movements have earned the right to speak for We the People in a way sharply distinguished from the more problematic efforts at political representation attempted by normal representative bodies. In contrast, Canadians did not traditionally invest extraparliamentary efforts at political accommodation with populist symbolism. While rival parliaments might challenge each others' lawmaking powers, while special processes might evolve to reconcile ongoing conflicts, these efforts at higher-level resolution were not attempted in the name of 'We the People of Canada.' Instead they were looked upon as useful auxiliary techniques that merely supplemented the basic British tradition of parliamentary sovereignty.

A populist reinterpretation of the meaning of extraparliamentary processes would come only as the culmination of two transformations in the nature of Canadian politics. The nature of the first change is obvious. Before it was possible to look upon extraparliamentary processes as expressing the political will of We the People of Canada, the dominant

16 'The Canadian constitution did not envisage the need for extensive federal-provincial negotiations. It was not expected that the various governments' functions would overlap much; and, in case they did, the constitution tried to make sure that there was no doubt who would win by granting Ottawa the power to disallow provincial legislation, to appoint senators, and to appoint lieutenant governors. But with the demands of the modern state and the resulting increase in federal-provincial interaction, the need to develop a set of institutions within which adjustment could take place became crucial' (Simeon, *ibid.*, at 124).



group of English-speaking Canadians would have to shuck off their imperial loyalties and think of themselves as Canadians rather than as British subjects. The decline of imperial consciousness, however, is only a necessary, and not a sufficient, condition for an effort to elaborate the will of We the People through extraparliamentary processes. What is also required is the rise of a political movement willing to raise fundamental questions about the nature of Canadian political identity.

It is for this reason that the 1976 victory of the Parti québécois should be viewed as an event of high significance in the development of the Canadian constitution. However qualified René Lévesque's electoral mandate,<sup>17</sup> it was plain that it raised a question of national identity that would not be readily susceptible to an easy compromise by a small group of leaders meeting in extraparliamentary conference. The political élites' capacity to muddle their way through to a British-style compromise was, paradoxically, further reduced by Pierre Trudeau's return to power in 1980. Here was a prime minister, after all, who owed his office to the very same voters who had sent Mr Lévesque to power. Without their victories in seventy-four out of seventy-five Quebec ridings,<sup>18</sup> the Liberals would have been reduced to insignificance as a power in the federal parliament. Who, then, spoke for the People of Quebec – Trudeau or Lévesque?

It is at this point that the problematicizing dynamic of federalism took hold. Faced with Trudeau's victory, Lévesque needed to re-establish himself as the genuine spokesman for Quebec on matters of the highest importance. To do so, moreover, he took a decisive step towards the populist redefinition of the nature of extraparliamentary process. Despite the fact that Canada had no formal procedure whereby the People could speak independently of parliament, neither Lévesque nor Trudeau nor anybody else had any trouble understanding the deep constitutional significance of the referendum on sovereignty-association. Canada was at a constitutional crossroads – and not only, as we hope it is clear, concerning the substance of Canadian national identity but also

17 The voters were constantly assured that they could have the PQ government without separatism, and that a provincial referendum would be held before taking Quebec out of Confederation. Even so, the Parti québécois won only 40 per cent of the popular vote in the election of 1976, although this was translated into 64 per cent of the seats in the Quebec National Assembly. See generally Dupont *How Lévesque Won* (1977) and Saywell *The Rise of the Parti québécois 1967–1976* (1977), at 122–71.

18 In winning all but one of the seventy-five Quebec seats the Liberals came closest to a clean sweep of that province since the 1921 election when Prime Minister Mackenzie King and the Liberal Party won all sixty-five ridings (Thorburn, ed *Party Politics in Canada* [4th ed, 1980], at 308).

concerning the very process by which that identity would be articulated. For the first time in Canadian history, a populist form of dualistic constitutional consciousness was coming to the fore. The nature of the Canadian constitution would be defined through an extraparliamentary procedure provoking an extraordinarily broad and intense political debate upon the fundamental character of the issues involved. The fate of Canada was no longer to be settled primarily by sensible members of the political élite. Like it or not, the élite would be forced to struggle explicitly for the self-conscious support of a mass public mobilized around particular constitutional principles.

The Quebec referendum also reinforced the political participants' sense of the distinctive pace and complexity of higher lawmaking. Nobody looked upon the referendum as if it would yield a determinate solution to the problem of Quebec's constitutional status.<sup>19</sup> The point of the vote was not to generate a flurry of parliamentary activity yielding an authoritative-looking Constitutional Act, 1980. Instead, by defeating sovereignty-association, the voters of Quebec had initiated a larger, higher lawmaking process through which the nature of the nation's political identity would be confronted with renewed seriousness by We the People of Canada, and not only the citizens of Quebec. To personalize the point: it was one thing to establish that René Lévesque did not (yet) speak for the People of Quebec, quite another to establish that Pierre Trudeau did indeed speak for the People of Canada. Certainly the simple fact that Trudeau was the undisputed master of parliament's sovereignty in Ottawa could hardly serve as a constitutional conversation-stopper, in the British manner. Perhaps if his parliamentary majority had extended westward beyond Manitoba,<sup>20</sup> perhaps if Liberals had controlled most, if not all, of the provincial legislatures,<sup>21</sup> the prime minister would have been able to propound the constitutional meaning of the Quebec referendum in an institutionally unproblematic way. But the Liberal Party of 1981 was not what it used to be in 1968, let alone what it had been

19 Indeed, Prime Minister Trudeau made it clear that his government would 'interpret a vote of No to sovereignty-association as a vote for the rebuilding of the Canadian federation' (House of Commons Debates, 14 April 1980, at 5).

20 In the federal election of 18 February 1980, the Liberal Party won no seats west of Manitoba, where they managed to retain their only two seats (Thorburn, *supra* note 18, at 310).

21 At the time of the federal election of 18 February 1980, the Liberal Party did not control any provincial legislatures. The Social Credit Party was in power in British Columbia, the New Democratic Party in Saskatchewan, the Parti québécois in Quebec, and the Progressive Conservative Party in the other seven provinces. This state of affairs continued throughout the constitutional negotiations.

a generation earlier.<sup>22</sup> The constitutional meaning of the Quebec referendum was not to be proclaimed by a single voice speaking from the Throne on Parliament Hill, let alone from Westminster. Even after the representative character of the Quebec government had been put in question, no single representative or party emerged from the federalist matrix as unproblematic spokesman for the People. Instead, the Quebec referendum only served to usher in a second stage in the higher lawmaking process, one in which would-be spokesmen for the People proffered up competing conceptions of Canada's constitutional future. On the one hand, the federal prime minister offered a conception of Canadian political identity that was both nationalistic in its conception of government and individualistic in its conception of rights; the 'gang of eight' provincial premiers<sup>23</sup> offered a counter-conception that decentralized power at the same time as it glorified the rights of provincial majorities to overrule any judicial conception of individual rights. Canada was once more at the crossroads – on the matter of process no less than the matter of substance. How were Canadians to go about articulating their collective judgment as to the merits of these competing constitutional visions?

This central question of dualistic theory took on concrete institutional form with the entry of the Supreme Court into the higher lawmaking process. The most significant thing about the *Reference* case,<sup>24</sup> however, was not what the court said, but the way the prime minister reacted to the litigation. After all, if he had taken the notion of parliamentary sovereignty with dead seriousness, he could have simply ignored the pending litigation in the spring of 1981 and persisted in his announced intention of repatriating the Constitution by Dominion Day.<sup>25</sup> Moreover,

22 In the federal election of 1935, William Lyon Mackenzie King's Liberal Party received a majority of seats in every province but Alberta and British Columbia. In that year, there were Liberal Party governments in every province but Alberta and Manitoba (Urquhart, ed *Historical Statistics of Canada* [1971], at w253-339).

23 The 'gang of eight' comprised Bennett of British Columbia, Lougheed of Alberta, Blakeney of Saskatchewan, Lyon of Manitoba, Lévesque of Quebec, Buchanan of Nova Scotia, MacLean of Prince Edward Island, and Peckford of Newfoundland. See generally Sheppard and Valpy *The National Deal* (1982), at 174-96.

24 *Reference Re Amendments of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 125 D.L.R. (3d) 1 (s.c.c.)

25 This is, surely, what a prime minister of the United Kingdom would have done in an analogous situation. Imagine, for example, that before joining the Common Market, the British prime minister had called a special referendum and that the vote had gone against membership (Cf note 7 supra). Imagine, further, that the prime minister had decided to ignore the expressed wishes of the voters and announced his intention to

despite the lobbying activities of the dissenting provinces in Westminster, there was a chance that this final invocation of parliamentary sovereignty would have succeeded in England.<sup>26</sup> If it had succeeded, surely the Supreme Court's decision would have looked very different when it was announced in the fall.

The problematicizing logic of federalism had, however, made such a strong invocation of parliamentary sovereignty untenable. Even the prime minister had to recognize that unilateral repatriation during the interim period of Supreme Court deliberation would deprive the Liberal Party's Constitution Act of the legitimacy it would require. And so, despite his evident intention to press onward, the prime minister conceded that it was right for the courts to decide whether the federal Parliament did indeed speak for We the People of Canada.<sup>27</sup>

And yet, while parliamentary sovereignty was half dead, the Canadian practice of popular sovereignty in the dualistic tradition was still in an embryonic stage. Although the prospect of a Supreme Court decision sufficed to stop a premature Act of Westminster, it did not induce Trudeau to press the dualistic logic of popular sovereignty to its natural conclusion. To see our point, return to 25 June 1981, the day on which the justices recessed for the summer without letting the country know the procedure it should follow in repatriating the Constitution.<sup>28</sup> At that

advise the queen to accede to the Treaty of Rome and to invoke his parliamentary majority in support of supporting legislation. Imagine, finally, that leading opposition politicians responded to this announcement by bringing a lawsuit challenging the propriety of the prime minister's actions.

Can anyone doubt that the British prime minister would have acted very differently from Pierre Trudeau? So long as he was willing to bear the political price, so long as he could hold his parliamentary majority, no British prime minister would explicitly defer his decision, as Pierre Trudeau did, until the courts could pass upon his constitutional authority. Instead, he would be entirely within his constitutional rights to dismiss his rivals' appeal to the courts as an absurd effort to make an end-run around the principle of parliamentary sovereignty.

<sup>26</sup> Britain's Prime Minister Margaret Thatcher had, on 10 November 1980 and again on 12 February 1981, pledged her government's unqualified support for whatever resolution the Canadian Parliament transmitted. '[T]he main worry of Mrs. Thatcher's government was the enormous mischief the constitution resolution could do to Westminster's business schedule ... British officials have maintained, on and off the record, that passage was never in doubt' (Sheppard and Valpy, *supra* note 23 at 211).

<sup>27</sup> Before the litigation commenced, Trudeau explicitly agreed not to send the Constitution Resolution to the British Parliament until the Supreme Court of Canada had ruled on the legality of his unilateral approach (House of Commons Debates, 31 March 1981, at 8786).

<sup>28</sup> The Supreme Court ended its five days of hearings on the Constitution on 4 May 1981. On 25 June the court recessed for the summer without giving a hint when its judgment would be handed down. Since Trudeau had agreed not to seek the final approval of the package in Parliament until the court's decision was announced, the delay meant that it would be impossible to submit the joint resolution to the United Kingdom Parliament

point, one could have readily imagined an energetic liberal nationalist declaring that it would be better if the People of Canada themselves had a say on this critical question rather than leaving it for the courts to decide. In short, why didn't Trudeau call an extraordinary national referendum on the proposed Liberal constitution: Charter of Rights, patriation, amending procedure,<sup>29</sup> the works? The Supreme Court had already made it impossible to repatriate by Canada's 114th Dominion Day on the sheer assertion of parliamentary sovereignty. Why waste the summer in the way it was wasted – for, as you will recall, constitutional discussion did in fact tend to peter out as Canadians turned their attention to the problems of energy pricing and a bank rate that was rising to record heights.<sup>30</sup>

So far as we can tell, moreover, Trudeau might well have won such a referendum in a big way.<sup>31</sup> A charter of rights is not very easy to oppose in sixty-second television advertisements; nor does the provincial interest in oil and gas and fish and the rest constitute the stuff of a strong majority against a constitution. Indeed, such a referendum would have given Trudeau that wide electoral support from all regions of the country that his Liberal Party so evidently lacked in a normal parliamentary election. To make the mystery more complete, Trudeau's proposed constitution makes it plain that the prime minister was perfectly aware of the legitimating power of a national referendum. His own proposal for replacing the constitution's interim amending procedure contemplated a special referendum if seven premiers, representing 80 per cent of the Canadian population, could agree on a counter-proposal to Trudeau's own general amending procedure.<sup>32</sup> Moreover, under the proposed permanent amending procedure, the constitution could have been revised by a referendum that gained a majority of all Canadian voters and a majority of the votes in six or more provinces representing all regions of

before that body adjourned for the summer at the end of July. The British Parliament would not resume again until late September or October.

Had the decision been announced before 25 June Trudeau would probably have done everything in his power to forward the constitution to England in time for them to pass it before their summer recess. This delay (the decision was finally announced on 28 September 1981) granted Canadians at least four more months to negotiate a political solution and avoid the humiliation involved in a foreign Parliament debating Canadian affairs in an authoritative fashion. While there is no objective evidence that such considerations weighed with Laskin CJ and the court, it is hard to imagine that these considerations did not cross their minds.

29 For further discussion of the Liberals' proposed amending procedure, see text at note 33, *infra*.

30 *The Decima Quarterly Report*, Public Affairs Trends vol 2, no. 2, Summer 1981, at 23

31 CROP Report 81-3-72 (see appendix below).

32 House of Commons Debates, 16 February 1981, at 7270, Resolution, s 42

Canada.<sup>33</sup> Why, then, did Trudeau not break the impasse caused by provincial opposition and judicial delay by calling the Canadian People to the polls to speak on the legitimacy of the Liberal constitution? If he had taken this step and won, the justices' discussion of Canada's distinctive constitutional conventions would have been different when they finally rendered their famous judgment in September. At the very least, the court would have been obliged to discuss the significance of the recent referendum, no less than the continued provincial resistance. Wouldn't a landslide victory have vastly enhanced the perceived legitimacy of the liberal nationalist effort at repatriation?

Trudeau's failure to press down the populist's higher lawmaking path, then, is no less significant than his halt on the road to Westminster. In the summer of 1981, Canada remained at the crossroads, though more self-conscious about the awkwardness of remaining there forever. Indeed, the Supreme Court majority opinion in the *Reference* case was symptomatic of the very same uncertainty that was symbolized by the prime minister's indecision. Everything in the British experience had taught the court to end its opinion with its answer to the second of its constitutional questions: 'The law knows nothing of any requirement of provincial consent.'<sup>34</sup> And yet, having bowed ritualistically to the tradition

33 Ibid, s 46 provided: 'An amendment to the Constitution of Canada may be made ... where so authorized by a referendum held throughout Canada ... at which (a) a majority of persons voting thereat, and (b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize [a constitutional amendment] have approved the making of the amendment.'

The structure of the proposed general amending formula was remarkably similar to article v of the United States Constitution (supra note 4). Both contained alternative modes of state/provincial ratification for proposed amendments. The usual method would be by the state or provincial legislatures acting in their normal legislative capacity. But both formulas gave the federal legislative institution the power to bypass the state or provincial legislatures by going directly to the people. Thus the Trudeau constitution would have allowed the federal parliament to call a special referendum on its proposals, while the American Constitution authorizes Congress to call special constitutional conventions, meeting in each state, to ratify proposed amendments. The analogy between these two procedures is especially close, given the eighteenth-century Americans' view of the convention; see supra note 9. For it is no exaggeration to say that the American draftsmen thought of the convention in much the same way as modern Canadians think of the referendum – as a specially appropriate technique by which the people can speak directly on matters of fundamental importance.

34 The second question answered by the court was: 'Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships.' The majority, composed of Laskin CJ and Dickson, Beetz, Estey, McIntyre, Chouinard, and Lamar JJ, interpreted

of parliamentary sovereignty that had dominated Canada's British past, the court pressed on, in its answer to the third question, to make it plain that the imperial heritage could no longer do justice to the Canadian constitutional experience.<sup>35</sup> Given the pervasive character of the British tradition, the court expressed itself in ways that, predictably, would provoke charges that it had gone beyond its legal functions to pronounce upon matters pre-eminently political – as indeed it had so long as one views the process within a British single-track framework.

From a dualistic point of view, however, the court had intervened on behalf of the most fundamental legal principle of the emerging Canadian Constitution: parliament is *not* sovereign on matters going to the essence of Canadian constitutional identity. Before such issues may be resolved in a constitutionally legitimate fashion, political leaders must do much more than ram their program through a single parliamentary assembly. Instead, they must establish the constitutional legitimacy of their proposals through a special and more arduous lawmaking procedure. In contrast to the American system, however, the *Reference* case suggested a very different interpretation of the constitutional meaning of the higher lawmaking procedure.<sup>36</sup> While in the United States higher lawmaking is declared in the name of We the People, the Supreme Court suggested that Canadian higher lawmaking authority resided in a league of sovereign parliaments on the provincial and federal levels, who could enact constitutional law on the basis of 'substantial'<sup>37</sup> agreement.

Although the court's opinion could offer this dualistic solution to the other lawmaking participants, it hardly had the constitutional authority to impose this solution on Canada. Instead, it was up to the People's very problematic representatives – the prime minister and the provincial

the words 'constitutionally required' as meaning 'legally required' and answered that 'as a matter of law,' the agreement of the provinces was not constitutionally required (*Reference*, supra note 24, at 12, 47).

35 The third question answered by the court was: 'Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom ... a measure to amend the Constitution of Canada affecting federal-provincial relationships ... without first obtaining the agreement of the provinces' (ibid., at 12). The members of the court realigned on this question. Martland and Ritchie JJ, the two judges who had dissented on the second question, now found themselves aligned with the majority, who decided in favour of the existence of a constitutional convention. Laskin CJ and Estey and McIntyre JJ dissented, answering the question in the negative.

36 For a proposed judicial approach, written before the *Reference* case was decided, that contemplated a more populist understanding of the emerging dualistic constitution see Schwartz, General national agreement: The legal sanction for constitutional reform in Canada (1981) 6 *Queen's L.J.* 513a.

37 *Reference*, supra note 24, at 103

premiers – to take the next step in Canada’s effort to reach a legitimate constitutional solution. Thus, it was still quite open to Trudeau to force the provincial negotiations to an impasse and then appeal to the People over the heads of the premiers.<sup>38</sup>

It was at this critical moment, however, that the dead hand of British parliamentary sovereignty managed to rule Canada from the grave. To see our point, imagine that Canadians did not believe that they were obliged to ask Westminster to enact a statute in order to gain control over their constitutional identities. Imagine, that is, that Canada became independent in the simplistic American revolutionary way – declaring independence from the folks back home and leaving the matter at that. On this scenario, we think it would have been impossible for Trudeau and the premiers to have taken their next step – which, of course, was to strike a bargain and gain substantial support for an approach to Westminster. Instead, they would have been obliged to call a special nationwide referendum to validate their compromises in the name of We the People of Canada. Given the residual symbolic importance of Westminster, however, no such referendum was thought necessary to legitimate the Constitution Act, 1982.

The reaffirmation of Westminster’s parliamentary sovereignty by a league of Canadian parliamentary sovereigns had profoundly important practical consequences. It yielded a constitution that repressed the embryonic populist constitutional consciousness that had been expressed, as we have seen, in the preceding phases of the repatriation struggle. Thus Trudeau’s original proposal to allow We the People of Canada to amend their constitution, through a carefully structured referendum procedure, was compromised away.<sup>39</sup> Similarly, the Constitution Act permits an ordinary parliament to override temporarily most of the fundamental rights reserved by We the People of Canada.<sup>40</sup> Indeed the very notion that the Constitution Act gained its authority from ‘We the People of Canada’ was deemed too provocative to warrant explicit inclusion.

<sup>38</sup> This is exactly what almost happened. In the last flurry of constitutional negotiations in November 1981, it appeared that an impasse had been reached. Trudeau proposed that the first ministers ‘should agree to keep talking and hold a referendum in two years’ time.’ Only Lévesque embraced the referendum proposal ‘as an honourable way out.’ The need for a referendum was averted when the federal government was able to strike a deal with nine of the premiers on 5 November. See generally Sheppard and Valpy, *supra* note 23, at 283–302.

<sup>39</sup> Section 46 of Trudeau’s resolution (*supra* note 33) was removed. In its place is s 38 of the Constitution Act, 1982, which provides that no amendment will have effect in a province if the legislative assembly, by a resolution supported by a majority of its members, expressed its dissent prior to the proclamation of the amendment.

<sup>40</sup> Constitution Act, 1982, s 33



And so, instead of taking the populist path to higher lawmaking, Canadians have, for the moment, tried to adapt parliamentary sovereignty to their own federal conditions. Rather than a single parliamentary sovereign, the Constitution Act gives us a league of parliamentary sovereigns. Yet, by its own terms, the act cannot yet be considered a final solution to this generation's exercise in nation-building. For once Mr Trudeau accepted a constitution based on parliamentary sovereignty, there was nothing to stop Mr Lévesque from using his authority as parliamentary sovereign to refuse to become a party to the accord. Surely, Lévesque properly insisted, the separatist defeat in the Quebec referendum did not imply that the provincial government was obligated to accept the terms proffered to it by the rest of Canada. Once the Quebec government had refused to endorse the terms of repatriation, moreover, the requirement of 'substantial' agreement placed a cloud on the entire process of repatriation. After all, can the support of the Canadian league of parliamentary sovereigns be fairly considered 'substantial' when the consent of a province accounting for 25 per cent of the entire population was so ostentatiously withheld?

Needless to say, the Supreme Court of Canada found it quite easy to frame a positive answer to this unsettling question.<sup>41</sup> But alas, it is one thing for a few judges to proclaim that Quebec is legitimately part of the confederation, but quite another for the question to be settled in a way that most French, as well as English, Canadians would accept as legitimate. Before this could have been accomplished, Trudeau would have had to call another referendum to establish that the Lévesque government's position was unrepresentative of the true sentiments of the majority of fellow Quebecers. Yet, as we have seen, this is precisely the step that Trudeau refused to take: rather than appeal to the People to ratify the Constitution, Trudeau merely appealed to his fellow parliamentary sovereigns. And within this frame of reference, the refusal of the reigning sovereign of Quebec to accept its assigned role in the confederacy can only be ignored by English-speaking Canada at grave peril. Whatever the others may say, Quebec's representative in the Canadian league of parliamentary sovereigns still denies that the league is constitutionally legitimate.

Canada remains, then, at the constitutional crossroads. It has neither completely succeeded in adapting British parliamentary sovereignty nor fully domesticated American popular sovereignty to Canadian purposes. Until a constitutional form is found in which Quebec explicitly accepts its

<sup>41</sup> *Re A.G. of Quebec and A.G. of Canada* (1983) 140 D.L.R. (3d) 385

place in the federal community, the constitution of the Canadian polity remains incomplete. Perhaps a generation from now, after another exhausting series of referenda on the provincial and the federal level, both Anglophone and Francophone voters will approve a mutually satisfactory constitution, one that hands down the law to the parliaments of Canada in the name of We the People of Canada. Perhaps, in a very British show of good sense, parliamentary sovereigns in Ottawa and all the provinces will reach a sensible agreement that all of them can explicitly affirm in the name of the parliamentary sovereigns of Canada. Perhaps Canada will find its own distinctive path to democratic reconciliation and individual liberty.

There can, however, be no question of the magnitude of the challenge. To put the point in American terms, the Constitution Act, 1982, does represent a distinctively Canadian solution to the problem Americans confronted in 1787: how to divide powers over economic, military, and diplomatic functions in a way that is satisfactory both to the states and to the nation as a whole. Canadians have yet to resolve, however, the problem that defeated the United States in the nineteenth century – how to use constitutional law as a means of reconciling the deep cultural differences that separate a minority region from a majority region. Indeed, it took a Civil War for the United States to ‘solve’ its problem; and this tragic failure of the nineteenth century still haunts America in the declining days of the twentieth. Nor does the British experience in Ireland have much to recommend it as a model. Given the failures of these constitutional traditions, it should be no surprise that Canada is still in the agony of constitutional creation.

#### *Appendix*

In April 1981, eligible voters were asked the following question:

The Canadian government has presented to Parliament a constitution package. The three main parts of this package include patriation of the Constitution ... , an amending formula which gives the major geographic regions a veto power regarding future changes to the Constitution, [and] a Bill of Rights which would provide individual Canadians with protection against unfair treatment by *any* level of government in Canada.

Suppose a Canada-wide referendum were held on this constitutional package *as a whole*. Would you vote for or against this package?

The results were as shown in the table.

## All respondents

	total	Atl. Can.	Que.	Ont.	West*	Alb.	bc
Sample	1867	202	583	466	616	225	175
for (%)	53	57	56	57	42	41	45
against (%)	30	31	31	25	37	43	39
it depends (%)	6	4	4	8	7	4	6
don't know (%)	11	7	9	10	14	12	10

## Decided respondents only

	total	Atl. Can.	Que.	Ont.	West*	Alb.	bc
Sample	1556	177	501	388	490	185	148
for (%)	64	65	65	70	53	49	54
against (%)	36	35	35	30	47	51	46

\* Including Alberta and bc

Note that the level of support for the package was lower than for the three main parts of the package. Of the three constitutional components presented, the Charter of Rights was the most widely supported (84% of all respondents; 63% *strongly* support), followed by patriation (63% of all respondents), and the amending formula (56% of all respondents).