

The Philosophical Basis Of Constitutional Discussion In Canada

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The present constitutional crisis in Canada resembles that of the United States in the interval between gaining its independence and the discovery and ratification of the constitution which was to give stability to its revolution. The 'patriation' of the Canadian constitution did away with the last remnant of colonial dependence on Great Britain. We have not yet on our own discovered an acceptable formulation of our most difficult constitutional problem - how communities of a British and a French culture can constitute one political community without subordination or assimilation. The thirteen former colonies would have sunk into impotence had they not found a constitution expressive of a common political loyalty stronger than all divisive interests, a common loyalty which could accommodate loyalties to particular sovereign communities. Canada likewise will not long survive as one state unless we can define constitutionally the common loyalty and attachment of both historic peoples and cultures - a loyalty which can coincide with an undiminished loyalty to particular sovereignties.

The differences are of course very great between our crisis and that of Americans after the War of Independence. We do not have to replace with a new sovereignty a former sovereignty which we have rejected. For us, after 'patriation', the question is whether Canada is capable of an internal political unity, on its own and without reference to a third party. We have a federation which works better and more to the satisfaction of its citizens than most states. Quebec and other Canadians have had a common political formation in which as we passed from colonial dependence to complete independence we made our own the developing democratic freedom of the most advanced states.

Thus the patriation of the Canadian constitution might seem little more than a formality. Or the 1982 amendment with the charter and an amending formula might be thought sufficient to give Canadians a sense that the constitution was their own. The 'bilingualism' of an elite would allow a common Canadian spirit to break through the isolation of the two linguistic communities. The experience of the following fifteen years has shown that Trudeau's reforms are no more than the beginning of a true patriation, that is, the discovering of an internal unity and common loyalty adequate even to sovereign differences. The 1995 referendum makes evident the limits of Trudeauism.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

To discover the basis of a unified Canadian sovereignty is more difficult in two respects than the formidable task of the American founders. The member states of the American union had all a common culture and political tradition. We have to find a constitution and political loyalty freely acceptable to peoples of two of the great European cultures, at home ever more or less antagonistic to each other. Secondly, Americans had in the British constitution of the time a model which with certain modifications served to define their freedom. The European Union is often seen by Canadians as a model in one way or another for a new federation. How the model might apply to Canadians who, European in culture, are also North Americans has not been explained.

Those who designed the institutions of the American republic were often well acquainted with the French culture of the time. Americans in their subsequent development have drawn also on other European cultures and can with reason regard themselves as heirs to the whole European tradition, however much they continue to be regarded by some Europeans as barbarians. But their borrowings have been of a primarily British and empirical orientation. They have not had to accommodate on its own the more intellectual spirit of French culture. In the European Union the British and French with other peoples have submitted partially to common institutions. But in this relation they also maintain the illusion that they are as before independent nation states. Such a relation of the two peoples as exists imperfectly in Canada, and threatens to dissolve, is without precedent.

The European Union is an unlikely model for Canadians looking to find an internal unity or an actual sovereignty, in which there can be substantial agreement about amendments to our primary political institutions. Both separatists and federalists in Canada tend to a rather superficial view of the union. To the one party it appears to confirm a conviction that a small Francophone community in Quebec could on its own do quite well in a world of continental and global economic associations. The other party learns from the union that closed national communities are an impediment to success in the new economic order and must give way to a culture of equal individuals having common rights and freedoms - among which is the right to be part of a linguistic community. Both parties derive from that model an aversion to the authoritarian structure of the nation state in the time of its independence. The model draws Canadians into the disintegration of the European nation states and the uncertain emergence of a common state. In no way does it illustrate how Canada in North America might understand and define institutionally its difference from the United States which has not, as the European states, lost a confidence that it can order its own affairs and maintain a dominant role in world politics. Separatists assume in an independent Quebec a unified political will, not to be derived from the European model.

The true implication of patriation is that we have to give up looking to Europe as a model and guide to the independence whether of Canada or Quebec. It is still a species of colonialism when now the European Union takes the place of the British Empire or a Catholic France. Like the former American colonies we have to modify and make our own the political formation we have received in the course of a long colonial dependence.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

It is possible in the manner of nationalist historians to regard the history of Quebec as essentially the development of New France to its destined completion as an independent French nation state in North America. The Conquest and the two centuries and a half of English domination can appear as an episode which the Quebec people lived through, intact in its inner core and able since the Quiet Revolution to prove its inner strength in economic, political and cultural achievements. If the English power assured to the Quebec nation its survival, that power was ever also a threat against which it must find security in itself. The time has evidently come in this view when the English relation is no longer necessary to Quebec, virtually irrelevant unless for common economic advantages.

A parallel narration of Canadian history from the side of the other 'nation' has often been told. From colony Canada has developed to the point where it is an independent replica of post-imperial Britain. Part of the story is also of the weakness of this Anglo-Canadian nationalism; confronted by the forces of a continental or global economy it laments impotently its passing. There is not the confidence of separatists in Quebec that a balance can be found between national particularity and economic union with the United States.

It is hard to bring down to earth the idea of Canada as 'two nations', to envisage them as actually existing. They are abstractions which have no existence unless in European conditions. Were the history of the 'two nations' such as nationalists recount, they would already have separated painlessly enough, seeing mutual benefit and little loss in their separation. But it is inexplicable on that view that a majority of Quebecers remain attached to Canada. Of this the recent referendum is the most obvious proof. A deceptive question and a campaign of historical distortions were not enough. It was enough that the federalists presented only an abstract choice between Canada and independence. And Canada in that choice was defined in the manner of Trudeau as the economic individualistic antithesis to nationalism; a choice so defined makes nationalists of many who know its dangers.

That Canada after patriation should be more than a contest between antithetical aspects of the European Union has a certain recognition in the argument often made by Lucien Bouchard, an argument which reflects his own experience and perhaps a continuing difficulty with fiercer and more abstract nationalists. The first choice of Quebecers, the argument runs, would be to remain in a Canada where there was an equality and mutual recognition of the two peoples. Successive attempts to obtain such recognition have been rejected by English Canadians, who appear to have no understanding of what is sought. Independence is the only remaining option.

The weakness of this argument is obvious enough. Strictly speaking there has been but one serious attempt to accommodate Quebec in the patriated constitution - that of the Meech Lake Accord. That Accord might be said to be post-colonial in that it sought a reconciliation in a deepened understanding of the relation of sovereign provinces to one another and to the federal sovereignty. It was the beginning at least of such an understanding. That the Accord looked in the right direction for a reconciliation of the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

two peoples is amply proven by the vehement reaction of Quebecers at its rejection and by the consistent finding of repeated opinion polls that a strong majority would support a solution along these lines. The defeat of the Meech Lake Accord only proves that no other course than separation remains if one can assume that English Canadians are incorrigibly wedded to the Trudeauite liberalism that destroyed the Accord from within and then externally by the agency of Clyde Wells. It was destroyed from within when Brian Mulroney, more skilled as a mediator than in his grasp of what was mediated, allowed to be associated with the Accord a concoction of demands of another inspiration proposed by Frank McKenna. The Accord in itself was no doubt ambiguous, read differently by many in Quebec and English Canada. Trudeauites, seeing disguised nationalism in it, opposed it consistently from their standpoint. What the other Canada is capable of towards Quebec is not evident in its defeat.

Joe Clark's subsequent attempt at a reconciliation was a mishmash of discordant elements in which neither community could recognize itself. The basic structure of the Charlottetown Accord, if it can be said to have a structure, conceived Canada as a plurality of cultures within a common economy. The two historic peoples receded into the background; what was said of their relation made no sense in that context. The proposed Accord is not, however, without value in that it spelled out rather fully for Canadians the implications of the European model. For the latter's representation of the elements of such a union - of many communities united in one economy - is fictitious when applied to Canada. So far as anything is proven by the defeat of this proposal, it is that such a juxtaposition of nationalism and economic individualism appeared alien to most Canadians.

What is true in the assertion that all attempts at reconciliation have failed is at most this, that a reconciliation on the basis of the European model is not possible, that we have to move beyond the residual colonialism which to this point has largely controlled the constitutional argument since patriation. Lévesque and Trudeau deserve to be honoured by all Canadians, not exactly for what they directly intended, but for bringing the argument to this provisional conclusion. René Lévesque, though as a nationalist he advanced arguments pertinent to a European context, was, as well as a citizen of a free Quebec, a North American. As such he could take *le beau risque*, he could collaborate with the premiers of other provinces in their opposition to a unilateral patriation. He could also be seduced from that alliance because of the instability of his relation to it.

Mr. Bouchard, taking a like risk, found himself deeply distressed at its apparent failure; so with others whom Mulroney persuaded to give federalism a chance. The conclusion that separation is the only course remaining rests on personal feeling and a misreading of certain events. It has no general cogency. The well-founded conclusion from recent Canadian history is rather, as indicated, that the reconciliation of the two peoples, implied and demanded in patriation, is to be found neither in nationalism nor in economic individualism, as conceived in the European model. There is not only a separate history of Quebec and another of a British 'nation'; there is also a common Canadian history more basic than either of these abstractions. Quebec is not externally related to the Canadian federation, from which it might extract itself at will on the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

assumption that it is the replica of a European nation state. The vitality and survival of a French people in North America require that through its culture it be engaged in the history and the problems of the continent, and not be at home save in economic relations only within the confines of a linguistic community. So long as the two peoples were in a colonial relation to Europe, they might be federated but their common relations to the federation could not but be distorted and more or less concealed. Superimposed on it was a divergent relation to a European center. In recent years the British Empire in the one case, Catholic France in the other, have given way to a common relation to the European Union, as that in which the British and French peoples would find a stability they no longer have in themselves. This mode of dependency too must break down before the two peoples can find a common center which is their own in their North American setting.

This post-colonial colonialism, so to speak, continues to inform the relation of Ottawa to the separatist government in Quebec. The antithetical positions in which this ultimate dependence is expressed are perhaps in both cases in course of revision. The federal government after the 1995 referendum can no longer adhere to a pure Trudeauism. The referendum has also made evident that the pure separatism of Parizeau cannot prevail. In neither case is more than the semblance of revision possible without going beyond the European model from which they are derived. We are at a point of uncommon difficulty, where, as the Americans two centuries ago, we have to define our independence constitutionally, in our case in conformity with the sense the two peoples have of their own freedom.

There is need to be clear why neither an independent nation state in Quebec - or in other parts of Canada - nor the antithetical form of a basically economic union is a real possibility for Canadians. Against these opposed positions and their application to Canada there are two fatal objections: the first is that there are no longer in Europe nation states such as the separatist supposes; the second that in North America there are not, and never have been nation states. The Trudeauite position succumbs to the same argument.

I. The European Union

The Quiet Revolution in Quebec was contemporaneous with a shift in Canada generally as to the ends of government and the rights and reasonable expectations of individuals in relation to the state. Largely through the agency of the federal government the network of social programs was established which are an important element in the attachment of Canadians to their common government. Canada became a social democratic state in line with the more enlightened European states and distinct in new ways from the United States. For English Canadians also there was a Quiet Revolution, which remains even if some give in too much to an American conservatism or to the pressures of a global economy.

In Quebec the revolution began at a different point than in the other Canada, out of the aversion of a church-oriented society to the seductions of a modern industrial economy.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The result was generally the same in both cases, if one allows for cultural differences in the attitude of individuals to government.

The revolution from older and more limited concepts of individual rights to the idea that the general well-being of individuals is the direct concern of governments is not in itself nationalistic. The revolutions of the seventeenth and eighteenth centuries had obtained the right of individuals to pursue their reasonable interests freely and rights to legal and political equality. The European states as reconstituted after the ruin of the French Revolution had implicit in them a deeper revolution in which the state in collaboration with the democratic will of its members undertakes also to correct the abuses of a free economy and to secure to individuals essential human goods to a tolerable level.

The states so humanized in the course of the last and the present centuries were particular peoples. Universal rights were realized and understood variously according to the characteristic temper and mentality of the European peoples. States so constituted are appropriately called nation states, a designation which suits less well earlier forms of the European state.

Quebec nationalists equate the Quebec which has resulted from the Quiet Revolution with such a nation state, Quebec as part of the Canadian federation appears as an incomplete or improper state. It has not a full sovereignty of its own. But the Europe to which they look for a model is also part of an economic and political union. In those relations it is no longer a sovereign nation simply but has imparted something of its sovereignty to these larger associations. There thus would recur apparently for Quebec something of the same contraction of sovereignty as it suffers in the Canadian federation.

There is a difficulty in the concept of a nation state. It is at the same time a particular national community having its own language, customs, animation, exclusive of other such communities, and is founded on universal human rights which are not abstract but pervade the whole range of its interests. The difficulty of this relation, long felt by those who live in the French or British state, may escape the eye of an external observer who sees only the ordered freedom of a particular people, a model to which his own people tend as the fulfilment of their history. A young Lucien Bouchard, as many another, admired the heroic figures of Churchill and de Gaulle who in a critical time drew their peoples from deep divisions to receive for a little the spirit of their institutions.

During the nineteenth century and until the First World War the political division of the universal and the natural and particular elements of the European state was in general held in check. In the French state, to say of it what may be said *mutatis mutandis* of the British or German state, there were radical divisions, but submerged in the attachment of the people to their sovereign state, which asserted the universality of French culture in an empire comprising many peoples and regimes. The collision of the European imperial states in the First World War made evident the human cost of greatness. Individuals fell back on themselves; the union of nationality and universal rights was shattered. In its place emerged a divided and antagonistic relation to nation and to universal humanity.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The political life of all the nation states was dominated by an opposition of nationalistic and socialist parties.¹ In the one part individuals sought an intuitive relation of their national particularity to the state through a supposedly inspired leader. In the other the inspired leader would guide them to the satisfaction of their desires in a perfected economy which took the place of the state. In both forms the universality of an older European world was pulled down to earth and centered in the individual, as worker or as member of a national community.

The Second World War made evident what was in these opposed forms and the tenuous relation they provided of individuals to the rational freedom of culture and tradition. The reaction of individuals from the ruin these forms had brought upon them was a still deeper flight from the authority of political and other institutions. In the medium of language was sought a community anterior to the tyranny of thought and the universal. Language might be taken in a fragmented and empirical form (Wittgenstein) or as inspired and unified poetical utterance (Heidegger). But the pre-rational community sought in language was before long subject to its own 'deconstruction'. The community of individuals in the medium of language was found illusory. In truth, endless division or difference stood in the way of community.

A pleiad of writers in France have drawn out these ultimate consequences of founding the universality of a people and culture on its exclusive particularity. Thus, 'deconstruction' makes evident, if not to themselves, to an observer why the European states had need of a political union, if individuals were to have a basis of community beyond endless diversity in relation to themselves and others.²

The constitutions of European states as revised after the Second World War are normally prefaced by such a charter of individual rights as was added to the Canadian Constitution in the 1982 amendment. The experience of the European states as sketched makes evident that these rights, if they be regarded as predicated of the members of a particular linguistic and cultural community as such, are contingent only - not 'inalienable', as in the older American or French declarations. Rights were predicated formerly of individuals in virtue of their common rationality. According to the latest European thought such individuals do not exist. Rather, one should say, they only exist so far as a common state and community is given priority over particular national communities.

Europeans, for all anyone can know, may continue indefinitely in an ambiguity where now the Union, now the member states appear prior. So the Union through its institutions appears empowered to act as a state. But its actions only take effect so far as the particular states can bargain their way to agreement. A Thatcher or Chirac can gratify national sentiment by acting as though their countries were still nation states - sovereign in a strict and older sense. One knows how to take such shows of independence.

¹ The opposition was characteristically more muted in Britain; at its extreme in Germany; qualified variously by national differences in France, Italy, Spain, etc; the one side suppressed in the Soviet Union.

² Foucault, Deleuze, Derrida, etc. These writers, situated in a national culture, would one way or another be free in that particularity by sheltering it under an endless otherness.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The Union allows to Europeans a sense of the freedom they do not have in their national communities. It provides at least an abstract relation to a common culture. The Union is necessary to contemporary Europeans, but not much loved by them. In all member states there is a nationalist element that would be free of Union. What part of Quebec separatists, situated in a like Union, would be of that party? Is there a right of separation from the Union? Countries joined often by the vote of a small majority. They are only bound to the Union by treaty. A like small majority would seem adequate ground for terminating the treaty. But it is an abuse of language to call the power to revert to an independence no longer possible a right. To encourage such a reversion can only be the work of a faction, not of a unified people.

The argument given is more easily grasped when one has considered the difference of North American from European states: as not founded on nationality they need not succumb to the logic which has made the nation state obsolete as the primary form of political community. The conclusion stands: the European nation state no longer exists. It continues only as subordinated to a common European state.

II. The North American States

There are no nation states in North America.³ By the time of the discovery and occupation of the Americas the political institutions which had taken shape in Europe on the ruins of the Roman Empire and beyond its boundaries had in some cases attained the unity and stability of a state. The several European peoples who took part in this great work of discovery and occupation might be called nation states, though they were still far from that fusion of sovereignty and nationality which they would come to after the French Revolution. They had reached or were approaching a point where feudal divisions were brought firmly under the unified sovereignty of monarchs. In their common relation to a monarch, individuals were not nobles or commoners first but Englishmen, Frenchmen, or of whatever nation - even though the dynastic and other interests of the monarch might diverge from and be destructive of the interests of his subjects. There was not yet room within that sovereignty for a civic and economic freedom and the right to participate on equal terms in the various goods of society.

The political institutions which these nation states built in the New World were not simply a replica of those they lived in at home. Immigrants might indeed take themselves to be exiles condemned to live in savage and unformed lands.⁴ But if they would have for themselves in America the ordered life they knew at home, they and their descendants had to build this order on a new ground. They had to subdue the wilderness, so that it would serve their needs and desires, and at length beyond these works of necessity to fashion a cultivated life not borrowed but their own. They brought with them the

³ The same may be said of South America but for simplicity the present argument has primarily in view North America (Canada, United States, Mexico).

⁴ They might, as in New England, also think themselves delivered from religious oppression and free to build a world better conformed to their beliefs.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

religions, institutions, culture of a particular European people. This model was receptive of further developments in the original but what they built in the light of this model was another and freer relation to it than was possible for those who had remained in Europe.

Those who had migrated to America could not revert to the state of a Germanic tribe which knew its culture in the medium of language and custom, not also in the common medium of thought. They had behind them the long formation by which they had brought together the inner world of belief and thought and their relation to nature.⁵ The humanistic and afterwards the rational-scientific culture of the modern age addressed itself to individuals as human and only secondarily as of a particular nation and language. That culture, as modified by the particular bent and character of the several European peoples who had part in the occupation was the model for the new beginning in the Americas.

First in this construction is not to build a particular nation but to establish in America the Spanish or French or British version of this common culture. There was room for many Spains, Britains, Frances in the New World. New Spain, New France, New England (with the other English colonies) are not names of particular nations but, potentially at least, of continental empires. The home countries fought one another over the domination and division of the New World. As the political powers passed from European nations to their colonists this general relation to a common culture remained. Colonial empires tended to pass into federations - not as alliances of nations, but as a twofold relation of individuals to the federation and to a particular state. In that division of sovereignty and of individual loyalty, the more general relation to the union gave stability also to the parts.

This transition of empire to a type of federation previously unknown is no doubt most evident in the case of the United States. Colonies which had gained but were in imminent danger of losing this independence found stability in a union which expressed more distinctly their common culture and institutions. They remain sovereign states, giving in common a part of their sovereignty to the Union. Individuals are subject to two coincident sovereignties. Inseparable from the Union is a sense that to it belongs all North America, at least between certain latitudes. However unjust it might appear to aboriginal peoples, to Mexicans or Canadians, the Union expanded as by a certain destiny into a continental empire. Virginia, New York or any State can be likened to a European nation state. But to Americans their relation to the Union was also essential.

The United States was founded explicitly not on race or language but on universal humanity. A common language, the descent of a large proportion of its population from British immigrants, the continuing British quality of its culture, do not make the United States a nation state. Universal rights, so far as they do not derive from the universal culture of the Roman Empire, became known through the revolutions of the seventeenth and eighteenth centuries in certain European nation states. It became evident in the present century how insecure is the relation of universal right to race, language and

⁵ The class structures which in an older world kept their hold tended to dissolve in the New World

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

cultural particularity in the nation state, where at least these differences are taken to be primary. The European union tends to purge the nation states of this ambiguity. The United States was built on this modern freedom; there are racial divisions and hatreds, but the impulse also to overcome them. Hence the capacity of the United States to absorb and convert to Americans in a generation or two immigrants from all nations.

It is less evident perhaps that the independent states of Latin American may not be equated more or less to European nation states. They are fragments, however, of former empires which imposed a common Spanish or Portuguese culture on native peoples, into which they have gradually been drawn while retaining something of their origins. The mixed populations of Mexico or Brazil are not nation states like Spain or Portugal but participate in a common European culture of a particular type. However much the mixture of European and aboriginal peoples varies among Latin American states, the pattern remains that they are fragments of an imperial culture or cultures and, without political unity, define themselves readily as distinct from the radically individualized culture of the United States. In their internal structure the principal Latin American states are federations, borrowing in their institutions from the American model. Even where there are unitary states these also by the general argument given should not be accounted nation states.

Is Quebec an exception to the rule that there are no nation states in the Americas? As New France it had become a continental empire. If after the Conquest the Quebec people retreated into themselves for survival and were largely excluded from the western expansion of Canada, they thought themselves at times to have a spiritual role in Canada and North America as against a British culture devoted to economic interests. What is called separatism at the present time is rather a demand for recognition as an essential and equal part with the British element in Canada.

The modern scientific and technical culture, detached from the conditions of its origin, has of course spread to all peoples and becomes a world culture. The free subjective spirit moving in this culture from its beginnings and the democratic institutions and concern for individual rights which developed from it have been received with more difficulty. The reception of this culture by most peoples has been on the basis of a native culture which continues with the new, the one side variously modifying the other. With the Japanese and some other peoples of the Far East the solidity and social cohesion of the old culture have aided greatly in their rise to near supremacy in the 'global economy'. In other cases, notably with Islamic peoples, a deep antagonism between the old and the borrowed culture simmers and is easily awakened to violent reactions. In general it is not yet evident how far the free subjective spirit of the western culture will invade the old and how far it will stagnate under the weight of rigid customs and immovable institutional structures.

In the United States and Canada this culture has room to unfold, neither enclosed within national communities nor modified by the alien spirit of other cultures. With modifications the same may be said of Latin America. There the Spanish invaders encountered splendid empires in Mexico and Peru. But the bonds attaching individuals to

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

these empires were weak and gave way almost on contact with the free resolute will of a few conquistadors. European culture in its Iberian form gradually took root in a passive enslaved multitude. In Canada and the United States the aboriginal people were largely thrust aside and those formed to a more general and freer relation to European culture were European immigrants and their descendants. With the end of the independent states in Europe people so formed have come into their own.

The European culture which has had its own unique growth in the New World has several variants according to the particular culture of the occupying powers. These variants differ primarily in the way in which they have integrated into an older state the subjective freedom of the modern age:

(A) Latin American states after two centuries of independence have not found a stable relation of free individuals to the state.

(B) In the United States the society of free individuals is taken to be primary, but is stabilized in relation to a state limited by the division of legislative and executive powers. The state sustains but does not dominate the society of free individuals. An unresolved tension occurs between individual freedom and a recognized obligation of the state to correct and complement the competitive economic society.

(C) In Canada the society of free individuals exists within the state. There is not the aversion of Americans to the state when it is felt to impinge on individual freedom. Canadians expect the state to provide for their general well-being through social programs etc. Unique to the Canadian federation is that it is composed at the same time of provinces, sovereign and equal to one another, and of two great European cultures in which the relation of individual freedom to the state is understood in different but complementary ways.

The interest of the present argument is to clarify the Canadian form of political freedom by drawing out its difference from the American - a comparison far more pertinent than the analogy of the European Union.

A. Latin American Polities

Of the Latin American form it is enough to ask why it has not settled into the stability of the American and Canadian structures. Spanish and Portuguese conquerors brought to the New World their version of a Renaissance Catholicism which had in it the ideal of a humane government of aboriginal peoples converted to their religion. The reality of the conquest was rather the enslavement of the aborigines to a landed aristocracy. Two centuries of liberal ideas and institutions have not eradicated an assumption that political power belongs primarily to an aristocratic military class.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Liberal ideas are the leaven of recurrent revolutions. Revolutions fail in that the enlightened concepts of individual freedom and equality and of democratic government do not inwardly transform an older feudal structure. There is not a strong society of free individuals, as in the United States, in which feudal distinctions pass into a general equality and differences of wealth and power are thought to be within that primary equality.

Political power may pass from those of pure European descent to wider sections of the mixed population. An underlying resistance of Iberian culture to the individual freedom of the American and French revolutions remains. In Britain and France the emergence of the free rational individual, and the society of such individuals out of an older communal solidarity was a native growth. These countries were the seat of the revolutions which transformed the substantial absolute state into the democratic state. In Spain and Portugal this revolutionary spirit was an alien force. In their colonies it was easily received by those who would be independent of a home country, or after independence, would overthrow oppressive regimes, only in its victory, to revert to another form of the old order. That in turn awakens discontent and new revolution.

The most successful of Latin American governments has been that of the PRI in Mexico - the government of institutionalized revolution, where popular government, or the appearance of it, rests on an antecedent agreement among the powerful elements of society and is not permitted to fall into extreme divisions. Presidents name their successors. A continuing revolutionary ferment falls within an underlying Catholic culture, accepting of authority, into which the aboriginal and mixed populations have been drawn. Resurgent democratic forces and NAFTA may destroy this arrangement. For good? Or only after a time to renew the former cycle?⁶

B. The United States

In the United States democratic government does not need a unified authority outside the process proper - a *deus ex machina* - to save it from its own divisiveness. The revolution does not need to be 'institutionalized', as in Mexico, but has an intrinsic stability. The political institutions settled upon in 1787 have been found adequate in essentials to the profound changes of two centuries in the mentality and interests of the American people.

Americans are deeply attached to their political institutions, which they always regard as a model for all peoples. At the same time they dislike government as ever tending to encroach on the freedom of individuals to pursue the good as they like. There is demanded at the same time a maximum of private freedom and, as required, a unified and

⁶ The Mexican polity is treated here in a few words simply to complete the structure of the argument. For a more extended treatment see F.L. Jackson, "Mexican Freedom; The Ideal of the Indigenous State" in this volume of *Animus*, to whom the writer is much indebted.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

effective political will. A strongly competitive divisive spirit is contained within a unified political community. How this relation of seemingly discordant elements is possible is a difficult matter.⁷

Derived principally from the institutions of a particular European people, of mixed Germanic and Celtic stock, American institutions are dissociated from that national particularity and able to attract to the idea of individual freedom moving in them people from many nations. American political history is not a national history but the working out on a larger playing field of those ideas of individual freedom and a democratic state which occupied Europeans in their national communities in the seventeenth and eighteenth centuries. Not that Americans, as Europeans, have not moved on to a later age. But Americans have not left behind them as something done with and of cultural interest only the problems of their origins and older formation: individual freedom as then understood and its changing relations to the state. The problem is not dissolved, as for Europeans, into an antithetical relation of linguistic communities to an individual freedom without intrinsic limit and direction.

The constitution of the American Union modified the British constitution of the time in that it divided the powers of government more radically, limited the executive powers temporally and derived it by election by the people. These and related modifications were agreed upon by representatives of the now independent colonies and ratified by their legislatures, representative in turn of their peoples. The constitution thus adopted might in a common language of the time be regarded as a 'social contract'. In a strict consideration this, as other forms of a 'social contract', does not found a state, which exists already, but defines the terms of assent of free individuals to its authority and builds this assent into its structure.⁸ The union of the thirteen independent colonies replaced their former common relation to Great Britain, removing from it the 'tyranny' of royal power which had been imposed provocatively without due assent of the governed.

The states of the Union, which had already existed for as long as a century and a half, modified their institutions similarly. The formation of the federal constitution is of peculiar interest as revealing distinctly what is in these modifications, in particular limits of a contract theory of the state. The 'social contract', however variously understood, assumes a voluntary association of individuals in a system of cooperation. It overlooks that the individuals who thus choose to cooperate are already in a political community which the 'contract' qualifies but has not invented: before as after the 'contract' the state had power to make and enforce laws, for the good or detriment of the people, to override the particular ends individuals or subordinate communities might set for themselves. The state is not a voluntary association, but, if a state of a free people, protects the rights and

⁷ The constant problem of the older modern political philosophy which would find place for private freedom within the state. Without, as with Marx, Mill, etc. making the state a function of private freedom.

⁸ For this relation to be evident the construction of society from an antecedent state of nature must be seen to belong to a subjective reflection without historical objectivity. So far as his standpoint permitted, Hume already had a sense that this was so in calling the contract a 'fiction' (*Treatise*, Bk III, Part II, Sect. 1: Of Justice). But it is a rational construction (Rousseau, Kant, recently Rawls).

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

freedoms of its members, and inclines them to prefer when necessary the good of the whole political community to their private ends and interests.⁹

The American people both during the War of Independence and in their first attempt at a union in the Articles of Confederation experienced fully the limits of a cooperative federalism. The Union was not on its own a state capable of carrying out what was expected of it - to consolidate the independence won in a difficult war, internally and in relation to foreign powers. Individuals and communities closer to them had reason, as ever, to prefer those nearer to a more remote interest on which their freedom principally depended. The War however and the imminent dissolution of the federation awakened a sufficient sense of their common good in the American people to devise and accept a federal state in which sovereignty and coercive power and the assent of free individuals - an effective state and private freedom - found a firm and stable balance.

The American Union is not derivative from particular communities in the manner of the European Union, but is directly the common state of all Americans.¹⁰ In this relation the founders of the Union agreed in fact to a political relation beyond the scope of a contract, in which a priority of the contracting parties, in this case the States, is assumed. For individuals this relation was equal to that which bound them to a particular state. States and the Union had a shared sovereignty. The Union as the common state of all Americans and that which defined their relations with other states, had a priority over the particular states. As the States were not prior to the Union, once founded, so were they not subordinate but shared a coincident sovereignty distinguished by the powers appropriated to each.

The Union has also another primacy. In its first invention it was the product of a profound reflection: Americans in that relation came to know what their freedom was, not as a fact only, but in its general form. The tension between the free movement of private interest and the common good is most evident in that relation. At that level conflicts can be brought back to the principles of the Constitution and the American idea of freedom. It falls likewise to the federal state to resolve the conflicting interests of States according to commonly accepted principles.¹¹

European states in the time of their full sovereignty when their interests and ambitions collided beyond negotiation resorted to war as the final arbitration. In the American Union, with one great exception, divisions among sovereign bodies have been resolved peacefully. There is present effectively, as not in that Europe, a common political state and a common political will, to which such differences give way short of war. It only

⁹ That the state is not a voluntary association of individuals Aristotle showed against the subjective philosophy of his time: man is by nature a 'political animal', who has only as much of individual freedom as the state can contain. Contemporary Aristoteleans (A. MacIntyre, etc.) revive that teaching in some form. The enlightened modern, however, can only tolerate a state in which there is room for a society of free individuals. The priority to society of such a state is both proved and resisted in the course of American history.

¹⁰ *The Federalist*, XLV (Madison).

¹¹ *The Federalist*, IX, X (Hamilton).

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

extended its own experience at home when twice in the present century the United States persuaded the great powers to initiate a world government in the interests of peace.

The American federation is a relation of sovereign States to a sovereign Union, but that as ordinarily viewed from the standpoint of free individuals. The Union is the ultimate support of 'government of the people, by the people and for the people'. Political power derives from the people who made and can amend their institutions. But the constitution on which the self-government of free individuals depends, so far as it expresses and gives objective form to their freedom, is in a proper consideration only amendable in its essentials if the amendment is thought to be more adequate to that freedom. The individuals who constitute for themselves a state are 'created equal' and have rights in virtue of that equality, among others, to 'life, liberty and the pursuit of happiness'. Government exists to support and make room for these 'inalienable rights' and has thus a corresponding stability in its primary structure not subject to arbitrary amendment.

The equal individuals having a common end in their individual and mutual well-being or 'happiness' are assumed to be already a 'society' before they have instituted a political order. The free individuals of that society may, with Hobbes, be regarded as in a state of war as soon as they compete for the necessities of human life. So regarded, they are actually free only through the state. They may also be regarded as having through their rationality power over the conditions of their needs and well-being and thus be accounted free prior to the state. So variously Locke, Rousseau, Kant and others. The history of the American republic illustrates amply that neither the idealistic view of the free individual nor that which sees him enslaved in a struggle to survive and advance himself in competition with others is true by itself, that both are abstractions from a comprehensive view. Abundant resources and an open frontier invited individuals to seek their good with the least reliance on the state. Urban life and an industrial economy at length contracted or nullified that individual freedom, unless the state intervened to provide a tolerable equality of opportunity and support for those whom fluctuations of the economy made destitute. The dependence of 'society' on the state thus became less formal, and the assumption that 'society' was antecedent to the state more dubious.

The political history of the United States, considered in its essentials, is of the development and clarification of the relation of individual freedom, and the society of free individuals, to an underlying political community. This development remains incomplete. The tension between a liberal state which took on itself to assist individuals directly according to their need and the conservatism which would leave the maximum possible to the competitive society is now at a certain extreme. There is to be an end to 'big government', at the same time as more is expected and required of government to regulate environmental and other basic conditions of human well-being.

The development is not to a European socialism which at the extreme in Marxism obliterates the distinction of state from society. Nor is it the chaotic capitalism following on the breakdown of Marxist regulation which is not a 'civil society', that is a society of free and rational individuals. Nor again is its terminus a 'global economy' beyond the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

scope of regulation by nation states. The developing relation of society to state in the United States holds firmly to this difference: as the well-being of individuals becomes more fully the interest of the state, the demand remains that these individuals pursue and find their 'happiness' by their own talents and exertions, and that they have a fair opportunity to do so. The competition of 'civil society' is for individuals the way to their good, the political community the end, but an end partially concealed. The way to the community sought is not broken by an endless regress as in the European Union and the necessity thus imposed of choosing between cultural community and individual freedom.¹²

What is the 'free individual' of the American republic and of the eighteenth century 'enlightenment' which is its origin? Hume in his analysis of the free individual discovers a moral sentiment whose object is the 'useful' and the 'good', his own and that of others. The individual who has in himself this unified relation to what serves his needs and desires and to himself as their end, and a like interest in realizing the need and the good of others, is the 'free individual', and the community of individuals so moved is 'civil society'. Community and individual freedom belong together. The many arts by which individuals satisfy their needs and desires are, as beyond the capacity of each for efficient production, divided among them. They thus create an economic society in which they compete for its goods. But underlying the competition is the original moral structure, according to which ideally in seeking one's own good one seeks also the good of all.¹³

The general structure of this society can perhaps be made evident most directly if one considers its origin in the socio-political structure immediately antecedent to it. Montesquieu defines the moving principle in individuals in relation to the consolidated monarchies of the early modern age as 'honour'. By 'honour' he meant a relation in which particular needs, desires and interests of individuals were centred in service to the monarch and in virtue of that interest given up as required. 'Honour' is the relation of individuals to the unified state in which feudal privileges have been subordinated to the political community. 'Honour' Montesquieu distinguishes from 'virtue' as the prime motive which can hold together a democratic state. Through 'virtue' the individual takes to himself that unity of needs, desires, interests, which in a monarchy he received from above by his complete loyalty.¹⁴

The 'liberty' of the 'virtuous' man is to be able to do what he ought to do, what agrees with that rational spirit he has in common with others.¹⁵ It is the principle of 'civil society', and the polity of a monarchic state, to become democratic, has to be so modified as not to impede the society of free individuals. The 'political virtue' of the free

¹² The difference of society from the state does not collapse as for Marxists into either anarchic freedom or the rigid domination of a party. From the side of the existential individual even so acute a philosopher as Heidegger did not distinguish American liberalism from Soviet Marxism.

¹³ Hume, *Treatise*, Book III, Part III, Sect.1.

¹⁴ *De l'esprit des lois*, III,iii; III, vii.

¹⁵ *Ibid.* XI, iii: "...la liberté [sc. politique] ne peut consister qu'à pouvoir faire ce que l'on doit faire, et à n'être point contraint de faire ce que l'on ne doit pas vouloir." This universal relation of individuals to the constitution is the basis of their confidence in the laws and the expectation that they will generally be obeyed. Cf XII, ii.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

individual was this same rational freedom as operating in the legislative power of the state. By itself in that relation political virtue would be subject to corruption through the intrusion of special interests. For those who represent society in the legislative branch, as those who chose them, are not only moral or rational but serve as well many interests, their own as well as others. The executive on its own easily passed from the will of the people, as embodied in laws to which they had assented, to an arbitrary and tyrannical personal will. The correction of this twofold tendency of the state to corruption and tyranny was that it be controlled through their representation by that part of society which had imbibed the spirit of the modern age and were certain they could regulate their affairs in their own and the general interest. But they had to be bound to that intention by an executive power, itself obliged to act lawfully. The moral virtue of this class, transferred to the state as political virtue, made possible a common rational freedom. On the ground of their common rationality individuals had rights to their freedom as against arbitrary intrusion from the side of the state.¹⁶

In England this beginning of modern democratic government was confined to a propertied class and coexisted with an aristocracy of birth and class gradations inconsistent with the universal equality and freedom contained in its principle. The monarchic unity which the state had attained in subordinating feudal freedoms to itself continued in the new division of powers. Government was not so far in the possession of a society of free and equal individuals as to be "of the people, by the people and for the people". In the United States the idea that government was instituted by free individuals for their good had much less to oppose it. The religious freedom of a largely Protestant people had passed into the inner rational freedom of 'enlightened' individuals in their worldly relations. And in America it was incomparably more open to free and equal individuals to seek their good independently. The community or society of such individuals appeared primary, a unified sovereign state the source of tyranny. The divided power of the state might be unified against an external enemy in the President as Commander-in-Chief, but the Presidential office was itself limited temporally and derived from the people.

The American federation appeared to early observers to be a weak state which could hardly survive deep divisions among its constituent parts, should these become actual. The society of free individuals was minimally dependent on the federal state.¹⁷ Its members had established loyalties to their particular states. In what did a stronger loyalty to the federation consist, which could sustain whatever centrifugal forces might work against it? In this, that the federal state expressed most purely that 'virtue' which was the moving principle of democracies, the sense of freedom as against particular and divisive

¹⁶ Americans, regarding the state more from the rational self-relation of the individual (Jefferson) or of individuals in their economic relations (Hamilton) than from their common rationality conceived the division of powers, which made political liberty possible, more loosely than Montesquieu. They attended less to the primary unity of the legislative and executive powers, on which Montesquieu is not far from Rousseau's doctrine of a primary indivisibility (*Du contrat social*, II, II), and did not concur in his consequent reflection: "Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle." (*De l'esprit*, XI, vi): the judicial power is that part of the executive which interprets the laws in relation of particular cases.

¹⁷ Notes 10 and 11 *supra*.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

interests in the individual and the society of free individuals. The following stages may be discerned in the development of the recognition of this fact:

(1). The society of free individuals is unable short of war to maintain their common relation to the federal sovereignty when centrifugal interests take the form of a division between a slave and a free economy, of a different social order and understanding of the principles of the Revolution. Through the Civil War is awakened in Americans the sense that they are one people, that the free society has its ultimate support in the Union, which as able to sustain the deepest divisions is henceforth regarded as indivisible. For individuals in this relation natural interests are subsumed under virtue or the inalienable rights of the Revolution.

(2). On the basis of this final unification, the society of free individuals can in the second stage react to the negation of its freedom in the inequality and dependence of an industrial economy. The political relation of society is so far strengthened that the state gives support to the independence of individuals against the power of wealth and would restrict the influence of private interests in the election of representatives of the people. The individuals of society are to be moral and their state is the proponent of morality at home and abroad. In compensation to this strengthened universality of the individual, pragmatists would found the relations of individuals in society on their experience as natural and embodied. Neither morality nor pragmatism sufficed to save the real freedom of individuals against fluctuations of the economy. To stabilize the freedom of its members a new relation of society to the state was demanded.

(3). The state which would secure the freedom of individuals both as rational agents and in their natural needs threatened the independence and assumed priority of society. At the same time society could not do without a state to save it from its divided freedom. It might be proposed from the side of the state to eliminate or reduce to a minimum poverty and other natural ills. The bureaucratic apparatus which would accomplish these works was oppressive to the free society. Individuals in relation to 'big government' might forget the rational virtue of the free society and, while they became consumers' of its bounty, rebel against its authority and that of the state, against the inequalities of an ordered freedom.

The 'conservative' society, which would diminish the state to find stability against the 'liberated' individual for whom everything is as he chooses, falls back on an objective good and makes contact thus with the state it rejects. The 'liberated' individual ambiguously destroys the distinctions of society which extended its equality to those excluded from it.

Unknowingly he also in this way does away with what distinguishes society from state, and at the same time with his own arbitrary freedom.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

(B-1)

In the first decades after the adoption of the Constitution there were a number of secessionist movements in the United States. The rights of States as sovereign entities in relation to the federal sovereignty were indeterminate. Not that the Constitution was in fact unclear on this relation. The Union was not an association of States which their citizens had fully consented to join, from which they might also freely secede if that was the will of their people. The Union was the common state of all Americans individually, over whom it exercised sovereign authority directly in the powers given it by the Constitution. This common sovereignty it plainly did not fall within the particular sovereignty of a State to nullify. Madison commented on one such attempt: "For this preposterous and anarchical pretension there is not a shadow of countenance in the Constitution."

The Constitution was clear that States had no right of secession but only over time did the adopted constitution become established in the thought and habits of Americans. The original States of the Union had been in existence as long as a century and a half, and to them their citizens were accustomed to look for the protection of their interests and as the basis of their political freedom. That in the powers assigned to it the Union was a state, and that its legislation was directly binding on all individuals, was only to be known actually and fixed in the political habits of Americans through the conflicting interests of States and regions and their containment and resolution by the federal state. The constitution of a free people, if well designed, is a structure which permits a resolution of even the most difficult divisions acceptably. The habit of accepting its authority and of recognizing in it the objective expression of their freedom one should expect to be difficult, a federal constitution, such as the American and the Canadian, is only well established when the loyalties of individuals to the whole and to a sovereign part coincide and are articulated according to the division of powers.

At that point it can also become evident that the relation of individuals to the federation has a precedence over that to the partial sovereignty. For in that relation conflicts among sovereign parts have the ground of their resolution, and the relation of the principles of the constitution to individual freedom is there most evident.¹⁸ The nation states of Europe in the time of their independence when they could settle on no agreement to their differences sought a resolution by war. A federation which is not an association merely of sovereign parts, such as the European Union, but a common sovereignty having particular sovereignties within it, has the great virtue that every difference among the parts can be resolved peacefully. The Civil War as the great exception to the strength of the Union to sustain differences, belongs to and completed the formation of the American federation accordingly. In foreign relations, while economically aggressive, the United States has been mostly free of the tendency of the former European nations to universalize in empires their particular sense of themselves. Instead it has promoted a structure of world government to make wars unnecessary.

¹⁸ On the New England Convention, S.E. Morrison, *The Oxford History of the American People*, Oxford, 1965, 396-7.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

It was at first not evident to Americans, whether they should understand the Constitution as giving to individuals the right to pursue their good independently with the least intrusion possible of the state into their freedom or as unifying and protecting the general interests of society. The formation of ordered government under the President might seem to followers of Jefferson hardly less than a return to the tyranny of a king. To followers of Alexander Hamilton, Jefferson appeared an anarchic Jacobin. That the free individual having in large measure power over the conditions of his well-being and the state as supporting a society of such individuals, who in the means to their good were dependent and competitive, as well as free, were abstractions became clear as Republicans in the realities of office were found to differ little from Federalists. The sense of the division of powers in the Constitution was at the same time to check the arbitrary power of a sovereign and to ground the rational freedom of the individual. The independent individual and the monarch, thus constrained by the legislative power, were complementary not exclusive.

This unstable relation of individual freedom to the federal state on the occasion of the Sedition Act of 1798, which in restricting seditious speech was taken to exceed the power of Congress, gave rise at least to the beginning of a states' rights theory of the Constitution. A claim was made in the "Virginia and Kentucky Resolves" that States might interpose their authority between individuals and the federal state to declare void and demand the repeal of federal acts they judged to be unconstitutional. These documents, one the work of Madison, the other of Jefferson, did not assign a right of nullification to the people of a single state. But if the peoples of a number of states concerted in their demand, might this not be taken as equivalent to the will of the people as the ultimate source of political authority? But there was in this doctrine an assumption that the Union was a contract among states which they might revoke.

Stronger formulations of doctrine were to follow, not as defending individual freedom against the federal state but in defense of some regional interest. The war of 1812-14 was of particular interest to the states bordering on Upper Canada. To New England it was of no interest and the ruin of its commerce. A proposal to draft a new constitution protecting New England interests, to submit it to the original thirteen states, to go their own way if it were not accepted, did not prevail at the New England Convention of 1814. The disaffection on that occasion subsided with the termination of the war.¹⁹

The original Republican and Federalist parties - the parties of Jefferson and Hamilton - passed into Democrats and Whigs, both committed to maintain the Union. But the division of interests became more intractable as North and South diverged farther from each other with a rapid growth of manufacturing in the one, while the other drew its wealth in great part from the export of cotton grown by slave labour. The interests of the new States of the Northwest diverged from both. The North required tariffs for the protection of its industries; tariffs against British goods threatened the export market for Southern cotton. Other underlying differences gradually emerged that between free and slave states. The South, to retain its political power in Congress, would extend slavery to

¹⁹ The New England Convention, Morrison, pp. 396-7.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

the new states of the West; the North if it could not abolish slavery, would keep it within existing limits.

If the South could not maintain its interest politically within the Constitution, the only line of defense remaining appeared to be the states' rights doctrine: the Union is a compact among the sovereign States and within the Union they retain fully their former sovereignty. The federal government is only the agent of the States, which are therefore competent to annul on their territory any legislation they judge to exceed its powers.²⁰ Against a tariff act, South Carolina in 1832 sought to give effect to this doctrine: a convention called by the government declared in the name of the sovereign people that the tariff act was not authorized by the Constitution of the United States, was null and void on its territory and not binding on its agents.

The counter position was thus formulated by President Jackson, though a southerner and friend of states' rights: "whether it be formed by compact between the States, or in any other manner, it is a government in which all the people are represented, which operates directly on the people individually, not upon the States. Each State having parted with so many powers as to constitute jointly with the other States, a single nation, cannot possess any right to secede, because such secession does not break a league but destroys the unity of a nation." Both sides made preparations for war, but a compromise on the tariff act averted the crisis for the moment.

Underlying the divergent economic interests of North and South was a different concept of liberty. The free individual of the Declaration of Independence - the enlightened individual - had potentially in his self-relation the means to his to own and others' well-being. His freedom was compatible with the Union which in its relation to the divided powers of state was ideally capable of resolving all conflicting interests of the society of free individuals without the imposition of an extraneous tyrannical will. The type of the free individual had been for Jefferson the independent farmer who in great part had in his power the means to his well-being. This 'enlightened' freedom belonged essentially to all men as expressive of their common rationality. Jefferson and others of his clan might incidentally have owned slaves. In the subsequent development of the Republic, in which the whole relation of society with its conflicting regional interests came into view, it was made evident that the particular freedom of a slave-owning class was incompatible with the Union.

In defense of slavery the argument of the ancients was advanced that a free and cultivated society was not possible without the labour of an enslaved class. The dependent employees of Northern factories were virtual slaves. In this defense the 'enlightenment' concept of freedom was forgotten, that the free relation of individuals to themselves and others did not abstract from but was realized in the useful labour which had formerly been thought servile. An aristocratic freedom resting on slavery retreated from the principles of the Revolution and could only live with a modified Union.

²⁰ Calhoun's Exposition of 1828, Morrison, 432..

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

While the South by this doctrine was only conditionally attached to the Union, a fanatical spirit in the North began to demand the emancipation of the slaves as the fulfilment of the Revolution. To this demand was opposed the attachment of Southerners to their sovereign States. The war between these immovable forces made evident what lay in the doctrine that there was not right of secession from the Union as directly the state of all Americans. In that relation the society of free individuals had the objective constitutional structure in which democratic government - government of the people by their own agency and for the common well-being and the reality of their freedom - was possible. Through the primary concurrence of individual freedom with the operation of the federal state the Union was indivisible. Individuals might again find themselves unfree in the free society, but from that time with the sense of themselves as one nation - not as an association only of sovereign communities.

Through a development which had its completion in the Civil War the United States, from being a union of sovereign parts, became a nation.²¹ 'Nation' is used of course in an extended sense, in which it refers not to a linguistic or racial community but to a unified democratic community to which individuals of whatever origin may belong as adhering to the rational principles on which it was founded. Particular sovereign states continue within the common state but without a temporal or other primacy on which a right of secession might be based, if one assumed that the union rested on a contract of some kind among them.

Separatists in Quebec argue on the same assumptions with only the difference that the contracting parties - the 'two nations' - are said to be nation states - linguistic and racial communities naturally separate and thus incapable of constituting together a 'proper' state, nation or people. These assumptions apply no more to the Canadian than they did a century and a half ago to the American federation. But in neither case is the formal constitutional argument sufficient to preserve the federation unless the common sovereignty is known and felt by individuals to be congruent with and the foundation of their attachment to a particular sovereignty. How Americans came to recognize the federal state as the object and support of their democratic freedom is exemplary for Canadians, who in this regard are still at the first stage of constitutional development.

The relation of the American state to the society of free individuals who are said to found it is somewhat clarified in the first stage of its development. By the separation of powers and by the Bill of Rights individuals are at the same time to have stable government and protection against the tyranny - the arbitrary will - of a king. The Republic once founded was threatened much less by a tyranny of the executive power than by the conflicting interests of society which at the extreme government found impossible to resolve and contain. The Union could not be saved without civil war and in the direction of that war a virtual unification of the powers of the state and the President as Commander-in-Chief. To that unification corresponds on the side of free individuals a sovereign popular will supposedly free from the special interests of the same individuals

²¹ "Before 1861 the two words 'United States' were generally used as a plural noun ... After 1865 the United States became a singular noun." J. M. McPherson, *Abraham Lincoln and the Second American Revolution*, Oxford, 1991, viii.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

in the competition of society. The popular will and the unified will of the political community coincide. In that coincidence a priority one to the other of the will of the people and the unified political expression of it vanishes. But the relation of the one side to the other is not fully clarified so long as the particular divided interests of society fall outside that point of coincidence. It is a striking aspect of American political life that in a long series of presidents, many pedestrian enough in character indeed, a few heroic figures continue to hold the affection and respect of the people. In these heroes who stand at the beginning of the Republic and the principle points of transition in its history the American people appear to find a political embodiment of the popular will, thus a precedence of state to the divided will and interests of society. Eminent among these heroes is Abraham Lincoln with whom the Republic passes from problems about its unity and survival to divisions within an established and unquestioned unity.

(B-2)

In the decades following the Civil War the rapid growth of an industrial society tended to make obsolete the concept of the independent individual as the bearer of American freedom. The means to his happiness or the reality of his freedom was a system of economic relations controlled by the rich and powerful. One might go West and begin anew a more independent life, until the same confining structures followed - and eventually there was no more open West. The inequalities, the poverty and uncertainty of life for many might seem to demand some form of European socialism where the state would attempt to equalize the effects of an unregulated capitalism. Americans, although the Union had become a nation or people, would maintain on that basis a freedom of the individual in society. A socialist assimilation of society to the state was intolerable. How could the sense of individuals that this 'happiness' or success in society depended principally on themselves, was the realization of their freedom, be sustained in the dependent situation of workers in a capitalist economy? Defenders of slavery in the South had argued that the condition of factory workers in the North was hardly different, and might be worse, than that of slaves. The response of reforming presidents in what is called the 'Progressive Age' was partly to restrict the tendency of corporations to combine and eliminate competition, saving thus something of an equality of opportunity. For the 'enlightened' freedom of the Revolution demands that the individual, potentially free in his rational self-relation, have in society conditions which permit a tolerable realization of that inner freedom.

Some part again of a solution was to restore to individuals the sense that the state was not, as appeared, the instrument of powerful interests but served the popular will, that is, all individuals as equal. To that end the election of federal senators was taken from State legislators, subject to corruption by powerful interests, and given directly to the people. The introduction of 'primaries' again was expected to weaken the control of parties and the special interests they commonly served over the choice of candidates for election to Congress.

These and like reforms reflect an altered relation of society to the state. The virtue of the independent individual pursuing his good had become a common morality, and the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

relation of individuals to the state was on the basis of this morality. The state in this way imparted at least an inward and formal freedom to individuals in the capitalist society. Americans thus abstractly unified knew themselves as among the great powers of the day. They took part with the European nation states in the work of dividing the world among them. But they also distinguished themselves as moved, not to dominate, but to promote among others their unique freedom. When the European powers from the competition for empire turned on themselves in the First World War, the United States in this moral temper determined the victory. President Wilson would establish a moral world order. But for this flight neither Europeans nor his countrymen were prepared. The Europeans knew only their national interests; the real interests of Americans prevailed over their moral elevation.

The division in this moral politics was nowhere more conspicuous than in the relation of the United States to Latin America which it began to dominate at this time. Partly Americans intended to bring to Cuba and other Latin states democracy and the application of modern reason to their affairs. But of the goods flowing from this 'enlightened' reason Hispanic culture is not easily receptive. They brought also an economic domination which developed and used the resources of Latin countries in American interests. And for the protection of these interests they preferred compliant and dependent dictators to democratic forces better attuned to American political ideals.

To American culture of the time belongs also a correction of this universalized individual freedom. The true subject of American freedom was rather to be thought the 'pragmatic' individual: the living individual who shaped his world not in the light of universal ideas and ends but empirically in structures found to serve his needs and desires. A realization and concretion of the individual as moral or universal, the 'pragmatic' individual could not on his own find his way back to that universality. The inalienable rights of the Revolution and the principles of the constitution were not to be discovered from that standpoint but only shifting, evolving social structures.

For James or Dewey, who were formed and lived in the universality of a scientific culture, the consequences of Pragmatism for that culture might not be evident. One can look for the discovery of freer social forms in the light of growing experience. But going over themselves to the standpoint of their discovery they could not but agree with Richard Rorty that the 'pragmatic' individual is cut off by an ever recurrent negativity from and ascent to the universal. The 'enlightened' freedom of the American political tradition would have to be thought illusory.

In this second state the Republic appears to founder, as for different causes, it came near to ruin in the first. What is lacking here is a relation of the 'pragmatic' individual to the universal principles of the Revolution. The resolution in this case also is through a clarified relation of the free society, taken in its dividedness, to the state.

The conversion of Americans at that time to another concept of the state and its relation to the society of free individuals had first a negative side. The moral optimism which had carried them through the First World War showed itself in the war and its

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

aftermath to be inadequate to the reality of life. From the universality of institutions individuals turned to relations seemingly truer to life. If the 'liberation' from an abstract morality was then only at its beginning, a rebellious and dissatisfied sentiment pervaded the general culture.

This cultural shift was played against the background of the old order - of a capitalism confirmed by morality. The break between this order and real life was imposed by the Great Depression. If the relation of the state to society be that which came into being in this second stage, President Hoover rightly concluded that nothing could be done politically about the unemployment and misery of a large part of the American people who were displaced from the free economy. State intervention would be immoral. If the state were to respond to the need of the impoverished, there would lie in this response an assumption that its concern extended to the conditions of life, which, not attended to, made meaningless the rational pursuit of their 'happiness' by individuals. Corresponding to this obligation on the side of the state would be a new dimension in the rights or rational expectations of individuals - a new concept of their freedom.

The American state in thus overreaching the free society and setting conditions to its operation, in sustaining the whole interest of individuals, may be said to have bridged in principle the division between the pragmatic individual and the free rational individual of the Revolution. The intention was not, as in Marxism, to annul the difference or assimilate society and state to each other, but, what is more difficult, to save the free society through a new relation to the state.

(B-3)

Franklin Roosevelt initiated a change in the understanding by Americans of the ends of government and of their freedom such as has given him a place among the heroes of the republic - even if this third revolution remains incomplete and of uncertain issue. There are still those after fifty years who propose to undo the New Deal, but only if somehow its benefits can continue on their own without 'big government'. That the whole material interests of its citizens was the proper concern of government had in a gradual process since the mid nineteenth century become accepted doctrine in the more advanced European states. This revolution had other impediments and took another course in the United States than in Europe. Conceivably in the end it may be better established there than in Europe, where its causes have long been obscured in a dichotomy between nationalism and the economic society.

In the United States the argument has not been as in Europe within nation states which had appropriated or supposed they had appropriated the revolutions of the seventeenth and eighteenth centuries, and thus had the affairs of civil society within their scope. The argument has been instead between the society of free individuals, which would maintain its priority, and the tendency of a state whose object was the concrete and unified interest of its citizens to assume a primacy over society. It is not that Roosevelt or Americans since his time have ceased to take their stand on the side of society and to regard the revolution from that point of view. But the logic of the revolution has itself tended to

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

undermine the ground on which they stand. Thus what seemed stable in society has become unstable: the institutional relations of individuals have fallen into an extreme turmoil, and many ask whether the Republic can long survive.

In the present argument the essential difference between society and the state which encroaches on it is that in society, although the individual in his rational freedom and in his divided relations to a natural world is taken to be one individual, this unity is only partially explicit. A multitude of individuals as rational make up a society, but they are also competitive and divided. The state is called a complete community in the sense that it has room for the divisions of society with a unity of ends. The New Deal brought into the free society a unity of ends, in that it proposed to complement its independent operation when this does not extend to the whole range of human needs, to regulate *ab extra* in various ways its natural fluctuations, to conform the justice of the courts to the needs and economic rights of individuals and so on. So far as these interventions were like a *deus ex machina* and did not take into them the order of society they must be disturbing to that order and the sense individuals had of their freedom through that order.

The social reforms initiated by the New Deal can appear to be only an addendum to the society of free individuals when it fails of itself to meet the needs of its members. The right of individuals to what belongs to their general well-being and development may appear to have its realization ordinarily through participation in the free society. But the seeds were sown for a revolution in the relation of society to state and of individuals to both. A society, John Rawls observes, having in mind the American society, is neither an association nor a community having a unified end. An association one joins from an interest in its purposes, and may leave if it no longer interests. The state, according to a long tradition, is thought to be a 'complete society' uniting in relation to itself the diverse ends of its members. A society is a community continuous over generations, into which individuals are born and in it pass their lives, in which individuals pursue a plurality of goods but not one unified political good.²²

But in the New Deal is implicit such a unified relation of the state to individuals having in themselves relation to a comprehensive good. The pragmatic individual, in whom abstract morality and that from which it abstracts are united, is potentially a political animal, regarded from the side of life and nature. There is in him a sense or intuition of a unified end underlying the process of his development. The experience of the limits of the pluralistic competitive society in the Great Depression awakened this political dimension and made individuals so constituted receptive of the New Deal, just as this has as the subjects of its reform individuals having in themselves an intrinsic principle of development of whatever is in them.

This incipient relation of the individual to a state, in which he overreaches his relation to society, has in part a negative aspect. Institutions shaped on the assumptions of the competitive society can be felt unfree. The family, as nurturing the independent individual of society and as reflecting this relation in its discipline, gave way to a family

²² John Rawls, *Political Liberalism*, New York, 1993, 40-43.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

unified by a more immediate affection. This weaker bond was then less able to contain the divisive ambitions of society. A radical subjective freedom, indifferent to natural distinctions, promoted as alternate families a number of socially destructive relations.

The division of parties in society tended to extremes. To 'conservatives' in the time of Joseph McCarthy 'liberals' might seem virtual Marxists - destroyers of the free society. In the 'political correctness' of the present time it is hardly safe to be a conservative. Only by moderating extreme positions within themselves do parties win support enough from the people to govern. Those who hold, or would hold, office are subject to a negative criticism by journalists who expose every deviation from a political virtue they would destroy.

Society itself has become more intensely competitive, as institutional loyalties have dissolved and success or survival depends on abstract criteria. With a weakening of social bonds individuals become more easily an end to themselves for criminal and other antisocial works. The noble work of those who liberated blacks from a submissive and subordinate place in American society or the attempt of liberals to create a 'great society' in which there would be no more poverty or urban slums - these and similar works ended otherwise than intended. The freedom of those liberated had not in it generally an intrinsic order and direction. The ghettos became more violent and drug-ridden, cities dangerous to live in.

The freedom which a liberal state has brought to individuals is widely the banality of the consumer society with its endless satisfactions and nothing for the rational spirit. In the 'consumer society' and the technological apparatus which caters to its needs and passions, the rich grow richer and the poorer find it hard or impossible to hold their ground. Where are the equality and rational independence to which all at last are to have been liberated? The end in which that equality and their natural goods might fall together?

The economic society which the state was to regulate for the good of individuals is to be deregulated and have a life of its own as a 'global economy' ever expanding in an inexhaustible market. But it is not the former society which has as its mover the free rational individual. Its god is change and those flourish who produce and keep up with the change. Neither in the individual nor in society is there a centre which can dominate change and bring order into it.

Such most briefly is the negative side of this third stage in the Revolution, which is not accidental to it but the consequence of its pragmatism. The pragmatic individual, who has implicit in him relation to a comprehensive good, is at first the interest of a beneficent liberal state in its external and material relation and not in its inward rational direction. The individual is in this way freed from the moral or rational society, but to a freedom which knows neither that order nor a new integration of it with the state.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Americans might - Richard Rorty tells them they must²³ - remain with this result and abandon the ideas of the Revolution: that all men have inalienable rights - rights pertaining to them not accidentally but in consequence of their rationality; that as rational they are not simply involved in or enslaved by the great economic system by which together they undertake to satisfy their needs and multiple desires, but in and through it they have the right to seek their happiness, that is, the sense that this system is for them, that they are free in it. The 'enlightened' freedom of Americans has always had in it this unification of ends, whereby free individuals are not simply a multitude but have with others a common end and are a society. The logic of this unification has become more evident from one stage to another of the 'enlightened' freedom. The primary sense of the development indeed has been that this freedom has become clearer and more stable, as belonging to a rational self-consciousness.

When the free individual gave body to his morality as the pragmatic individual, he had hold virtually of the connection and transition between his involvement in the many ends serving his needs and transient or more stable desires and his universality. The many ends were for him as an endless but seemingly progressive process. Rorty, imbued with contemporary European thought, attends to the ever unsurmounted negativity in this process and pronounces a comprehension of that recurrent division, and thus a referring of the many ends to one end or the good, to be impossible. In that he is the victim of an alien logic and has forgotten that 'Enlightenment' even in its less developed forms knows this unified relation to self-conscious freedom of what is other than itself, and which appears to be only a disparate multitude.

The positive side of this third stage in the American revolution is that society is drawn farther into this unity of ends or the state, to the point where the assumed priority of society loses all stability. For the free individuals of society this movement can appear anything but positive - a recurrence of the old tyranny of the state against which Americans gained their independence. But the movement here is from the side of society, and the state which threatens to emerge from it is a more unified democratic state, which does not detract from but gives stability to the society of free individuals. In the various forms of 'enlightened' society the animation is from individuals who seek their good through particular ends. The competition of individuals in the advancement of their particular ends is within a society or community which it divides. Individuals in the 'enlightened' society know themselves as free so far as this division does not alienate but is known as their own. But the community, and thus the recognition by individuals of their freedom, is incomplete so long as the division and the competition are taken as primary and not comprehended in the community. That this is true Americans before 'Enlightenment' knew in the medium of their reformed Christianity, and the moving spirit of 'Enlightenment' from the first was to give universality and historical existence to the freedom of the 'elect'.²⁴

²³ Richard Rorty, "Pragmatism, Relativism, and Irrationalism" in *Consequences of Pragmatism*. Minneapolis, 1982, 160-175, esp. 165f.

²⁴ *Infra*.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The present perplexities of the Republic have awakened a great deal of reflection among Americans. Within the perspective of a society engrossed with the goods which an ever more sophisticated technical economy provides for the satisfaction and anticipation of every need and desire the 'enlightened' tradition of a rational and practical freedom is lost from sight. But that tradition also remains alive among Americans, for whom the Constitution and their democratic freedom have an almost sacred quality. The need, practically and for political thought, is to bring together that rational tradition and the irrational culture of the present time. How is contemporary individual freedom, in which rights are detached from their universal and rational basis, to be thought continuous with that tradition?

In regard to these and like questions the writings of John Rawls are of particular interest. Rawls would revive in a contemporary context an old doctrine that the state rests on a 'social contract', and has in view the whole 'enlightened' tradition and the origin of 'Enlightenment' in pre-revolutionary America. His interest is to save the society of free individuals by finding in it for the developed individual freedom of the present time a justice or confirmation of their freedom. This justice as political would define the relation of individuals to the state, and would maintain the difference and priority of society in relation to the state.

Especially in his *Political Liberalism*, Rawls, although the 'enlightened' concepts of his thought are universal, writes of their embodiment in the political history of the United States. Since the United States was founded on 'enlightened' principles and not on national particularity, the course of its political development, considered in essentials, exemplifies the development and clarification of these principles. Thus it is not an extraneous imposition when Rawls situates himself in the Kantian philosophy, the last and most developed expression of 'enlightened' thought. Pragmatism had its source in that philosophy, and in this development is brought back to its source.

Rawls' use of the Kantian philosophy is novel and pertinent to his time. Various answers were given to the question, what is the good or unity of ends? These answers, whether utilitarian, intuitional or pragmatic, related the good too directly to the finite ends of society, confusing thus the difference of society from state. Rawls has in mind, and would have his readers assume, a well-ordered society. The general conditions of such a society are "that everyone accepts, and knows that everyone accepts, the very same principles of justice"; that "its basic structure - its main political and social institutions and how they fit together as one system of cooperation - is publicly known, or with good reason believed, to satisfy these principles"; that "its citizens have a normally effective sense of justice, and so they generally comply with society's basic institutions, which they regard as just."²⁵ What principles of justice sustain in Americans such a confidence in their basic institutions and their normal functioning? In what context are these principles voluntarily accepted and preferred to other principles?

²⁵ *Political Liberalism*, 35.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

This 'well-ordered society' Rawls knows is a highly idealized concept of the society in which he lives, where many have lost confidence in their institutions, their just operation and that their fellow citizens normally act justly. But the Republic since its founding has rested on such an idea, free individuals realizing tolerably their own and the general good under institutions adapted to that end. When the working of their institutions was felt not to be just, the resilient spirit of Americans, as the present argument has shown, was able so to revise them as to restore a general confidence in them. Rawls' question is how such a restoration is possible in present circumstances.

Rawls supposes that his readers have from their tradition concepts of justice and the good - of ends and a just ordering of them. He supposes also that they recognize the common good of the free society. These primary social goods are: (a) basic rights and liberties, (b) freedom of movement and free choice of occupation, (c) powers and prerogatives of office and positions of responsibility in the political and economic institutions of the basic structure, (d) income and wealth, (e) the social bases of self-respect.²⁶ Not that for Rawls these are the only or the highest human goods. His interest is that in the light of comprehensive ideas of the good, individuals discern a just order in the pursuit of these goods, to know themselves as free in finite and limiting ends.

This is pure 'Enlightenment' doctrine: from the contemplation of ultimate ends one is to turn to the world, to what falls within the human understanding and is useful for the improvement of human life.²⁷ But this confinement of humans for their good is only free if held in relation to the infinite good from which they have turned. The Kantian philosophy of the understanding rests on a higher standpoint of practical reason, and this on a comprehensive religious standpoint. These levels are not to be conflated. Rawls' inquiry has for its object to articulate the relation of the comprehensive good to the goods of society by discovering a concept of justice such as persons situated in that higher standpoint would prefer to other concepts which tended to obliterate the difference.

Rawls invites the reader by "a device of representation" to place himself behind a "veil of ignorance" where he knows nothing of society explicitly. He retreats, that is, to the universal good which is without the division and determinations belonging to the society of free individuals. The object he has before him through this construction is the same concept of the good as that in which the contentious religious sects of an earlier America consented to tolerate their differences and work together for worldly ends.²⁸ Or it is the principle of 'Enlightenment', in whose light people in the eighteenth century were moved to bring reason and justice into human affairs.

The situation of the reader who has placed himself under the "veil of ignorance" is analogous to that of the representatives to whom initially Americans entrusted the work of designing their political institutions. The demand then was to find institutions which supported and did not oppress the freedom individuals knew in society. With the likeness there are great differences between the one situation and the other. The good which the

²⁶ *Political Liberalism*, 181.

²⁷ Kant, *Kritik der Reinen Vernunft*, Vorrede.

²⁸ *Political Liberalism*, 24.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

'enlightened' were to bring into the world through determinate political and social structures was not a representation which a self-conscious thought knew as its own, but the abstraction of a highest being - inaccessible, through presupposed, to a Humean scepticism, variously knowable to other philosophies of the time. More like Hume than like Kant, the founders lived in the world of that older modern philosophy. And the tolerance of religious diversity which 'Enlightenment' brought was of religion so far as reasonable by the measure of that abstraction.²⁹

For Rawls' Kantian standpoint this comprehensive idea has more explicitly the form of the good, not beyond but inclusive of finite ends. Theoretically 'regulative' for that philosophy, it is for practical reason the assumed but unattainable end of its striving. Rawls' "device of representation" can serve as a measure in choosing the appropriate concept of justice for society because it is not, as in the earlier 'enlightened' thought of the Founders, a being concealed behind finite ends, but that in which they are centered. The preferable concept of justice is that which, allowing the dispersion and multiplicity of goods in society, also draws it into unity progressively more apparent.

In the light of this measure Rawls finds two principles of justice. One is the equality of individuals as rational and their rights or particular forms of this rational equality. The other is the 'difference principle', that through which in pursuing the common particular goods of society individuals have relation to the concealed unity of ends, and thus that perception of their freedom which belongs to a 'well-ordered society'. The 'difference principle' is succinctly stated as follows:

Social and economic inequalities are to satisfy two conditions: first they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.³⁰

Equality of opportunity maximized approximates as far as possible a realized or concrete equality. Differences in natural capacity and interest cannot be wholly eliminated and ignored, as by lot in ancient Athens or as in Andrew Jackson's belief that government offices were such that everyone was capable of them. The other clause reduces farther this disparity: economic competition reaches beyond its divisive tendency and is made the servant of all according to their need. The ambitious pursuit of wealth and power is voluntarily converted into the common end of giving to all the benefits of economic and technical progress and thus the sense of a real and improving freedom.

To the participation of individuals in this 'just society' there is the condition that they be members of society, that is, moral and rational agents who freely chose a particular work among those offered in society; that in pursuing their individual good in that way, with and against others, they come to recognize that society is not competitive only, but beyond competition a system of cooperation. Many in the indulgent, debauched and, it

²⁹ *Political Liberalism*, 195ff.

³⁰ *Political Liberalism*, 6.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

may be, rebellious society of the present time define their freedom by negating that condition. The 'justice' of Rawls well-ordered society does not respond to this deeper dissatisfaction but defines only a 'should be' or a moral and voluntary restraint on the aggressive pursuit by individuals and economic associations of their particular good.

The moral restraint of this social and political justice is grounded and stabilized in the good to which individuals represent themselves as subordinated. In this representation the many ends through which individuals in society would attain their good and a realization of their freedom are not opposed to their common end or community but drawn into it. In society itself the communal relation which is the basis of justice has priority over the good which there exists in the multiple ends through which individuals freely pursue their good. So long as the good in which this division is unified is a representation only, it is of no effect towards bringing into society more than an indefinite approach to a realized community - a community, that is, whose primary end is not the particular goods of the competitive society but the inclusive good of individuals as living and rational beings.

The 'represented' good further is only supportive of a voluntary and moral justice if it is not a construction only, to which the free individuals of society who construct it are prior, but is the *'prius'* for them. This transposition is the central interest of contemporary American culture. It appears most distinctly in a deepened opposition of 'right' and 'left' in society. The 'right' no longer simply defends economic freedom against the state of the New Deal or virtue against permissiveness, but has need to find a relation underlying reflection and choice, which it finds in family and the 'right to life'. This attitude may assume many forms: care for the environment, idealization of primitive society, hostility to reason and 'technology'. Taken in its American context, it is rather a recognition of life as created and of the relation of the rational creature to an absolute good. A 'religious right' so understood has no quarrel with the free economy or with 'technology' so far as this respects life. The primary opposition to a 'right' so founded is an unlimited 'freedom of choice'.

The 'left' in this opposition is a subjectivity which is not the moral and rational subject of the free society nor simply the subject 'liberated' from that morality, but has for its interest to surmount that division. This freedom animates what is called 'political correctness'. It pervades the popular arts. There is in it the contradiction that one would destroy reason and morality and in so doing exceed the morality of those one exposes and destroys. This negation and restoration is practiced not only on others but by the individual on himself, especially in the destructive aesthetic frenzy of the arts, which in its negativity turns also to morality and the universal. This freedom has of course nihilistic Nietzschean forms, but, taken in its opposition to the good in which the 'right' would find stability, its object likewise may be seen to be a unity before, but capable of, division - the attempt of the individual to make the good his own.

'Enlightenment' in its development and various forms would realize freedom through the knowledge of nature and its application to the improvement of human life. The society of free individuals who pursue this work know their freedom through the common relation of their particular good to the common good. So far as this relation to

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

the universal is inward and concealed from them in their relations to a world confronting them, as e.g. in Hume's account of the structure of 'enlightened' reason, their freedom is abstract and divided: there is a community and a multitude of individuals pursuing competitively diverse ends. As the present study has brought out in relation to the United States, whose institutions were founded on this concept of a society of free individuals, a development of this society has the meaning of drawing together and articulating the relation of its inner end or common good, the many useful arts and their competitive application, and the individuals who have their freedom in relating the two. The term of this development is that the system of particular ends should be known as realizing the common end, and the freedom of individuals in their particular ends as within their common end. There is a point in this movement where the freedom of individuals in society conflicts with the common end and the attempt to realize it directly. The state since the New Deal takes for its object the whole good of individuals. In society that work is the prerogative of free individuals, who would have also their particular good. Essential to free individuals is that the good be effected by them, not simply that it be done.

Rawls' concept of justice has the great interest that it shows the limit of this accommodation to each other of the state and the free society. Beyond this point either the free moral subject recedes into a relation to the good prior to its divided moral relation to society or the 'liberal' who was the agent and advocate of a direct political realization of the good finds that he can maintain his freedom only as an absolute freedom of choice, as beyond the division of moral and immoral. In the one case the division of society as primary is given up, in the other as meaningless it is virtually given up.

That the positivity of 'Enlightenment' when it has the form of a relation of a would-be concrete moral will to the good passes into a radical opposition of good and evil, or the individual will absolutized, has its classical exposition in Kant's treatise on religion³¹ considered from the side of 'enlightened' reason. The aversion of 'Enlightenment' to the Christian doctrine of a radical propensity to evil in man rested on an abstract concept of the good which the intrinsic development of the position has corrected. The idea of a concrete good to be freely realized, which is implicit in 'Enlightenment', is derived from that part of the Christian community which admitted a free subjective movement in the reception of grace. What in early New England and the other colonies was known in the various Protestant communities the 'enlightened' proposed as a universal human work to be realized historically by a society of free individuals turned to their finite interests. The condition of such a work, known in the Augustinian-Calvinist theology of American sects, namely a unification of the divided good and evil propensities of the human soul, was forgotten in the structure of the society of free individuals. Protestant Christianity remained in general the belief of enlightened America, moralized more or less and recalled to its concrete doctrine by degrees through experience of the limits of enlightened freedom at its several stages. The term of this development would be to grasp

³¹ *Religion innerhalb der Grenzen der blossen Vernunft.*

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

what 'Enlightenment' is and to retract the assumptions of the society of free individuals and its apparent priority to the state.

In Europe the revolutions of the eighteenth century had their result in the formation of the democratic state which has place for society and individual freedom within it. On this basis the universal social programs, which in the United States are felt to impinge on individuals, are more easily accepted. In relation to the state, individuals can feel themselves not less but more free than in society. As predicated of particular national communities this distinction survives in cultured habits and tends to be negated in relation to the common economic community.

At such time as out of the present disposition of forces in the United States the state might emerge more clearly as the basis and support of the society of free individuals, both sustaining the goods and interests of society and bringing them under more universal human ends, that state, as resting on universal principles, would have a far greater stability than the one-time independent nation states of Europe. If the present tendency to give over to the states a greater part of what the central government has taken to itself since the New Deal were to continue, the federation would have more life. For the sense of individuals that in the central state and the Constitution they have the ultimate security of their liberties is best maintained by strong differences among the particular sovereignties and between them and the federal state, with the more developed concept now of individual freedom.

The separation of powers in the Constitution suited better the relation of private interests to the incipient state of the early republic. In place of a fear of tyranny there is now a sense that the state is beholden to special interests and cannot respond to the recognized needs of the people. Montesquieu having before him the unified state of the early modern age would correct through the division of powers both the arbitrary will of the sovereign and the capricious will of the people. A primary unity of the powers remained and the idea of the judiciary as a third power, which occurred to him, he quickly corrected, seeing its function in the interpretation of laws and their application to particular cases as part of the executive power. Rousseau discerning the unity of the rational and the sensuous will and that the state is occupied with the relation of the two denied that the powers were primarily separate. Still less from the Kantian standpoint of Rawls should one allow such a separation of the popular will as determined by the representatives in Congress from the Presidential power. And the Supreme Court which on its own declares the content of individual rights, thus taking on itself to legislate for the people, shows the worst consequences of the tripartite division. Domestically and in foreign relations there are two competing powers, of which each would be the state, and law and policy in consequence proceed rather from compromise than a unified view of the common interest. In a recognition of the priority of state to society the relation of powers would be seen differently.

These and like institutional changes are implied if Americans are to respond to the deepest division of society at the present time. When and in what ways they might find an acceptable response in continuity with their political traditions is for the future to

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

disclose. One who attends to American freedom and the spirit moving in their institutions can hardly doubt that, whenever it might be, they will resolve appropriately also this most difficult of divisions. It is sufficient for the present inquiry to have shown that the whole movement of American political history is towards the reversal of an assumed priority of society to state. What lies in the opposite assumption of Canadian history, that the state underlies the free society, has been given precision by this inquiry.

The United States is the first post-national state, the first state based not on national particularity but on rational principles, whose history is essentially the development of those principles. Americans were from the first conscious that they attempted something new, and of consequence for the human race: there began with their independence a "*novus ordo saeculorum*".

C. Canada

What is Canada? Not a 'proper' state, some would reply, taking for their model the now obsolete European nation state. Not like the United States, most would agree whether of the Anglophone or Francophone community. This difference, which shows itself in many forms, is rooted in a different perception of the relation of the state to the private freedom of society. Canadians in all parts of the country accept and are strongly attached to universal social programs, which are less felt to be an affront to private freedom.

Provinces in Canada because of this difference have a stronger sense of their sovereignty than is usual in the United States. They can on this account more easily take themselves to be independent, and thus like nation states. In Quebec, which lives in another language than the English-speaking provinces and in another form of the common European culture, a developed provincial sovereignty easily passes into a movement to separate from a redundant federation. The only adequate response is that Canada is a federation of sovereignties which on the basis of a common European culture can contain different national forms of that culture. Not just any difference, but that of the two peoples who in the seventeenth and eighteenth centuries discovered and brought into being the rational democratic freedom of the modern age. The peculiar spirit of this federation is that neither culture should dominate nor suppress the other, but, as complementary, the tension between the two should enliven the whole and make evident to both their common freedom.

That Canada is either a federation so defined or an historical blunder at the point of dissolution can be judged objectively by an argument structured as follows:

- (1). The common history of the British and French peoples in Canada during a long colonial dependence is essentially of the formation of a federation so conceived.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

(2). Canadian history since the 'patriation' of the Constitution is essentially a continuing attempt to make our own what we had become in the course of that dependent development. This second stage has two movements in it: in this our Canadian revolution, as in all successful revolutions, there is need first to be 'liberated' from the authority of received institutions, then to review and appropriate from the standpoint of that freedom what was before found oppressive.

Since, unlike Americans, we suspended our revolution until the complete development of democratic institutions in one federation, in its positive development we have less need to amend than to understand the principles of our freedom.

(C-1)

The English and the French occupation and colonization of North America both began in the first years of the seventeenth century. The political institutions and government of the two peoples at that time were both divergent and founded on common principles. In a parallel but also different development, both had subjected the feudal estates to a monarchy which as beyond this division is called 'absolute'. This reduction was carried out more radically by the French kings, who soon ceased to summon the estates. In England, after an apparent accommodation of king and parliament to each other rival claims to sovereignty were fought out in the Civil War and at length adjusted to each other. In France only the Revolution made room for popular freedom within the unified state.

There is a different development of common political principles. The subjective freedom of the modern age required a radical revision of the medieval state, where finally the would-be independence of the estates was stabilized under an absolute monarchy. In this revision the English maintained better a continuity of the old with the new, glossing over in their empirical temper the deep divisions latent in the process. The French held logically to the implications of absolute monarchy, restraining the subjective freedom which moved strongly in them, until this, assuming a radical form, destroyed the monarchic state.

In the philosophy, the science, the arts of the time, there was a reciprocity where what might be discovered on one side of the Channel was taken up and carried farther on the other. The movement began in many matters with the British; what they had done the French genius would then raise to a more rational form. In political matters to carry divisions to extremes can be destructive, as French history illustrates. To live with a constitution which is not grasped in its principles, given conceptual and written form, is however unworthy of a cultivated people. In such federations as the American and Canadian an unclarity about the principles of the constitution is dangerous.

For a century and a half France and Great Britain contested which would dominate North America beyond Mexico. The British conquest of New France was followed shortly by the independence of their American colonies. In Canada conqueror and

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

conquered came under one monarch. The subsequent political history of Canada is the common development of that, at first formal, relation.

That peoples should pass from one monarch to another was a frequent occurrence at the time. Alsace and afterward Corsica were, for example, taken into the French state. Such transitions became more difficult when government in the nineteenth century had passed from kings to peoples and their elected representatives. When the basis of government in European states passed from rational principles to race, language and cultural particularity, these transitions must appear impossible. If one would follow the political development of Canada the initial relation of the two peoples should not be taken anachronistically.

Religion, language and the civil law distinguished the conquered people from their conquerors. In a political relation these differences were tolerable to an 'enlightened' age. That the subjects of a Christian king had to belong uniformly to one part of the Church, as Louis XIV had been persuaded to think in the previous century, had ceased to appear a necessary basis of political cohesion. Still less to those who had some part in the common European culture of the time need language and the conventions of another law seem radical impediments to a common polity.

The conquered also from their own culture could not be without inclination to the freer form of government the Conquest had brought within their reach. New France had appeared a model of conformity to the absolute monarchy and to a monarchic church. But the realities of life in North America awakened also incipiently an independence and equality of individuals which tended to make of feudal forms of land tenure merely formal distinctions. The religious beginnings of subjective freedom in Jansenism and Calvinism might be suppressed but not the response to life in the New World. Peculiar to the French among European peoples is an adherence at the same time to a unified authority in king or pope, which will have no individual freedom unless as subordinated to it, and to the Cartesian freedom of the modern age which is its own centre of authority. A common government and common loyalties between this people and a British people in whom the same division occurred in a more moderate and subdued form might be a difficulty, but, given favourable conditions, in no way impossible.

To know how the common polity of these peoples which now exists, if imperfectly, came to be, one must attend not only to the events of their common and special histories but to the spirit moving in them. The moving principle of the French monarchy, which ruled in New France until the Conquest, was the quality Montesquieu calls 'honour'. 'Honour' he distinguishes from 'virtue', the animating principle and source of loyalty in democratic constitutions. The latter quality he observes particularly in the English state of his time. The 'virtuous' man is the free moral individual of the American revolution, but considered as in relation to the English monarchic state. The difference of these subjective principles and of the constitutions they sustain is the best beginning, if one would grasp the initial relation of the two peoples. In 'honour' there is not yet the subjective freedom of the modern age but a striving towards it, in that the individual discovers his highest secular good in loyal service, it may be at the cost of his possessions

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

and his life, to the monarch. In this he has brought into one relation his various interests and passions. The object of that unified relation is called in political discourse 'the good'. For the particular goods which he is thus ready to sacrifice he can ordinarily expect benefits to be conferred on him emanating from the monarch. The 'virtuous' man has in his self-relation, and not from above, his relation to the many particular goods he needs or desires.

'Honour', so understood, is the virtue first of an aristocratic class, then derivatively of a bourgeoisie who would be something in the world. The one class tends to an excess of independence and finds submission hard. The monarchic government operates through a relation of this to the more compliant middle class. The peasantry fall outside this direct relation to the monarch. Thus in New France the will of the monarch is executed by the divided authority of the military Governor and the Intendant. But the relation of the country people to this system is different almost from the first in New France. There is not a half-servile peasantry, but the 'habitant' with a strengthened sense of his independence and equality. One reads with admiration of the heroic characters who made New France - Champlain, Frontenac and many another - of the wars with the Indians and the English enemy; of the great explorations which extended the French Empire to the western plains and the Gulf of Mexico; of the heroic missions of the Jesuits, in a like service of 'honour' to the Papal monarch. The formation of a Quebec people has in it also the beginning of a 'virtue' which could survive the termination of this ordered relation of individuals to their political centre in the absolute monarch.

The disappearance of the old order can appear in a nationalist perspective as an immense shock from which to this day French Quebecers have hardly recovered. It is also said that they were already a 'people' or a 'nation', in which case they would have in themselves a political order to replace that from which they were severed. It would be better said that the Conquest stabilized their relation to the culture earlier imposed from above, that French culture from that point took root in North America and was capable of an intrinsic development. The conquered were not in a later nationalist sense a 'nation' or 'people', but the bearers of French culture of the 'old regime', towards which they must find a freer relation.

The British community which came into being in Canada after the Conquest and would soon consist in great part of royalist refugees from the American Revolution, had in common with the French community a devotion to the monarchic state as the source of its freedom. It differed from the French community in that it had in it also the 'enlightened' subjective freedom to which Church and State were alike inimical in New France. The conquered people, in the sense of themselves as now on their own, were readily receptive of that freedom.

Towards the conquered people the British government followed an ambiguous and shifting policy. Were that possible, it would assimilate the French to the British community. But the Quebec Act of 1774, in recognizing the right of the French community to its religion and law, envisaged a coexistence of the two communities. And the Constitutional Act of 1791 granted equally to both the beginnings at least of

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

representative institutions. Lord Durham hoped that the union of the two Canadas in 1840 would lead to the assimilation of the French to the English community. But with the 'responsible government' which he also recommended, coexistence was found to be irreversible.

Two communities existed side by side under a common government, to one its proper government, alien to the other. But the relation of the French community to the conqueror was far from defensive only. Holding simply to the authoritarian structures of the old regime, it would have generated from itself that revolutionary reaction which thirty years after the Conquest was to destroy the French monarchy. In Canada the nearest equivalent to the American and French revolutions, in which the society of free individuals took possession of the state, was the rebellion of 1837 in both Canadas against governments which excluded the popular will from their councils. Had those rebellions prevailed, both communities would have been absorbed quickly into the United States.

However well in the old and the new France monarchy and Church might suppress the emergence of a subjective spirit in religion, when this subjectivity took on secular forms and became the spirit of a free society they were impotent against it. The limited and ineffective participation of both communities in government since 1791 provoked them to rebellion. The 'responsible' government then granted to the Canadas and to the Atlantic colonies was capable of uniting with the monarchy the individual freedom of society.

How monarchy and individual freedom could be mutually supportive Burke in reaction to the French Revolution best explained to English readers. So far as the freedom of society in relation to the state is not abstract and equalizing only, but through the resolved opposition of parliamentary houses contains acceptably the whole public interest, it is not at odds with a monarchic will which intends the same general interest. The right of rebellion from the side of society lies with its representatives, as those who know most definitely the essential interests of the state, if, as on the occasion of the expulsion of James II, the monarch has undertaken to destroy the liberties of the people and reverts to an absolute monarch. However badly this doctrine is articulated in British or Canadian institutions at the present time, it expresses accurately what lies in the transition from the revolutions of the seventeenth and eighteenth centuries to the democratic states of the following century, where society is taken one way or another to be contained in the state.

It could easily appear to Lord Durham, a liberal of the time when the British state was passing to a democratic form, that the two Canadas could live under a common government responsible to the popular will, and that in that relation the particular cultural and religious attachments of the French community would lose their hold. The deeper sense of particular freedom in both communities nullified so direct a union. The attempted union rather gave form to their difference as democratic communities.

The difficulties of a union whose components would not unite one knows were among the causes of the Canadian federation. Why would not a wider union inclusive of the Atlantic colonies have the same and further difficulties? Some might think that finally in that federation the French community would be assimilated to the British. But having

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

their own government in the federation the French community might just as well consolidate its difference. Apart from reasons of security and the pressures of the British government on the colonies to unite, why an interest in the federation? As North Americans neither the British nor the French in Canada can make of themselves nation states only but, as the Americans, through a federation would know the common principles of their particular states. From a like impulse the British and French in Europe gave universality to their culture through their nineteenth century empires. What they attempted then to do severally by the domination of others they now began to do together through their relation to a still abstract community.

The French and British communities in Canada, though their first union failed, had advanced a long way since the Conquest towards a common polity. The opposition of the English people to an absolute monarch and to the absolute authority of the Roman Church had been a large part of their history in the seventeenth and eighteenth centuries. Since the Conquest the former subjects of the French kings had taken from the conqueror the principles of an ordered popular government on a British model and not that of the successive constitutions of an attempted restoration in France. Both the Protestant and the Roman parts of the Christian church, as the religion of 'enlightened' peoples, had lost much of the ground of their implacable hostility towards each other. What then were the obstacles to a federation in which both communities with others could find a common expression of their freedom? The answer is given by the history of Canada since Confederation.

The debates among the political leaders of the several colonies, in which they devised and agreed to the constitution of a federation very much as the British parliament would enact, show little understanding of the principal questions, how provincial and federal sovereignty would be related to each other, and how the difference of provinces, especially of Quebec, would be saved in their federal relation. As themselves colonies and not sovereign states they could not but assume the British constitution as it was, and then ask with what distribution of powers it could be applied to a federation. As the federation would have a sovereignty subordinate to that of Great Britain, so the provincial would be subordinate to the federal sovereignty. Canada would be a dependent unitary state, containing dependent sovereignties in it. But the idea was also expressed that Canada would form a new 'political nationality' - a society in which British and French Canadians alike could appreciate and understand their position relative to each other.³² Only as this idea has come to be partially realized is Canada a proper federation.

In concept the provinces have the structure of a complete state according to the Burkean model, where popular sovereignty and the unified sovereignty of the monarch coalesce, where the powers of government are at once divided and unified in the collaboration of king and parliament. Provinces, so conceived, are equally sovereign with the federal state in the matters assigned them. The priority of the federal state is only that it acts for all the people domestically and '*ad extra*', and that in its operation it should be capable of resolving acceptably the most difficult division of interests among provinces.

³² George-Etienne Cartier, quoted by Peter H. Russell, *Constitutional Odyssey*, 2nd ed., Toronto, 1993, 85.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The history of the federation in its first century is essentially a movement towards the realization of this concept.

The British constitution of the time was in important aspects a bad model for the Canadian federation. Burke's idea of a state which in its sovereignty would hold together the potentially destructive forces of a free society was lost in the nineteenth century state, where the monarchic or unitive power came to be largely ceremonial, the 'upper house' more or less redundant and parliament virtually the 'Commons', and where actual sovereignty was concentrated in the Prime Minister. This model suited badly a federation of particular sovereignties which in its central government had need to represent not only Canadians individually but also the substantial interest of provinces. A Senate in the patronage of the Prime Minister could not fulfill that function. Again, the collapsed parliamentary structure adopted must give weight too directly to the populous central provinces, whose difference when they were united, had made evident the need of a larger federation. A Canada of 'two nations' was unworkable. This duality of the Canadas, if it would not be disruptive but beneficent, had to be situated within the primary equality of a number of provinces.

The French people, as they sought to reconstitute the state after the Revolution, could not be satisfied with the British solution. The presidency, as representing people in their fundamental equality and solidarity, could not be confined within the parliamentary structure which represented them in their various interests. If unstable, it expresses better than the British structure the rational equality of individuals, and thus the French mentality and tradition. But the centralizing tendency of this structure, as reductive of differences, is also inadequate to a federation of sovereign provinces.

That Canada was founded by 'two nations' is not without truth, if it is taken to mean that within a colonial context the political leaders of the united Canada recognized that their common and particular sovereignties had to be separated and ordered to each other on that basis, and that with others they found and proposed to the imperial power a constitution tolerably adapted to that end. How the common sovereignty would secure the opposed ends of the 'two nations' was to say the least unclear. The one 'nation' saw itself as part of, and perhaps nearly equivalent to, a British North America extending from sea to sea. The other supported the union as permitting a more independent growth of the French and Catholic culture centred in Lower Canada.

There was thus in both 'nations' the beginning of a common but differently qualified loyalty to the federation. For both that qualified loyalty was subordinate to a higher loyalty - to the Empire for the one, to the Roman Church for the other. The Maritime Provinces in joining the federation exchanged their former colonial independence for a chronic dependence. Their attachment to the federation was and remains at once disinterested and servile. They never doubt their equality with the central provinces, and in this are complete Canadians, but in an economy not favourable to their interests they have learned to expect external assistance. Contrariwise, the western Provinces, which knew little or nothing of a prior independence, having become economically self-sufficient, have need that their sovereign equality be recognized by the central provinces.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Newfoundland which alone of the provinces joined the federation from an independent status can less than any doubt its equality with the rest.

It is evident that while Canada was in a colonial relation to Great Britain, even if it were latterly only for constitutional amendment, provinces could have no right of secession from the federation, this resting on an act of the British Parliament. It is mythical to think of the federation as a compact between 'two nations'. The question of secession arises however in an interesting form at the point where the provinces have attained fully that sovereignty which belonged to them in concept from the beginning. As sovereign, why can a province not choose to exercise that sovereignty independently, if it so chooses? That is in truth the constitutional basis of Quebec separatism, and to answer the claim requires great clarity about the nature of the Canadian federation.

The process is well known by which the Judicial Committee of the Privy Council in a series of cases gradually corrected the initial assumption of the federal government that the Parliament of Canada through its power of disallowance and its general power to provide for 'peace, order and good government' could overrule provincial legislation. "What the Judicial Committee did was to give official legal sanction to a theory of federalism congenial to those who, at the time of Confederation and afterwards, could not accept federalism."³³ Rather than a theory one should say that it is of the essence of North American federalism that states or provinces be sovereign in their assigned powers. On the view of John A. MacDonald that "the true principle of a Confederation lay in giving the General Government all the principles and powers of sovereignty,"³⁴ Canada could not long have survived. The effect of that principle must be to impose the will of the one 'nation', centred in Ontario, not only on the Quebec 'nation' but on the diverse interests of the other sovereign provinces.

The interest of the present study, however, is not so much the step by step attrition of insufficient views of the Constitution through court decisions, as in its principles and the spirit moving in them. So long as the centralized federalism of the beginning prevails, the sovereign provinces are not secure in the exercise of their powers. But if the federal invasions of their particular powers were stayed, a more difficult problem would remain. The difference of provinces, conspicuously of Quebec but also of the others, is not confined to their particular constitutional powers but extends to their whole culture and its linguistic medium as well as to their religion. The sovereignty of a province which would care for and secure its difference in this comprehensive sense cannot be formal or ceremonial only, as that invested in a Lieutenant Governor, but that which imparts to the divisive interests of society the unity of a political community - of a particular political community.

The movement here has an opposite direction to that of the United States, where the individuals of a free society are drawn by degrees more fully into a political community. In the Canadian federation the political community is assumed, and a relation of

³³ Russell, 43.

³⁴ Quoted in Russell, 43.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

individuals to it, at first abstract, has to take into it the divided freedom of society. The correction of a federal power which as general can dominate the particular provincial sovereignties is thus through a development and clarification of the ends of government. The relation of individuals to the state which Canada became in adopting "a Constitution similar in Principle to that of the United Kingdom"³⁵ is implicitly that in which the development of the American state, as given above, terminates. That is, it is implicitly what it actually became after the Second World War - a state having the general well-being of its members for its end. Initially both federal and provincial sovereignties in Canada were far from this ideal. The federal state concerned itself with the general conditions (tariffs, railways, etc.) of a free economic development and touched little the ordinary lives of individuals.

The development of post-revolutionary states in Europe had a very different structure from that of the same states when they were in course of being revolutionized during the seventeenth and eighteenth centuries. The society of free individuals, which both endangered the absolute state and transformed it into an ordered democratic state, was in that new relation both inwardly integrated into the state and drew the state into its interests. Hence the separation in the British state between a royal sovereignty and the sovereignty in the House of Commons of the leader of the majority party - a separation which gradually took place in the nineteenth century there and analogously in other European states. To a radical thought which abstracted from the inner unity it could appear that the old difference of state and society had vanished. But the history of the time reveals much more a need and desire to hold together the relation of free individuals to the inner substantial unity and their life in the state which collaborated with private interests in creating an earlier version of the 'global economy'. A unity of the two aspects was sought in the competing world empires which the nation states made for themselves. The empires held the loyalty of their citizens by drawing together their dispersed interests and ambitions with their inner communal relation, which, far from ceremonial only, confirmed the assumption that society was contained in the state or political community. The ordering of the economy to the good of individuals is an imparting to it of this concrete relation.

These considerations are essential to an understanding of the long protracted colonial dependence of Canadians. So long as Canadians of British stock or formed by that culture knew an integration of the elements of the nineteenth century state in relation to the Empire and not at home, their political loyalty was centred in that relation and not in their own federation.

The way to independence is thus the appropriation of that unity of the elements of the state which was the source of attraction to the Empire and a hardly questioning loyalty to it. That appropriation is at the same time a development of the Canadian state towards a concrete unity of ends - a capacity to use the goods of society for the common good and the needs of individuals. With this is formed a stronger attachment of individuals to the

³⁵ "The Constitution Act, 1867", preface, in *The Constitution Acts 1867 to 1982*, Department of Justice, Canada, 1989.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

federal state, and through a parallel formation to their provinces. As there is greater clarity about the ends of government and both the general and the particular sovereignties deepen, the abstract relation of the beginning, where power descends from the federal to the provincial level, passes more into an equal and shared sovereignty.

In this more developed relation it is thought appropriate for example to transfer revenues from the federal to provincial governments, to permit them to fulfil their recognized obligations to the people with a tolerable equality. Through tariffs and various natural conditions the economic development of the country was concentrated in the central provinces. The tension between a unitary economy and the right of sovereign provinces to provide for the particular needs and interests of their people had far greater recognition in Canada than in the American federation, as follows from their different principles. Canadians are receptive of such measures provided that the federal state supplies the provinces with the means to a reasonable equality. Through the strength of that relation they are able to moderate the tendency of the sovereign provinces to maximize their wealth. One may observe that were Canada still Quebec and Ontario only and their common sovereignty not strongly separated from their particular sovereignties this equalization would not occur.

The most difficult division in Canada is between the primarily French culture of Quebec and the primarily British culture of the other provinces. But towards the resolution of that division in a common sovereignty the differences among the English-speaking provinces are of the greatest importance. Through their resolution to federate provincial states have come to be related not as hierarchic but as primarily equal sovereignties, the provinces as particular sovereignties and sovereign over their particularity. Quebecers require something more if they are to recognize federal sovereignty as fully their own. The federal state has to reflect also a different sense of the elements of the same concrete sovereignty, that is, not only economic but cultural equality. But the Canadian federation, like the American, is a realization in North America of a common European culture and can contain on the same principle the difference of French and English cultures.

The liberation of Canadians of British culture from dependence on the Empire was effected historically by their participation in the two great European wars of this century. They were in this way required to find in themselves that unified relation to the state which hitherto they had through the Empire. After the First World War their dependent relation came to be recognized as a relation of equals.³⁶ Domestically that integration of the state was the ground of the deepened relation of federal to provincial sovereignty spoken of above, and of the better understanding of the ends of government. But that unification was British still and in relation to the Empire. It pertained differently to French Canada.

The Second World War was the external cause of a more complete independence and of a relation not primarily to Great Britain but to Europe. For Europeans that war was the

³⁶ James Ross Hurley, *Amending Canada's Constitution*, Canada, 1996, 24.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

point of transition from nation states to the European Community which began to take shape shortly afterwards. The nature of that war has already been considered, but not the somewhat complex relation of Canadians to it. The opposed fascist and socialist positions, which fought out their differences in the war were not national only but occurred variously in all the European nation states. In Canada they were borrowed and hardly felt except in certain circles. Some favoured and even fought for the government side in the Spanish Civil War; some in Quebec felt an affinity with the Vichy regime in France. These forces were pertinent however to a post-national independence in Canada. The Commonwealth in which Canada was equal to the British nation state was not a national community but gave to its members only a formal unity. The relation of nation states in the European Union which would emerge from the war is very different: the constituent parts are there taken into the union to the extent that the union is a state. The Canadian federation is only a community having states within it when its unity is at least that of the European Union. It is only altogether on its own and independent when it no longer looks to the European Union, but turning to itself finds a relation of sovereign parts to the federal state which is no longer ambiguous.

In the war Canada had part in a process by which the independent nation states were subsumed at least in principle under a common state. The opposed fascistic and socialist forms which are drawn into that union are already in a manner post-national. The Nietzschean nationalism of the one has in it a temporalized universality, and in the universal economic process of Marxism national communities have only an accidental being. In these forms the inner universality to which in the previous war the nation states sacrificed their particularity is externalized and temporalized. What is then sought is to regain the universality lost in this externality, and that is to bring to light the common state which underlies the particular national states and their mutual relations.

For Canadians the reflection into their own state of this dispersion and collection of the particularity of the European nation states provided the basis on which we could 'patriate' the Constitution, confident that we could resolve without reference to an external authority even the most difficult of differences - those between Quebec and the British culture of the other provinces. We appeared to have found a common sovereignty in which the two peoples were equal and their difference stabilized.

The route by which Quebec moved from a French and Catholic to a European colonialism, finally to a recognition of North American independence, can appear very different, but is essentially the same as for Canadians of British culture. The differences, as always, are those of the two cultures - of that which draws back from radical divisions and that which lets them appear. Having attempted briefly in 1837 a revolution of the American or French type, Quebec came under the authority of the restored Roman Church, which set itself against the more radical secularity of the nineteenth century. The Church could not undo this new revolution or the structure of the nineteenth century state already described, but held to one element of that state against the rest - to its substantial unity. On this account in Quebec it gave its blessing to a rural and family-oriented life, and was averse to the industrial society forming in the cities and controlled by Anglo-

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Canadian or American enterprise. Clerical power was not contested as in France by a liberal society no less French than itself - the other aspect of the nineteenth century state.

The Church carried to an extreme the division there in another form in New France between absolute authority and subjective freedom - a division always at some point intolerable to the free spirit of the French people.³⁷ In the nineteenth century form the division is unstable in that the subjective freedom of the modern age is implicit in the substantial aspect of the restored state. The Second World War provided the turning point to a unification of the divided state. France succumbed to the opposed existential and Marxist forces of the time. The Church, thinking it had affinity with the former, aggravated the division and made way for a mediated return to the substantial basis of the state through the heroic work of deGaulle. The reflection on this restoration on Quebec facilitated the 'quiet revolution' and the end of an abstract clerical power.

Through the historical development of Canada to independence all that divided the French and British communities following the Conquest has passed into the difference of two forms of a common European culture within a post-national state. Initially different in religion and the form of their freedom, when both attained self-government under the same parliamentary institutions, their relation to each other was no longer external and imposed only. The conditions of a common polity and a common political loyalty began to be present. The first attempted union of the two peoples failed, not having room for their difference. In the federation of these with other North American colonies, the difference of Quebec from the other provinces, and of these from one another and Quebec, had the form of particular sovereignties within a common sovereignty. That relation was implied in the Constitution and gradually realized. The two peoples were still divided in their political loyalties by their different response to the revolutions of the previous century. Catholic Quebec and a British Canada centred on the Empire were deeply divided until this division was taken into the common structure of the nineteenth century state, and through the unification of its elements to a post-national state.³⁸

(C-2)

In the difficult transition - in Canada to independence, in Europe to the beginning of a post-national state - there are two essential considerations: (i) the point of transition is the nineteenth century state restored to the unity of its elements; (ii) the common state as initially discerned in this relation is not an abstraction, nor the particular state in a recurrent division between nationalism and a society of equal individuals. The common post-national state came into view through the hard conditions of war. That this external mediation be replaced by a stable relation to the post-national state as primary in time of peace requires of individuals that they appropriate what was more done to them by the course of history than is their own work.

³⁷ On the French spirit, see *De l'esprit des lois*, XIX, ch.5.

³⁸ The Quebec people might turn inward from an un-Catholic secularity. The Church might attempt to give a Christian direction to that secularity through neo-Thomism and other forms antecedent to the subjective freedom of the modern age. But the division could only be bridged by the subjective freedom latent in that post-revolutionary Catholicism, which must appear.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

(i)

Canadians for a little after the Second World War appeared to have a sense of what they were as a people. As uncommonly free from the hatreds which set nation states against one another, Canada seemed to have a particular role in the new world order. Domestically we were capable of the enlightened social programs of a state which knew the true ends of government. In Quebec the authors of the 'quiet revolution' not only released the economic talents of their people but appeared to know what the state is. Then this initial clarity faded. Canadians seemed to lose all sense of what they had become. Institutions through which their freedom was able to develop were felt oppressive. Authority in all forms was felt alien by an anarchic freedom. Then also on the basis of this 'liberation' the desire awakened to have in some form or other the lost direction and universality, but as yet hardly that in which their freedom was formed and which underlies their free rejection of it.

In Quebec the 'quiet revolution' was soon fragmented. Some adopted Lévesque's interpretation that the state of Quebec was primarily a linguistic and cultural community which could only be itself as separate from Canada. Some, following Trudeau, took the state of Quebec to be the common centralizing relation of a multitude of equal individuals. Support for both interpretations was sought in analogies with the European Union - colonialism after its time. Trudeau's position permitted a federalism only superficially related to the Constitution and to the common Canadian loyalty formed by our history.

While these opposed interpretations of the revolution animated political life in Quebec for a time, the same - or a more radical - collapse of institutions occurred in the Canada of British culture. To an anarchic individualism neither nationalism nor democratic centralism has much attraction; still less, it might seem, the rational freedom of a common post-national state to which our history has led us.

A like collapse has befallen the state of Quebec and all parts of the federation. At the same time the true federalism to which historically we have come remains strongly attractive and is sought in Quebec and the rest of Canada. The Canada in which Quebec and the provinces of a British culture are equal and their differences secured eludes contemporary political discourse. An attempt to discover it at Meech Lake foundered: there was no sufficient consideration of principles and of the relation of what was proposed to nationalism and to the democratic centralism of Trudeau. By themselves in their opposition these positions beget recurrent referenda - or until, a multitude of accidental forces conspiring some day in that direction, the nationalists prevail. We are at an impasse, and do not know how to move beyond it.

(ii)

The current impasse, where everyone is weary of the recurrent contests between nationalists and democratic centralists but discovers no new positions in their place, where the interest of the general culture is to dissipate institutional structures and live the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Heraclitean freedom of incessant change, - these phenomena need not be thought negative only. In every successful revolution³⁹ - and for Canadians their independence is a revolution against a long colonial dependence - it is necessary first to loosen the hold of former things, to give oneself a distance from them. This destructive retreat in this as in other cases will then be found to be a '*reculer pour mieux sauter*'. The question occurs at that point: what then are Canadians moved to put in the place of the old? The answer is evident in many ways.

In Quebec there was an expectation that a renewed federalism would follow 'patriation'. This expectation explains the vehement reaction there to the defeat of the Meech Lake Accord, in which there was seen to be at least the beginning of such a renewal. It explains the continuing attachment of Quebecers to federalism, and the refusal to accept separation simply. The exasperating immobility of Canadians of British culture in the face of an impending ruin to their country has in part a like explanation: somehow Canada will remain together; the constitutional problem is not as bad as it appears to be, that is, an undefined solution is assumed.

The positive impulse is to make our own what we have become through our history, to know our constitution as the basis of our freedom. As with Americans when they had to give form and stability to their independence, our history was a series of episodes received from colonial powers, assented to but never taken wholly upon ourselves. To make it our own we have to dwell again with its stages, know their limits and the causes of our dissatisfaction with them. The objective measure in this renewed experience is the last stage, in which our dependence ended and consequently we had need to know our institutions and the freedom formed in them.

The difference of North American from European nation states has already been examined. At the beginning of a Canadian reflection on our independence this difference is not wholly apparent. We see the incipient structure of our independence not as it properly is for us as Canadians but by reference to the analogous transition of the European nation states into the post-national state of the Union. This reference is necessary and useful, but also misleading. In the model, nation states, understood as linguistic and cultural communities, are there, and with them the common economy in which individuals are equal. The political union can appear as added to these communities, a 'superstate', not a proper state. In the Canadian, as in the American federation, the particular states and the economic relations of individuals fall within the union. The nationalist and the democratic centralist in Canada, relying on the model, give priority, the one to the nation, the other to the economic community; or as combining them, treat their unity as derivative. The contortions by which in post-modern European thought the difference of these communities in relation to each other and to the political union is both maintained and undermined have already been noticed. These difficulties point to but never reach the North American comprehension of particular states in the post-national state. The model for us is thus properly a device serving to bring this unified relation into view.

³⁹ Not like the Russian revolution which has failed to transform the character of the old Russian society.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

When this difference is grasped the appropriation of our independence and developed freedom can be seen to have a definite logical form. We must ask first what we have when the dispersed elements of the European Union - the national communities and the multitude of equal economic individuals - are taken into the common state, which in this relation would no longer be a 'superstate' but the central state of a federation of the North American type. Then of this realized union we must ask what form of freedom is in it - whether that which we have come to in our history or another and less complete freedom.

Perhaps with little clarity as to method, this construction was offered to the Canadian people in the Charlottetown Accord. Canadians in all parts of the country with an uncommon unanimity rejected the Accord. The people, being sometimes clearer than their leaders about their ultimate political interests, one can reasonably suppose, did not find in it an adequate and acceptable definition of their freedom.

Absent from the arguments of separatists and federalists, which look from the one side to the European Union, from the other to the Charlottetown Accord, is anything more than a trivial consideration of our difference from the United States. That we are different, Canadians whether of British or of French culture, have commonly assumed. Assumed also has been that in some way our freedom and our political institutions are to be preferred to the American form. This difference, if one would determine methodically and not by some prejudice or arbitrary opinion what it is, must be considered as the difference of one type of North American polity from another.

Historically Canadians retreated from the revolutions of the eighteenth century and were barely touched by them in the 1837 rebellions. But the nineteenth century state which in one form we received in responsible government and in the 1867 Constitution is a response to those revolutions and contains them in it. Only with NAFTA and the growing integration of the Canadian with the American economy are the conditions present in which we can experience fully that enlightened freedom and measure it by our sense of ourselves and our freedom. If as with the definition of our freedom in the Charlottetown Accord we find dissatisfaction also with the American model we could then attend to the measure by which we made those judgments, namely the freedom contained in our type of post-national federation.

The interest of a reflection on the history of the Canadian federation would then be to make our own that correction and unification of the elements of the nineteenth century state which was imposed on us externally by the wars of the European nation states and their consequent transition to a post-national state.

This threefold reflection through which our independence would not be immediate and abstract but of what we had become in the course of our history needs to be set forth more precisely:

(ii-a)

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The first attempt to grasp our new found Canadian independence and the polity appropriate to it broke down into an opposition of nationalist and democratic centralist positions, and the pursuit of these positions has weakened for a new generation either into indifference or into an aesthetic rather than a political relation to them. The logic of this division, and the changing relations to this division and to an underlying unity is a matter of great interest : it has been the object in Europe of a 'post-modern' culture. This culture is beyond the contest of fascists and Marxists in the inter-war and war years, in that a unity of the opposed positions is recognized and they are on that account pacified. The elements of the political structure are a plurality of linguistic and cultural communities, a common economic society in which cultural differences are predicated of equal individuals, and the common state.

In any political community there is an initial solidarity, the separation from it of a multitude of competing and cooperating interests and a unified relation of these interests. In the European Community the several linguistic and cultural communities take themselves to be sovereign states, that is, to have their relations to the common economic society and the common state centered in them. They enter these larger communities by treaties and with the consent of their peoples, and to secede from them is likewise within their power and their affair only. But this conviction is belied by the fact that they do not singly have power to regulate the economic relations of their citizens and the fact that the common state is essential both to their internal unity and to prevent a recurrence of wars among them. It is thus equally true to say that the economic society and the common state are prior to the linguistic and cultural communities, and that sovereignty is situated rather in economic society and eminently in the common state. In this consideration the supposed power of the nation states, which these linguistic communities take themselves to be, to join or secede as they like from the larger community appears more illusory than real.

But if the order of priority is reversed and the common state taken to be first, there is the difficulty that the members of the linguistic and cultural communities do not find the multitude of habits, traditions, familiar ways in which they live and are a particular community preserved in that relation, but rather an abstract bureaucracy for which they feel no affection. The common economy, while offering a field for the expression of particular interests and talents, and satisfying needs and desires more abundantly, also levels and subjects individuals to blind economic forces in which they feel themselves unfree. There occurs thus a dialectic which instates and destabilizes one element and then another in a recurrent circle.

These linguistic and cultural communities are not states in an older and common sense, in that there is not in them a unity of ends. Or, better, a unified end exists in them in the medium of language and imagination and in cultural habits, not in thought and thought realized in action. Thus the post-modern culture of these communities is averse to thought and assigns a primacy to language as the seat of a cultural content formerly taken to be founded on the universality of thought.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

The members of these confined communities as equal in their common economic community touch on the universal, and are uncomfortable with language and the fixity of cultural habits. It belongs also to 'post-modern' culture to expose the instability of language and the life enclosed within it. It is easily shown that there is an 'otherness' or negativity which ever eludes linguistic expression, so that what is said and accepted in the discourse of cultural communities is no more true than untrue.

The society of equal individuals, if its members thus free themselves from the tedious confines of a particular cultural community, is itself exposed to a like criticism. It is at home in an abstract equality, and thus in turn oblivious of 'otherness' or difference. Here too an apparent stability is exposed to doubt and instability, incorrigible from its standpoint.

Thus the relation of individuals to the common state recurs as that on which both the linguistic and the economic community rest. But how from the recurrent 'otherness' and thus unfreedom of these communities can one enter the common political community in which this negativity is circumvented, if indeed there is in that community what formerly one expected of a state - a unity of ends? If there is to be experience of that common state, it must be encountered first as other, as externalized and temporalized. One is attracted to the image of aboriginal peoples living not far from a 'state of nature' where there are no longer a multitude of tribes but they have begun to think of themselves as a people. Those whom we formerly thought barbarous and unfree are thus made our guides to freedom: from the rational order we imposed on them, thinking ourselves free in it, we must be saved by their example. But then the beginning of experience is not its end and when we have made that temporalized state our own, that preference for the primitive and immediate is reversed: we know the common state for what it is - as that on which the other communities depend. The movement of these divided communities to the unity of a state is analogous to the unification of the nation state before Enlightenment and the formation of civil society within it.

Thus we have in the transition of the European nation states to a post-national state, in a first reflection on their consequent dependence, a relation like that of their original formation into sovereign states. Here this relation is not of a particular state but of a common state. The particular states, considered in that dependence, are not primarily linguistic and cultural communities, nor the multitude of equal individuals in their particular interest, but themselves sovereign in the same sense as the common state, particularized sovereignties.

In the European Community this dialectic of 'post-modern' culture is not carried through to its conclusion. The cultural and linguistic habits, the former independence of the nation states as embodied have too strong a hold. The common economy and common state which are perforce accepted are also resisted. But the dialectic which allows a sceptical freedom from the national and economic communities is a no less necessary element of this culture. In a North American situation there is not the same resistance to the argument which here only discovers a form of the 'post-national' state in which in fact we live.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

On the stages of this dialectical drama as played in Canada not much need be added. An attempt was made in the Charlottetown Accord to draw together the elements of the argument. Canada, it was said there, is composed of linguistic and cultural communities and a common economy. There is an enveloping political community best perceived through the spirituality of the native peoples.⁴⁰ To serve this role the content of this spirituality had to be extended from the particularity of tribes and a particular way of life. The many tribes are seen as a people and constituting thereby an immediately existing state, which serves as a model or symbol of the unified political community which the Canadian state would be. The further step of referring this externalized polity to the actual Canadian state is not taken. If this first reflection were completed, one would know the Canadian state as unified, not the further development of individual freedom within it.

When we bring before us the whole articulation of the argument some consequences of great interest become evident. The first is that the assumed democratic right of national communities to secede from the Canadian federation rests on an incomplete reflection on the European model which is assumed to confirm it. Secondly the acceptance by the democratic centralist that such a right exists, though requiring perhaps a stronger proof than 'fifty percent plus one', rests on equally unstable assumptions. Thirdly, since the linguistic and cultural communities in the light of the whole argument have only such sovereignty as the common state imparts to them, they have on their own no right of secession.

It is also evident that the freedom individuals have in relation to the common state, so far as this is defined by the present argument, is not adequate to that which they acquired in the course of our history. It is rather the concept of freedom with which our history began. Likewise federal and provincial sovereignties, as defined by the whole argument of the European model, are not what we know from our history. There is lacking to it both the subjective freedom of Enlightenment and the incorporation of that freedom into the post-revolutionary state. How in our independence do we make our own this further development of our freedom and our political institutions? Not certainly from the European model.

(ii-b)

The further development of an independent Canada towards an appropriation of its history and political freedom is in relation to the United States. We have both to be open to the 'enlightened' freedom which opposes the state unless as the servant of free rational individuals and to hold to our historic differences from the United States - to a state which has that freedom in it but can draw particular interests into the whole interest of its citizens. Western Canadians and their governments tend to fluctuate between a conservatism of the American right and a socialistic liberalism. This conservatism has a political instrument in the Reform Party, which would replace a traditional conservatism more attached to the state. Ontario, which in the time of the Empire, was sure of its

⁴⁰ There is the memorable image of the prayerful chanting and drumming of the native chief at the hearings on the Charlottetown Accord conducted by Joe Clark.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

difference from the United States, has seen the disintegration of a British conservatism and its replacement, at least for the moment, by an American conservatism like that of the Reform Party. Ontarians feared NAFTA. But the conjoint opposition of socialism, and an older conservatism, which might define a distinct Canadian position, hardly appears. Quebecers, having in them an 'enlightened' freedom akin to the American, are commonly at home more easily in the United States than in Ontario. So far as Quebecers retain something of the sense of a state they had in the first bloom of the 'quiet revolution', and thus of the difference of Canada from the United States, they could with reason accept NAFTA more confidently than Ontarians. The nationalist and centralist fragments of that revolution, which look to the European model, have no ground for that security. The people of the Maritimes have in common with Quebecers that they feel an affinity with New Englanders especially more easily than with Ontarians, and with that an inarticulate sense of a Canadian difference. Newfoundlanders, basically in a pre-enlightened society until recent years, received Americans enthusiastically during the Second World War⁴¹, and that attraction continues along with an indifference to Ontarian culture.

In what way these diverse relations will develop and out of them a clear perception take shape of a common difference of Canada from the United States, that for the present is unclear. The reaction to the pressures of a common economy should however tend to make the difference more distinct. At the same time, as the argument has shown, there is great need in the United States that the relation of society to state approach more nearly the Canadian model.

(ii-c)

As the centre of constitutional interest in Canada shifts from the abstractions of linguistic and cultural communities and democratic centralism, and from the first form of a post-national state on which they depend, to the deeper problem of the difference of our post-national federation from the American, the answer to current questions about a right of secession will be evident. The question will be asked in relation to the Constitution and not in terms of 'democratic rights' in abstraction from a context giving meaning to 'rights' and to 'democracy', or of loose analogies with other peoples of a very different history and political experience. The beginning of an appropriate answer is to recognize what a post-national federation, ours or the American, is, and what it means to say that it is indivisible. The present study of American institutions has shown not only that it does not belong to a particular sovereignty within the federation to dissolve for its own citizens or those of other particular sovereignties the integrity of their common state, it was also shown that the freedom of a particular sovereignty and the knowledge of its freedom are dependent on the federation. From which it followed that only if there is a democratic right to destroy and debase one's freedom is there a right of secession from such a federation. What was said of the American case applies by the same logic to the Canadian.

⁴¹ F.L Jackson, *Newfoundland in Canada: a People in Search of a Polity*, St. John's, 1984, pp. 7-29, esp. 17ff.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

But there is more to the appropriation of what we became through our history than to distinguish generally our concept of freedom and the relation of society to the state from the American. There is also the divided colonial relation of French and British in Canada from Confederation until the point of independence, when we thought ourselves capable of regulating this difference internally. It has been shown in the historical part of this inquiry on what this capacity rests, namely, that our federation, like the American, is based not on the culture of a particular nation state but on a common European culture. Within that common culture the two national cultures can have free play, and by their reciprocal relation bring to light their common basis.

A comparison with the United States can illustrate the essential operation of such a federation. Occasionally the debates of the American Congress carry the argument back to the principles of the Constitution on which ultimately political decisions depend. Such debates are a continuing education to the American people, who are both loyal as no other to the Constitution, whose principles are written and known, and who ordinarily regard government as a matter of deals, capitulation to special interests, etc. In the first spectacle their loyalty is confirmed, and respect for the state and those in political office can outweigh an everyday cynicism. The debates of the Parliament of Canada are uniformly confined to particularities, to partisan retorts and the like. The relation of decisions to their constitutional basis does not appear. The loyalty of Canadians and a stronger than American tendency to respect government are not informed and strengthened by the actual operation of government. How many Canadians know or have any definite sense of their Constitution?

The relation of peoples of French and British culture in Canada is in good part controlled by prejudices, ignorance, old hostilities, etc. of which politicians sometimes take advantage for their own ends, which as recorded in public opinion polls they sometimes regard as defining the limits of the politically possible. The primary condition of a more principled consideration of this and other deeply divisive matters is that the Constitution be known and its operation become conspicuous as need be. Public opinion can in this way be brought into contact with the stable and reasonable loyalties of the people, and the limits of the possible greatly extended: "*Les bornes du possible dans les choses morales sont moins étroites que nous ne pensons.*"⁴²

The Constitutional correction which could assure the minority of French culture in Canada of their equality and of a protection of their particularity not subject to the fluctuating opinions and prejudices of the majority and their elected representatives is first that state sovereignty be removed from the now meaningless symbolism for most of an all but defunct British monarchy and attached to the office of a president as protector of the Constitution. Canadians might then know what their Constitution is and relate thus political loyalty to a visible and present head of state. Secondly the effective sovereignty of the state should not rest in the Prime Minister all but exclusively, but as well in the twofold representation of the people individually and as sovereign provinces. Canadian sovereignty, which is properly neither French nor British but inclusive of both, can let

⁴² *Du contrat social*, III, ch.12.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

this difference have its place in the structure of the senatorial representation of the sovereign provinces. Fundamental questions about the relation of the two cultures could then be brought back to Constitutional principles and the common and equal loyalty of the peoples of both cultures.

The security of Quebec and as well of the other provinces in their particularity is to be obtained partly and primarily in an articulated relation to the federal sovereignty. The further and also essential protection is in the recognition of provincial sovereignty, within the powers assigned, as an unqualified sovereignty. For to particular sovereignties within the federation belong not only powers which might in altered circumstances be divided differently, but primarily their difference itself. In the case of Quebec that difference is the French language and culture. Others might care to protect lesser qualitative differences.

Canadians after Meech Lake and Charlottetown know the difficulty of amending constitutional principles. Neither an unstable consensus among Premiers and the Prime Minister nor the consultation of experts and special interests is an appropriate method. Because the Constitution defines the primary conditions of political agreement in Canada it cannot fall to any particular interest or collection of interests to amend its principles. Those who would with some clarity amend it must abstract from these particularities, discern the simple operation of the principles, and ask by what changes in continuity with their history the Constitution would better reflect the fundamental loyalties and sense of their freedom of the people. Once in this manner we have brought our independence into agreement with our history, we should be as reluctant to amend constitutional principles as the Americans. May Quebecers and others long be spared the partisan constitutional aggressions of recent years!

One might reasonably think that our independence was complete if we could regard the operation of a federation in which different partial sovereignties could subsist, even the difference of national cultures, where difficult conflicts among the parts could occur and be resolved without oppressing the differences. In the particular sovereignties as in nation states, individuals do not know their rights and freedoms immediately, but as distinctions which emerge and show their primacy in the resolution and clarification of differences. And the clarity a particular sovereign community has about its ends and the order pertinent to their realization it maintains not within itself simply, but through its sometimes difficult relation with other sovereign communities of the federation and their resolution through the common principles of the Constitution. Our independence is complete if the differences, for example of Ontario and the West - centralization and the sovereignty of provinces - are seen as in the course of their resolution realizing the federation and making possible a knowledge of our freedom. The different spirit of French and British culture and the consequent collisions and misunderstandings of the two not only sharpen in each the sense of its difference but permit a recognition of the

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

common European freedom which our federation and the American would variously realize.⁴³

Conclusion

The present argument has shown that questions about the democratic right of a linguistic and cultural community in Canada to secede from the federation belong to a preliminary stage in the definition of our independence. It has shown that the counter-position which takes Canada to be a centralized community of equal individuals belongs to the same stage. The two positions have in common that they recognize a democratic right of secession.

This democratic 'right' has two distinct meanings, as one may learn from the European model from which these positions derive. One is the right of linguistic and cultural communities to self-determination. Pure examples of that right are the demands of Basques, Irish nationalists and many other ethnic and linguistic communities within European nation states that they be given independence. An equivalent in Canada is the claim of native tribes to self-government. Whatever else may be said of this 'right', it is not democratic but communal, and exercised by leaders who think themselves authorized to realize it by whatever means.

The other meaning is the right of nation states to decide by simple majority whether or not to apply to join the European Community. Considered in its content, this is the right of members of a nation state, who no longer have the political will to maintain an internal unity or sovereignty, to choose whether by joining to acquiesce in their historical situation or at an unmanageable economic cost to remain on their own.

Nationalists in Quebec use the word ambiguously in both senses. Partly the leaders of an ethnic community have the right to obtain the independence of their people by a *coup*. Partly the whole Quebec community is said to have a right to choose democratically whether or not to be part of a Canadian or North American economic and political association. The content of this right is not so clear as in Europe, since Quebec is not in transition from the status of a nation state to that of a universal or post-national state. Nor is Canada or the United States in such a transition. Nor does the ethnic right to self-determination apply well to old stock Quebecers who are neither a politically undeveloped tribe nor a linguistic and cultural community absorbed into a nation state in the process of its formation; and now that the unity has slackened, demanding to be free from it.

Quebec independence and Canadian unity have thus to the present been discussed largely in borrowed and unreal concepts, in which no solution is to be found. The

⁴³ In France the older culture of the people enters contemporary life as refracted by the assumptions of the post-modern culture; similarly in Britain. The spirit of each can move more freely in Canada.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

unreality of current arguments would become evident were Quebec to become independent. First the ethnic and economic meanings of the 'right' to independence would collide: who belongs to the state of Quebec? Secondly, an economic and political association with the United States and/or Canada would not be with former nation states but with post-national states in which the political freedoms of the older modern age had not collapsed into cultural habits giving way to the leveling pressures of the common economy and state. In these relations an independent Quebec if it would not be absorbed, would have to define its political freedom through the constitutions of those federations. In this process it would discover that the constitution in which uniquely its language and culture would be secure and could flourish was that which already belonged to it though its common history with those of British culture in Canada. What concealed this reality from Quebecers would be seen to be the unreal abstraction of a first reflection on a common Canadian independence.

The same abstractions have their hold on Canadians of British culture. But having slight contact with political realities in Canada and the United States these abstractions are certain to fade and lose their attraction. A sign that we are moving from this first formulation of Canadian independence is the decision of the Government of Canada to ask the Supreme Court to define the so called democratic right of secession in terms of the Constitution. While the opposed abstractions of nationalists and federalists held the field the Constitution from which governments received their powers appeared to have no bearing on these constitutional differences!

One does not know whether the Supreme Court will answer the questions submitted to it directly according to the principles of the Constitution or will interpose concepts limiting their application to contemporary conditions. At the least the Court cannot but declare that there is no unilateral democratic right of secession; that a legal secession is only possible with the agreement of the federal and the other provincial sovereignties. It might not add that agreement could not be about economic and financial matters only but also and principally about federal and provincial sovereignty. At that level it must become evident that no agreement was possible, and that the Canadian, like the American, federation was indivisible, and for the same reasons. True separatists such as Mr. Parizeau knew well that discussions towards agreement must be futile. To semi-separatists that may not be so clear.

By what arguments could the federal and the provincial governments, if they were true to their primary constitutional obligations, be persuaded to give up the territorial integrity of Canada, the common country of all Canadians? What could persuade them to a course ruinous to all Canadians? To Quebec even more, if possible, than to others, since they would lose the only security possible for their distinct language and culture? So long as federalism could be equated with the democratic centralism of Pierre Trudeau the illusion might stand that these primary political questions need not enter the argument, that the real interests of Canadians were economic and not rather the freedom they had through their history and federal institutions.

DOULL: THE PHILOSOPHICAL BASIS OF CONSTITUTIONAL DISCUSSION IN CANADA

Until Canadians have gone farther in the understanding of their common history and institutions it must be uncertain whether in some referendum a majority of Quebec might choose to secede. Public opinion as evoked in referendum campaigns is unstable and fluctuates in response to changing circumstances. Mr. Bouchard or another may seize an opportune moment and persuade a majority to vote 'Yes'. A *de facto* Quebec may be there and the Government of Canada required to take account of the fact. If that government had become clearer than in the past about the Constitution, about the desire of most Quebecers to be equal and distinct under it, and in the only true and possible sense sovereign at home, its appropriate response is evident enough and of no great difficulty. Its response would be to carry on as usual in Quebec according to its constitutional obligations, and to leave it to the illegal government in Quebec to realize its independence. Since no *coup* can do without an army, the Government of Canada would be less negligent than before and make certain that the Canadian military knew whom they were obliged to serve. The federal government would only respond to force clearly initiated by the secessionist government, and then only to the minimum degree. So far as its services to the Quebec people, and their federal obligations, were disturbed, that would be unmistakably the work of the secessionists.

The Government of Canada would await the internal collapse of the *coup* from the opposition of a near majority of federalists; from the division of true separatists from semi-separatists who were led to think that independence was an easy matter; through the repressive methods the leaders of the *coup* must use to control disaffections and criticisms; through a general repugnance from the methods necessary to dislodge the federal presence; through economic confusion and hardship. The *coup* would not survive many months if at the same time the Government of Canada had the will at last to implement, it might be at first on its own, those reforms which would assure the Quebec people that they had their full recognition and their sovereignty in the Canadian federation. Since by the same reforms Canadians in the other provinces would come to a clarity about their freedom and its appropriate institutional structure, and thus have common cause with Quebecers, it would not be a great matter in those circumstances⁴⁴ for political leaders, if they were tolerably adequate to their offices, to awaken in their people a sense of their fundamental interest as Canadians and as citizens of a particular province.

⁴⁴And not only in those circumstances...