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Some Possible Lessons for Canada of the United States' Experience with Major Constitutional Change

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Canada is at a crucial moment of its history. Never has the need for constitutional reform been more pressing, and yet the rigidity of the amending formula and the undemocratic nature of the intergovernmental bargaining process have paralysed efforts directed at meaningful change. The author, in an "open letter" to Canadians, suggests that the American experience with major constitutional change can provide them with some useful lessons for effecting substantial constitutional reform. Historically, the legally specified procedure for constitutional change in the United States has proven just as intractable as in Canada. However, Americans have bypassed this problem by circumventing the existing amendment procedure and accomplishing constitutional reform through extra-legal means. The resulting changes arrived at were given both political legitimaey and legal validity by an intense and widespread participation of the Ameriean people in the political process that produced them. During such moments of extraordinary popular involvement in politics ("republican moments"), parochial interests were left aside and the debate centred on competing visions of the public good. The author therefore suggests that by engaging in a similar exercise of "republican politics," Canadians could transcend their differences and find a way out of the current constitutional impasse.

The author proposes the constitutional convention as an extra-legal method of achieving meaningful reform. Through the democratic and nonpartisan election of delegates, a convention could be created to ensure that all Canadians, including Quebeckers, actively participate in the shaping of a new constitutional arrangement. The fact of nonpartisan popular election would help to make the delegates aware that they must go beyond their own narrow interests and promote the public good in their negotiations for a renewed Canadian federation. A majority of members of the Bcaudoin-Edwards Committee rejected the idea of the constituent assembly because they saw it as yet another exercise in ordinary, interest group politics. However, the author believes that a democratic national convention might well offer the best hope for sparking the spirit of republicanism Canada needs to forge a new and lasting constitutional order.

Le Canada est à un tournant de son histoire. Le besoin de réformer la Constitution n'a jamais été aussi pressant, mais toute tentative de modification se bute à une formule d'amendement extrêmement rigide et à la nature non démocratique des pourparlers intergouvernementaux. L'auteur, dans une lettre ouverte aux Canadiens, suggère que l'expérience américaine peut les éclairer dans leur recherche d'un processus de réforme. Confrontés à une formule d'amendement tout aussi exigeante que la nôtre, les Américains ont pu surmonter cet obstacle en contournant la formule légale et en y substituant des moyens extra-juridiques. Issus d'assemblées populaires extraordinaires, les amendements ainsi produits ont acquis une légitimité politique et une validité juridique grâce à la participation active d'une partie importante de la population américaine au processus qui ont conduit à ces amendements. Dans de tels moments de participation populaire (« moments républicains, ») les intérêts privés ont toujours cédé leur place à une mise en valeur des différentes visions du bien public. L'auteur estime qu'en s'inspirant d'une telle « politique républicaine, » les Canadiens pourraient venir à bout de leurs divergences d'opinion et trouver une solution à l'impasse constitutionnelle.

L'auteur propose la tenue d'un congrès constitutionnel comme moyen extra-juridique d'arriver à une réforme significative. En élisant des délégués de façon démocratique et non partisane, il serait possible d'organiser un congrès où tous les Canadiens, y compris les Québécois, pourraient participer à l'élaboration d'une nouvelle entente constitutionnelle. L'élcction populaire et non partisane des délégués aiderait ceux-ci à renoncer à leurs préoccupations personnelles pour mieux viser l'intérêt public dans un fédéralisme canadien renouvelé. La plupart des membres du comité Beaudoin-Edwards ont rejeté la notion d'une assemblée constituante car ils n'y ont vu qu'une tribune pour les intérêts particuliers. Mais d'après l'auteur, un congrès démocratique national constitue peut-être le meilleur espoir pour engendrer cet esprit de républicanisme dont le Canada a besoin pour créer un régime constitutionnel nouveau et durable.

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Synopsis

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Introduction

Last May, I testified before the Special Joint Committee of the Senate and the House of Commons on the Process For Amending the Constitution of Canada.[1] My testimony focused on three points:

(1) In the United States, major constitutional change has been accomplished not through ordinary politics, but through a different mode of politics, which I call "republican politics."

(2) Not a single major change in the American federal structure has been accomplished simply by following the constitutionally specified amendment procedure; in each case, extra-legal means have been necessary. These changes have been accepted as legal because they were supported by popular mandates expressed through republican politics.

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[1]The Special Joint Committee of the Senate and House of Commons for Amending the Constitution of Canada [hereinafter *Beaudoin-Edwards Committee*] was established early in 1991 and co-chaired by Senator G.-A. Beaudoin and Member of Parliament J. Edwards. The mandate of the Committee was "to consult broadly with Canadians and inquire into and report upon the process for amending the Constitution of Canada, including, where appropriate, proposals for amending one or more of the amending formulae, with particular reference to: i) the role of the Canadian public in the process; ii) the effectiveness of the existing process and formulae for securing constitutional amendments; and iii) alternatives to the current process and formulae... ." See Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada, *Report: The Process for Amending the Constitution of Canada* (Ottawa: Queen's Printer, 20 June 1991) (Co-chairs: G.-A. Beaudoin & J. Edwards) at vii. In total, the Committee received over 500 briefs from some 450 individuals and organizations and heard 209 witnesses (*ibid.* at 10).

(3) A nationwide convention to consider and propose constitutional amendments might have some use in resolving Canada's current constitutional crisis, both by facilitating the exercise of republican politics and by providing the political legitimacy necessary to support extra-legal methods of constitutional change.

After two and a half hours of penetrating questioning by members of the Committee, I felt that I had a much improved sense of which aspects of the United States' experience are most salient to Canada today. While it seemed that my three basic points were relevant, it was clear that within each there were particular problems of special significance to the Canadian debate. This essay emphasizes those problems.

A caveat is in order. This essay does not aspire to a detached perspective. I write as an American firmly embedded in the American constitutional tradition. Although I have followed the events in Canada with great interest, I am very conscious of my position as an outsider observing processes that are intimately intertwined with the rich variety of Canadian traditions, ideas, and practices. In short, this is really more of an open letter than a tract on comparative constitutional change.

I. Background: Republican Politics v. Politics-as-Usual[2]

Since the 1950s, most American political analysts have agreed that the dominant mode of politics in the United States is characterized by interest group bargaining.[3] Politics, it seems, consists mainly of pressure groups and local interests fighting each other for a place at the public trough. Most of the citizenry most of the time disdains political involvement. Politicians and political parties engage in *ad hoc* bargaining rather than working toward broad programmatic change. Private interests forge strong relationships with government agencies and tenaciously resist attempts at fundamental reform.[4]

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[2]Many of the points made in this section are discussed at much greater length in J. Pope, "Republican Moments: The Role of Direct Popular Power in the American Constitutional Order" (1990) 139 U. Pa. L. Rev. 287 [hereinafter *Republican Moments*].

[3]See, for example, D. Truman, *The Governmental Process: Political Interests and Public Opinion*, 2d ed. (New York: Knopf, 1971); R.A. Dahl, *Democracy in the United States: Promise and Performance*, 3d ed. (Chicago: Rand McNally, 1976); C. Lindblom, *Politics and Markets: The World's Political Economic Systems* (New York: Basic Books, 1977).

[4]A list of all the books and articles making these points would fill an entire article. A few of the more prominent are M. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* (New Brunswick, N.J.: Rutgers U. Press, 1981); T. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: Norton, 1969); M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard U. Press, 1971); M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social Rigidities* (New Haven: Yale U. Press, 1982).

Although this mode of politics has its defenders, few would argue that it is well-suited for accomplishing major constitutional change. Even at its best, the politics of interest group bargaining discourages consideration of basic change.[5] Pragmatic conflict adjustment, not basic structural reform, is its hallmark.

Not surprisingly then, constitutional change in the United States has usually been accomplished through a different mode of politics, which I call "republican" because of its resemblance to the classical republican vision of political life.[6] The republican mode is distinguished by four features.[7] First, there is extraordinarily broad public involvement; people who normally have nothing to do with politics suddenly find themselves arguing about the future of the country. Second, this public involvement is exceptionally intense; not only do people pay attention to politics, but they take it seriously, sometimes to the point of exerting direct popular power to pressure or even bypass their elected representatives. Third, naked appeals to self-interest begin to seem inadequate, even crass; instead, people argue from principle and appeal to the public good. Public-mindedness makes serious inroads on selfish individualism. Finally, parties and interest group organizations alike lose their grip on politics and are

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[5]See D. Braybrooke & C. Lindblom, *Strategy of Decision: Policy Evaluation as a Social Process* (New York: Free Press of Glencoe, 1963) at 83-86; Lowi, *ibid.* at 60-61; D. Yates, *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government* (Cambridge: Harvard U. Press, 1982) at 103-05.

[6]The republican vision, which was highly influential among the American revolutionaries, is currently enjoying a significant revival in American political and legal thought. The standard works include J. Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York U. Press, 1984); B. Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: U. of California Press, 1984); E. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford U. Press, 1970); and G. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: U. of North Carolina Press, 1969).

In its modern version, republicanism presents an alternative to interest group bargaining. It emphasizes civic virtue over narrow self-interest, direct citizen participation over representative government, collective moral choice over instrumental rationality, and community over individual autonomy. Although republicanism was designed for small, homogeneous polities, I have argued that the republican mode can become dominant even in a large, heterogeneous polity like that of the United States during relatively brief periods of exceptionally intense citizen involvement. See *Republican Moments*, *supra*, note 2 at 306-13.

[7]The republican mode is, of course, an ideal typical construct: it is a distillation of characteristics that are rarely, if ever, observable in pure form in social practice. The construct draws on Prof. Bruce Ackerman's notion of "Constitutional Politics" in "The Storrs Lectures: Discovering the Constitution" (1984) 93 Yale L.J. 1013; "Constitutional Politics/Constitutional Law" (1989) 99 Yale L.J. 453 [hereinafter *Constitutional Politics*]; *We the People*, vol. 1 (Cambridge: Harvard U. Press, 1991) [hereinafter *We the People*] and on Samuel P. Huntington's theory of "creedal" politics in *American Politics: The Promise of Disharmony* (Cambridge: Harvard U. Press, 1981). For an expanded treatment of these subjects, see *Republican Moments*, *supra*, note 2 at 304-15.

pressured or displaced by voluntary associations, conventions, and other forms of popular organization.

For the past two centuries, American political life has alternated between periods of politics-as-usual and shorter periods (or "moments") of republican politics.[8] All of the United States' major constitutional transformations occurred during republican moments.

Consider, for example, the period leading up to the enactment of the *United States Constitution* and the *Bill of Rights*. It was a time when "every order and degree among the people"[9] was drawn into a vigorous debate over the basic principles of government. Not content with established government, people met in informal assemblies and organized extra-legal conventions. There was "an outpouring of political writings — pamphlets, letters, articles, sermons — that has never been equalled in the nation's history."[10] From the various assemblies, conventions, and congresses came a prodigious outburst of fundamental law, including the *Declaration of Independence*, the *Articles of Confederation*, the *Constitution*, the *Bill of Rights*, and various state constitutions. Throughout the process, political debate centred not on interest brokering, but on competing conceptions of the public good.[11]

Judging from the American experience, the central goal of a procedure for major constitutional change should be to nurture and facilitate republican politics. This goal breaks down into three broad tasks:

(1) stimulating broad and deep popular participation;

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[8]Historians and theorists have suggested that there is a cyclical dynamic behind this alternation. According to this view, each type of period helps to generate its own demise. Interest group politics may spawn orgies of corruption and conspicuous consumption that can ignite passionate movements for reform. Republican moments burn themselves out when people become exhausted with political activity and retreat to family and private pursuits. See A. Schlesinger, Jr., *The Cycles of American History* (Boston: Houghton Mifflin, 1986) at 28; A. Hirschman, *Shifting Involvements: Private Interest and Public Action* (Princeton: Princeton U. Press, 1982) at 92-102.

[9]Wood, *supra*, note 6 at 6. Professor Wood's enormously influential book presents a richly textured picture of this extraordinary exercise in popular political participation.

[10]*Ibid.*

[11]This is not to say that the process was pure. A wide variety of economic and sectional interests found their way into the debate and, according to some observers, even shaped the outcome. Nevertheless, viewed in comparison with other lawmaking events, the debate focused overwhelmingly on issues of principle. To give one illustration, the most important "bargaining chip" of the ratification process was not a tax break or economic concession, but the addition of a Bill of Rights to the *Constitution* which allowed larger states to win support of smaller states. For more detailed discussion of the contrast between public-minded deliberations and interest group bargaining, see W. Eskridge, Jr. & P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (St. Paul, Minn.: West Publishing, 1988) at 40-65; *Republican Moments*, *supra*, note 2 at 361-63.

(2) maximizing public-oriented deliberation (as opposed to interest brokering); and

(3) creating democratic organizational forms that are not entirely dependent on political parties and interest groups.

It might be argued that Canadian political parties qualitatively outperform their American counterparts in providing leadership on basic political questions, and thus that Canada does not need an alternative republican (or any other) mode of politics to achieve major constitutional change. I agree that the Canadian parties provide stronger programmatic leadership.[12] Nevertheless, the republican mode may be just as essential to Canada today as it has been to the United States in the past.

First, the republican mode can provide the kind of political legitimacy that supports using extra-legal amendment procedures, a point that I expand on below.[13] Second, the experiences of the *Constitution Act, 1982*[14] and the *Meech Lake Accord*[15] suggest that intergovernmental and interparty negotiations may not suffice to break the constitutional deadlock. Finally, the republican mode has the capacity to produce a lawmaking event of mythic proportions, the kind that can strengthen a nation's self-definition and embed a constitutional order in the popular consciousness.

II. Amendment by Extra-Legal Processes

The very enterprise of making major changes to a written constitution is afflicted with a terrible paradox. Amendment formulas typically impose arduous supermajority requirements to ensure that amendments reflect a high degree of social *consensus*. But the pressures for fundamental constitutional change normally result from deep social *conflicts* that make the achievement of consensus virtually impossible.

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[12]In the American system, unlike the Canadian parliamentary system, the party that holds the executive branch does not necessarily control one or both houses of Congress. The resulting fragmentation of power makes it extremely difficult to implement a consistent legislative program. Moreover, American elected representatives, unlike their Canadian counterparts, rarely follow their party's official program to the letter, and often feel free to disregard party directives on voting. The contrast between the two countries' political systems should not, of course, be overstated. Even Canadian parties experience difficulty developing and implementing coherent policy in the face of conflicting pressures from interest groups. See generally N. Ward, ed., *Dawson's The Government of Canada*, 6th ed. (Toronto: U. of Toronto Press, 1987) at 21-22. For a perceptive analysis of the decline of American parties and its consequences for the American constitutional order, see M. Fitts, "The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process" (1988) 136 U. Pa. L. Rev. 1567.

[13]See text accompanying notes 42-55.

[14]Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

[15]The legal text of the *Meech Lake Accord*, also known as the *1987 Constitutional Accord*, is reproduced below at pp. 162-179.

Since 1781, the United States has operated under two amending formulas, each of which required substantial agreement among the constituent states before the basic document could be altered. The original *Articles of Confederation* required the unanimous consent of all the states.[16] Article V of the present *Constitution* requires ratification by three fourths of the states.[17] Yet, every fundamental constitutional change in the United States has been brought on by intense political conflict. Thus, for two centuries the United States has faced the same knotty problem that Canada now confronts: how to achieve controversial change when a small number of states or provinces enjoy a veto power.

During those two centuries, the United States underwent three major constitutional transformations without discovering any way of untangling this problem. Instead, Americans indulged in the political equivalent of cutting the Gordian knot: all three transformations were accomplished by extra-legal means. Not one relied primarily on the constitutional amendment process then in place.[18] Although a number of other amendments have been adopted through the textually specified process, none amounted to a major transformation, and more specifically, none made a substantial alteration in the balance of power between the federal and state governments.

The first transformation took place between 1786 and 1791, when the United States abandoned its initial federal system (embodied in the *Articles of Confederation*) and enacted the current *Constitution* and its first ten Amendments, collectively known as the *Bill of Rights*. In 1787, Congress called a convention "for the sole and express purpose of revising the Articles of Confederation."[19] Instead, however, the delegates drafted an entirely new constitution. Rather than complying with the amending formula then in place, which required the unanimous consent of the state legislatures, the Convention declared that the new *Constitution* would take effect upon ratification by conventions in three-fourths of the states.[20] The new national government was organized with two

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[16]U.S. ARTS OF CONFED. of 1781, art. XIII.

[17]Article V provides:

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

[18]See *We the People*, *supra*, note 7 at 41, 45, 168; see also *infra*, notes 20, 22.

[19]C. Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September, 1787* (Boston: Little, Brown, 1986) at 4.

[20]See R. Kay, "The Creation of Constitutions in Canada and the United States" (1984) 7 Can.-U.S. L.J. 111 at 126-31; but see A. Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V" (1988) 55 U. Chic. L. Rev. 1043 at 1047-54. For a response to Amar, see *We the People*, *supra*, note 7 at 328 n. 4.

states, North Carolina and Rhode Island, still refusing to ratify.[21] I will suggest below that there may be some elements of this process that would be useful in Canada today.

Second, between 1864 and 1870, we adopted three amendments known as the "Reconstruction Amendments" that abolished slavery and drastically increased the power of the national government.[22] This transformation was forced on the defeated Southern states after our Civil War of 1861-1865.[23] I am confident that Canada will find a better procedure than this.

Finally, during the 1930s, we jettisoned virtually all constitutional constraints on federal and state economic legislation. The resulting expansion of the national regulatory power (which trumps state legislation) transformed the balance of power in the federal system. This transformation was accomplished by applying intense political pressure to the Supreme Court. President Franklin Roosevelt, who led the struggle, declined to use the Article V amendment formula because he believed, probably correctly, that the three-fourths requirement could not be met.[24] Instead, he proposed legislation to expand the Court by the number of seats necessary to create a majority in favour of removing constitutional constraints on national economic and social legislation.[25] Before this

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[21]These two states eventually ratified, a fact that has given rise to an argument that the legal defect was cured. See T.R. Powell, "Changing Constitutional Phases" (1939) 19 B.U. L. Rev. 509 at 511. It is impossible, however, to tell whether North Carolina and Rhode Island would have ratified had they not been pressured by the prospect of existing as tiny nations in the shadow of the militarily and economically dominant United States.

[22]The *Thirteenth Amendment abolished slavery and involuntary servitude. Among other things, the Fourteenth* barred states from denying any person due process or equal protection of the law. The *Fifteenth* prohibited the federal and state governments from denying the right to vote based on race, colour, or previous condition of servitude. All three empowered the United States Congress to enforce the amendments by appropriate legislation — a massive new grant of federal authority.

[23]See *Constitutional Politics, supra*, note 7 at 501-03. It might be argued that the process technically complied with Article V because more than three-fourths of the loyal states ratified the *Thirteenth* and *Fourteenth Amendments*. This observation holds even if one does not count New Jersey's and Ohio's ratifications, which were later withdrawn. Nevertheless, civil war is certainly an extra-legal procedure, and it is essential to any claim that the rebel states could lawfully be excluded from the calculation of the number of states necessary to ratify.

[24]L. Baker, *Back to Back: The Duel between FDR and the Supreme Court* (New York: Macmillan, 1967) at 9-10. At the time, New Dealers were experiencing difficulty in their attempts to ratify a modest amendment giving Congress the power to regulate child labour.

[25]During my testimony before the Special Joint Committee, I was asked to explain how this procedure was extra-legal. Although there may not have been anything technically illegal about Roosevelt's proposed legislation or his decision to appoint justices sympathetic to his program, the use of these tactics to bring about drastic constitutional change was clearly beyond both the text and spirit of the Constitution, which provides for amendment by the process specified in Article V, and thus was at least extra-legal. Many of the court-packing plan's opponents (who eventually succeeded in defeating the proposed legislation) believed that the plan seriously threatened to undermine the role of the Supreme Court in the constitutional order. See J.T. Patterson, *Congressional*

"court-packing" proposal reached a vote, the Court reversed its stand and upheld the most radical piece of national economic regulation to date, the *National Labor Relations Act*.[26] This shift was possible because Roosevelt was able to mobilize enormous popular support for his constitutional program. Leaving aside the questionable wisdom of accomplishing constitutional change through judicial appointments,[27] there is no sign in Canada today of a strong popular mandate for any particular program of constitutional change.

Today, the first two of these transformations are not only accepted, but venerated by most Americans. The third is fully accepted, although much of the citizenry does not recall it as a major constitutional event, perhaps because it was not accompanied by revolution or civil war.

So much for political legitimacy; how about legal validity? The possibility that the *Constitution of 1787* might be void has never been considered by the courts despite scholarly protestations.[28] The Supreme Court declined to rule on the validity of the Reconstruction Amendments, reasoning that it was a "political question" not suitable for resolution by the judicial branch.[29] Finally, as we have seen, the third transformation was accomplished through the Supreme Court, so that it was effected and pronounced legal at the same time. All three transformations are fully accepted by courts today; indeed, their extra-legal origins are forgotten to all but a few constitutional scholars.

Is there a principled, legal justification for this uncritical judicial acceptance of extra-legal procedures? To begin with, it is important to note that in the case of major constitutional change, the distinction between political legitimacy and legal validity is extremely tenuous. The written constitution provides the ultimate formal legal rule by which law may be recognized.[30] A statute, for

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Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939 (Lexington: U. of Kentucky Press, 1967) at 87-88.

[26]*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). For an argument that the court-packing plan was not itself responsible for this "switch in time that saved nine," see L. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (New York: Random House, 1985) at 67.

[27]For a critical view of this method, see *We the People*, *supra*, note 7 at 53-54.

[28]L. Orfield, *The Amending of the Federal Constitution* (New York: Da Capo Press, 1942) at 11.

[29]*White* v. *Hart*, 80 U.S. (13 Wall.) 646 at 649 (1871) (*dictum*); but see *Leser* v. *Garnett*, 258 U.S. 130 at 136 (1922) (stating that the *Fifteenth Amendment* was validly adopted).

[30]This discussion draws on the concept of an ultimate rule of recognition. See, generally, H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 102-07; Kay, *supra*, note 20 at 116-19. Note, however, that I am concerned with the ultimate *formal-legal* rule, while Hart is concerned with the *actual* standard used by legal insiders in recognizing valid law, which includes not only formal-legal rules but also assessments of the practical efficacy of laws. The debate over extra-legal amendment processes is precisely a struggle over the content and application of the Hartian ultimate rule of recognition. I am suggesting that the rule of recognition does not, in the United States, and should not, in Canada, rest solely on compliance with the formal-legal amendment procedure.

example, may be identified as law because it was enacted according to the constitutionally specified procedure. A constitutional amendment may similarly be recognized as valid law by referring to the textually specified amendment procedure. The amendment procedure itself, however, was not enacted according to any pre-existing legal rule of recognition. It can be recognized as law only by non-legal criteria.

In the industrialized West, democratic enactment has replaced religious blessing and royal sanction as the primary non-legal criterion of legality. Given that the amendment procedure itself is justified primarily by democratic enactment, then presumably it can be abrogated by a political process of equal or greater democratic validity.

This approach may be seen in American state court decisions dealing with amendments to state constitutions. A number of courts have affirmed the legality of extra-legal (also referred to as "extra-textual") amendment procedures.[31] These decisions draw on the theory of popular sovereignty,[32] which holds that iustead of merely consenting to be ruled by a sovereign, the people retain sovereignty, and all governmental bodies, state or federal, are merely agents of the people. It follows that the sovereign people can dismiss their agents or reallocate their powers at will.[33] The legality of extra-textual amendment procedures thus boils down to a determination of whether the people have spoken.[34]

Although this justification for extra-textual amendment relies heavily on distinctively American sources (most prominently, the *Declaration of Independence*), it grew out of two ideas that, in turn, are part of the English and French political heritage shared by the United States and Canada. First is the idea that government derives its legitimacy from the consent of the people, with its cor-

[31]See, for example, *In re Opinion to the Governor*, 178 A. 433 (Rhode Island 1935) [hereinafter *Governor*] (upholding a legislative call for a constitutional convention notwithstanding the lack of any express constitutional authority for such a convention); *Wheeler* v. *Board of Trustees*, 37 S.E.2d 322 (Georgia 1946) [hereinafter *Wheeler*] (upholding a new constitution that was enacted without the textually required convention on the ground that ratification by popular referendum had cured the defect); *Gatewood* v. *Mathews*, 403 S.W.2d 716 (Georgia 1966) [hereinafter *Gatewood*]; *Smith* v. *Cenarrusa*, 475 P.2d 11 (Ky. Ct. App. 1970) [hereinafter *Smith*] (both decisions upholding the legislature's action in submitting a proposed constitution for popular ratification despite the lack of constitutional authorization, on the ground that snbsequent ratification would cure the defect).

It should also be noted that a number of courts have denied the validity of extra-legal changes. See, for example, *McFadden* v. *Jordan*, 196 P.2d 787 (California 1948). These decisions are obviously of less use in explaining the judicial acceptance of the three great extra-legal transformations at the national level.

[32]See *Governor*, *ibid.* at 446-51; *Wheeler*, *ibid.* at 326; *Gatewood*, *ibid.* at 721; *Smith*, *ibid.* at 15-18.

[33]On the origins and significance of the American notion of popular sovereignty, see A. Amar, "Of Sovereignty and Federalism" (1987) 96 Yale L.J. 1425.

[34]See *We the People*, *supra*, note 7 at 49-50.

ollary that the people can withdraw their consent. Second is the Lockean principle that the people enjoy the right of self-preservation, which includes the right to alter their form of government if it becomes oppressive or if the existence of the country is threatened.[35]

Either of these theories could justify extra-legal amendment processes even without going as far as popular sovereignty. Moreover, the idea of popular sovereignty is already partially embodied in Canadian law and political practice through universal suffrage, which is not only guaranteed by the *Canadian Charter of Rights and Freedoms*, but also insulated from legislative override.[36]

There are two difficult problems in determining whether or not the people have spoken. First, there is the question of who are "the people." In the United States, it has long been settled that there is such a thing as an American "people" that holds the right of popular sovereignty. The *Constitution* proclaims that it was enacted by "We the People of the United States," and the concept of the people has played a central role in American political history.[37] Originally limited to white, property-owning males, the people now encompasses women, and members of all racial and ethnic groups and economic strata.

In Canada, the problem is obviously more complicated. According to one important school of thought, the Canadian Constitution originated as a compact between "two founding peoples."[38] The aboriginal peoples, who wield far more political influence than in the United States, must also be counted among the founding peoples.[39] Moreover, Canada has stronger traditions of provincial autonomy and regionalism than does the United States.[40] In short, there is a real

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[35]The view that government derives its legitimacy from popular consent has been, of course, a staple of social contract theory from St. Thomas Aquinas through Locke to Jean-Jacques Rousseau. See E. Barker, "Introduction" in *Social Contract: Essays by Locke, Hume, and Rousseau* (London: Oxford U. Press, 1958) at viii-ix, xxiv-xxvii; G.D.H. Cole, "Introduction" in J.-J. Rousseau, *The Social Contract and Discourses*, trans. G.D.H. Cole (London: Dent, 1966) at viii, xxvi, xxxii. For an analysis of Locke's thinking on the rights of self-defence, resistance and revolution, see R. Ashcraft, *Revolutionary Politics & Locke's Two Treatises of Government* (Princeton: Princeton U. Press, 1986) at 294-323.

[36]*Canadian Charter of Rights and Freedoms*, ss 3, 33, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. On the rise of popular sovereignty in Canada, see R. Whitaker, "Democracy and the Canadian Constitution" in K. Banting & R. Simeon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 240 at 249.

[37]On the concept of the "people" in U.S. political history, see D. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York: Basic Books, 1987).

[38]R. Macdonald, "... Meech Lake to the Contrary Notwithstanding (Part I)" (1991) 29 Osgoode Hall L.J. 253 at 284-89.

[39]*Ibid.* at 285 n. 61.

[40]See generally, R. Simeon & D. Elkins, "Regional Political Cultures in Canada" (1974) 7 Can. J. Pol. Sci. 397.

question whether there is such a thing as a *Canadian* people, or whether it makes more sense to talk of two, three, or more peoples.

In a sense, the idea of a Canadian people has never been put to a full test. Canada adopted a constitution and achieved independence without the direct involvement of the people as a people. Instead, constitution-making has been dominated by political elites.[41] It seems that Canadians have historically been less skeptical of their governments and more skeptical of popular power than have Americans.

We could conclude from these contrasts that the American experience is simply irrelevant to Canada. But I am more inclined (with typically American overenthusiasm, no doubt) to conclude that Canada's current constitutional ferment is the latest episode in the continuing creation of the Canadian people. It may be that unless Canadians strengthen their national identity, there will be no *Canadian* people to support a *Canadian* constitutional order, be it a centralized state or decentralized federal order with strong guarantees of regional and group autonomy.

This brings us to the second problem in judging the validity of extra-legal change: determining whether or not the people have acted with sufficient unity and clarity to justify departing from the amendment formula. We can assume that there will be no broad social consensus since that would obviate the need for extra-legal procedures in the first place. Thus, the departure from formal legality must be legitimated in the face of controversy.

Judging from the American experience, two conditions may be essential. First, the changes must result from an exercise of strong democracy approximating the republican mode described above, including broad and intense public participation and debate over issues of principle. Second, the opponents of change must receive a full, fair, and substantially equal opportunity to promote their viewpoint so that their defeat is seen as a clear affirmation of the changes, rather than a mere reflection of unequal political clout.

The enactment of the *United States Constitution of 1787* fits this model. To begin with, the proposed constitution was so controversial that it was adopted by only the barest of margins. Legitimacy could not be built upon a social consensus as to its substantive merit because there was none. Instead, legitimacy hinged primarily on the process of adoption. Whether for cynical or principled reasons, the Philadelphia convention chose the ratification process that was most likely to be regarded as an expression of popular sovereignty: state constituent conventions.[42]

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[41]Whitaker, *supra*, note 36 at 240-41.

[42]See Kay, *supra*, note 20 at 132-33; R. Kay, "The Illegality of the Constitution" (1987) 4 Const. Comm. 57 at 70-75.

Modern critics have pointed out that only a minority of the population participated in delegate elections, and that the Anti-federalist opposition, which was strongest among backcountry yeoman farmers, was unfairly disadvantaged by its geographic dispersal and meagre resources.[43] Nevertheless, the process leading to adoption was widely viewed as an exercise in strong democracy. The Anti-federalists themselves believed in democracy at the state level, and the convention had been the people's mechanism of choice since the revolutionary period.[44] Moreover, at least in the crucial states of New Hampshire, Massachusetts and New York, a number of Anti-federalist sympathizers were persuaded to support the proposed *Constitution* during the state ratifying convention, and it was these swing voters who made the difference.[45] In the political culture of the time, the ratification process appeared to be a legitimate exercise of popular sovereignty.[46]

In the second great transformation, democratic processes were overshadowed by the dynamics of civil war, occupation, and retribution. Nevertheless, republican politics played a significant part. Newly liberated African-Americans plunged into politics with tremendous energy, organizing, protesting, calling conventions, and forming coalitions with white Republicans.[47] It was the violent suppression of one such coalition effort — an attempt to convene a constitutional convention in Louisiana — that shocked the North into supporting Congressional reconstruction.[48] Thanks in part to the Louisiana incident, the Republican supporters of constitutional change won a smashing two-to-one victory in the Congressional elections of 1866, which had become a virtual referendum on the *Fourteenth Amendment*.[49] The Southern states could object that they had been excluded from the election, but the fact of their secession from the union negated the moral force of their argument.

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[43]The classic statement of this position is in C. Beard's, *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1986) at 239-52. Although some of Beard's specific findings have been disputed, his main points as to the low rate of voting and the disadvantaged situation of backcountry voters have stood the test of time. For a modern restatement of Beard's critiques, see M. Parenti, "The Constitution as an Elitist Document" in B. Ollman & J. Birnbaum, eds, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive, and Especially Socialist Criticism* (New York: New York U. Press, 1990) 141 at 155-56.

[44]Amar, *supra*, note 33 at 1459.

[45]Even Beard, foremost among the critics, rejected charges that Massachusetts delegates had been bribed, and accepted the view that the Federalists prevailed there and in New York and New Hampshire by eloquent persuasion and skilful manoeuvring. See Beard, *supra*, note 43 at 225-29. This is not to say that the process was entirely pure. See J. Main, *The Antifederalists; Critics of the Constitution, 1781-1788* (Chapel Hill: U. of North Carolina Press, 1961) at 187-248.

[46]Kay, *supra*, note 20 at 134-36, 160.

[47]E. Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988) at 110-19, 281-91.

[48]*Ibid.* at 263-64.

[49]*Ibid.* at 267.

While lacking any overarching organizational manifestations of popular sovereignty like the conventions of 1787-90, the third transformation was a product of mass protest, strikes, and Franklin Roosevelt's spectacular electoral victory of 1936.[50] The losers, most prominently business interests, could not plausibly complain that they lacked the resources and influence necessary for a fair chance to promote their viewpoint.

What kind of democratic exercise could justify the use of extra-legal amendment procedures in Canada today? A commonly mentioned possibility is ratification by referendum. In my view, however, a referendum *by itself* could never serve as a justification for extra-legal constitutional change. Even with a supermajority requirement, the referendum vote would say nothing about the intensity of public support or opposition. A referendum reduces citizen involvement to the casting of a "yes" or "no" vote. The absence of any popular role in formulating proposals leaves open the possibility that many citizens may be displeased with both of the allowable options (voting yes or no) and cast their votes for the lesser of two evils. A referendum vote count does not reflect the depth or intensity (as opposed to the numerical breadth) of support for the competing positions. A referendum victory under these circumstances would provide a flimsy basis for fundamental constitutional change, and a defeat would yield few lessons that would be of use in future efforts.

On the other hand, a referendum ratification vote coupled with public participation at the proposal stage[51] might justify extra-legal change. Consider the following scenario. Parliament calls a constitutional convention. There is broad participation in the election of convention delegates, and the population generally perceives the electoral process to be fair and the resulting delegate slates to be representative.[52] The convention overwhelmingly endorses a set of proposed amendments. The convention delegates and most Canadians are convinced that this is the last best hope for Canadian federalism. There is concern, however, that one or two small provinces might block ratification, or that the potentially applicable three-year deadline[53] might not allow sufficient time for the necessary deliberations. In this situation, the convention might legitimately propose abrogating the unanimity requirement[54] and substituting ratification by

[50]See *We the People*, *supra*, note 7 at 28; *Republican Moments*, *supra*, note 2 at 308-10.

[51]By "proposal stage," I mean the stage of drafting the proposed constitutional changes that will subsequently be submitted for ratification.

[52]Some proposals for ensuring a representative delegate body are discussed *infra*, text accompanying notes 66-69. The problem of Quebec's participation is discussed *infra*, text accompanying notes 71-73.

[53]S. 39(2) of the *Constitution Act, 1982* clearly imposes the three-year deadline on amendments requiring the support of at least seven provinces representing 50% of the population (s. 38(1)). There is no express time limit, however, for amendments requiring unanimous consent (s. 41).

[54]Unanimity is required for amendments whose subject matter falls into s. 41 of the *Constitution Act, 1982*. For amendments made under s. 42(1), the conditions of s. 38(1) apply, *i.e.* resolutions

popular referenda, perhaps with a nationwide supermajority and a requirement of separate majorities in each of, say, seven provinces making up to ninety percent of the population.

Although referendum ratification might thus play a useful role in constitutional change, it should not be chosen lightly. Empirical studies suggest that referendum elections are susceptible to manipulation by intensive media campaigns, especially when opponents of change put on last-minute advertising blitzes that exploit the electorate's fear of the unknown.[55] The obvious responses to this problem, restrictions on last-minute campaigning and limits on campaign spending, have been included in the *Canada Elections Act*, but have both been held unconstitutional in the United States.[56]

While it is possible to imagine situations in which extra-legal procedures would be appropriate, it is also easy to imagine situations in which they would not. It seems to this outsider, for example, that using extra-legal means to override dissent from Quebec would defeat the main point of the effort to reform the *Constitution Act, 1982*. The question, however, is one of legitimacy and constitutional politics, not technical law, just as it was when the *Constitution Act, 1982* was enacted over Quebec's protest, a procedure that was technically legal but widely challenged as effectively illegitimate.[57]

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of the House of Commons and the Senate and of seven provinces representing 50% of the population.

[55]T. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge: Harvard U. Press, 1989) at 109-13.

[56]In the United States, the courts have taken a restrictive view of possible limitations to freedom of speech in the context of a referendum campaign. See *Mills* v. *Alabama*, 384 U.S. 214 at 219-20 (1966) (overturning a state prohibition on election day campaigning); *Buckley* v. *Valeo*, 424 U.S. 1 at 39-59 (1976) (overturning federal restrictions on political campaign spending); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 at 790 (1978) (suggesting that restrictions on spending and contributions in the issue referendum context are even less justified than those in the candidate election context).

On the other hand, the *Canada Elections Act* (R.S.C. 1985, c. E-2) provides some safeguards against the possible manipulation through the media of the electorate in a federal election campaign. Under ss 48(1) and 213(1), parties and candidates that make campaign advertisements through any "broadcasting undertaking" or through "periodical publication(s)" either on the day of polling or on the day immediately preceding polling day are guilty of an offence. S. 208(3) establishes a formula for calculating the "maximum election expenses" a candidate can incur in his campaign, an amount which is mainly based on the number of voters in his electoral district (the formula is spelled out in detail at ss 210-12). Measures like these, if applied to a Canadian referendum campaign, could help make the process fairer and more democratic.

[57]See Kay, *supra*, note 20 at 154-55. In another example of a technically legal approach to a complex constitutional problem, the Supreme Court of Canada, in the *Quebec Reference* case (*A.-G. Quebec* v. *A.-G. Canada*, [1982] 2 S.C.R. 793, 140 D.L.R. (3d) 385) decided that Quebec did not enjoy a veto power over constitutional change because historically, the federal government and the other provinces had not, according to the Court, explicitly recognized, in their actions or statements, that such a veto existed. This decision has been controversial precisely because several

To sum up, extra-legal processes have been essential to all of the major transformations in the constitutional order of the United States. Because of deep social, economic and political *conflict* we were confronted by constitutional crises. But our written constitution effectively required *consensus* as a prerequisite for amendment. Absent a political miracle, our only hope was to change the *Constitution* by extra-legal means. Canada may well face a similar situation today.

III. Constitutional Convention

As we have seen, one of the United States' three major constitutional transformations might yield some positive lessons for Canada. The *Constitution of 1787* was proposed by a nationwide constitutional convention. Given the obvious caveat that this convention occurred over two centuries ago in an agricultural country of fewer than five million people, I think that the American experience suggests certain advantages of calling a convention at the proposal stage.

These advantages may be summed up in the observation that a convention can provide space for republican as opposed to ordinary politics. The calling of a convention signals to all concerned that something extraordinary is happening.[58] This is neither an intergovernmental negotiation nor an exercise in federal legislation. It is a focused attempt to deal with a constitutional crisis. When the delegates convene, they know that they have been called upon to rise above politics-as-usual.[59]

The selection of delegates for a constitutional convention should involve considerations that are different from those at stake in ordinary politics. Here, I think that the experience in 1787 does not provide a model for Canada today. The delegates to the Philadelphia convention were chosen by state legislatures without much controversy or deliberation, and little public discussion. This quiet process was made possible by the fact that few people expected the Philadelphia convention to produce major changes in the *Articles of Confederation*, much less a new constitution.

Even if it were possible to exclude the citizenry from participating, it would not be advisable. Delegate elections provide space for republican politics.

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observers felt the Court applied overly strict requirements for the existence of a constitutional convention.

[58]Amar, *supra*, note 33 at 1459 n. 147.

[59]The only major study of the political process in American state constitutional conventions found that a majority of the delegates to the six conventions under study believed, on the eve of the convention, that they were engaged in a lawmaking exercise that transcended politics-as-usual. E. Cornwell, Jr., J. Goodman & W. Swanson, *State Constitutional Conventions: The Politics of the Revision Process in Seven States* (New York: Praeger Publishers, 1975) at 74-75.

They get the citizenry involved in the constitution-making process from its inception. While an elite convention was not foreign to the political culture of 1787, it would clash badly with the more egalitarian and democratic political culture of today. Since 1787, there has been a consistent movement toward greater democracy, reflected in the move from indirect to direct election of senators and the President, and in the expansion of suffrage to include women, non-propertied males, and members of all races and national origins. It is not likely that any process other than direct election would be acceptable in the modern American political culture.[60] Although some might argue that this point is specific to the United States, there has clearly been a similar movement toward democracy in Canada[61] and at least some of the negative reaction to the processes leading to the *Constitution Act, 1982* and the *Meech Lake Accord* centred on the lack of popular participation at the proposal stage.[62]

To further distance republican from ordinary politics, delegates should be selected on a nonpartisan basis. Although it would be neither possible nor desirable to prevent parties, interest groups, and social movements from influencing the process, the removal of express party designations should provide an additional signal, both to the public and to the eventual delegates, that a constitutional convention calls for something different from politics-as-usual.[63] Moreover, freeing delegates from party loyalties should facilitate flexibility and compromise.[64] In the Philadelphia convention, for example, coalitions and cleavages shifted according to the issue.[65] This relatively free-flowing process made possible the drafting of a constitution that could be approved by all of the state delegations present. Fixed party voting blocs might well dam this fluid process of realignment.

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[60]Thus most American commentators agree that the delegates to a modern constitutional convention should be selected by direct popular elections rather than by the method used in 1787. See P. Weber & B. Perry, *Unfounded Fears: Myths and Realities of a Constitutional Convention* (Westport, Conn.: Greenwood Press, 1989) at 113; American Bar Association, Special Constitutional Convention Study Committee, *Amendment of the Constitution by the Convention Method under Article V* (Chicago: American Bar Association, 1974) at 33-34; American Bar Association, *Electing Delegates to a Constitutional Convention: Proceedings of an Annual Meeting Presidential Showcase Program* (Washington, D.C.: American Bar Association, 1985) at 15.

[61]See Whitaker, *supra*, note 36 and accompanying text.

[62]See K. Banting & R. Simeon, "Federalism, Democracy and the Constitution" in Banting & Simeon, eds, *supra*, note 36, 2 at 19-21; Macdonald, *supra*, note 38 at 276-77; B. Schwartz, "Refashioning Meech Lake" (1989) 18 Man. L.J. 19 at 20-22; A. Tupper, "Review Article: Thinking and Writing About Meech Lake" (1991) 29 Alta L. Rev. 310 at 326-27.

[63]In a study of delegate attitudes preceding six state constitutional conventions (one partisan and five nonpartisan), delegates selected in nonpartisan elections tended to support the higher law view of constitutional conventions more strongly than those elected in the partisan election. See *supra*, note 59 at 74-75.

[64]See text accompanying notes 78-87.

[65]C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Agathon Press, 1988).

Delegate elections will produce a representative convention only if the electoral process is structured to be strongly democratic. Important choices must be made on the size of districts, the number of delegates from each district, campaign funding restrictions, availability of public funding, and guaranteed access to media. Because of their complexity, most of these design questions are beyond the scope of this essay.[66] The important point here, however, is that such questions should all be resolved in the direction of strong democracy. Thus, for example, public funding and some form of guaranteed media access would seem presumptively desirable.

There is a danger that nonpartisan elections may lead to the underrepresentation of disadvantaged groups.[67] Political parties traditionally serve the function of mobilizing the electorate. With parties barred from playing that role, at least in an open way, there is an obvious danger that personal fame and the ability to purchase voter recognition with personal wealth could give the rich and famous a decisive advantage in the elections. According to the principal American empirical study of convention politics, however, the evidence on this point is inconclusive.[68] Moreover, in a high-stakes exercise in nationwide constitution-making, parties, social movements, unions and aboriginal peoples can all be expected to participate actively. Consider, for example, the highly effective efforts by the Canadian women's movement and the Indian lobby in the process leading up to the *Constitution Act, 1982*.[69] This kind of vigorous mobilization should more than offset the absence of formal party nominations and designations.

When they convene, the delegates should be freed from the exigencies of day-to-day politics so that they can focus on long-range structural concerns. In an extended process of small group discussion (attendance at the Philadelphia convention's plenary sessions rarely topped thirty,[70] and much of the work of a modern convention would undoubtedly be accomplished in committees and

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[66]Some of the questions are, however, addressed in my response to the proposals of the NDP minority on the *Beaudoin-Edwards Committee*. See *infra*, note 94 and accompanying text. For a useful overview of the issues involved in electing delegates to a constituent assembly, see Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada, *Minutes of Proceedings and Evidence*, issue no. 27 (Ottawa: Queen's Printer, 25 April 1991) at 119ff. (R. Janda) [hereinafter *Minutes of Proceedings*].

[67]There is some empirical evidence that nonpartisan election procedures result in the underrepresentation of women, persons in low status jobs, residents of poor neighbourhoods, and social, racial, and religious minorities. See E. Lee, *The Politics of Nonpartisanship: A Study of California City Elections* (Berkeley: U. of California Press, 1960) at 50-56, 181.

[68]The Cornwell study of American state constitutional conventions found "little consistent confirmation of the hypothesis that partisan systems were any more representative than nonpartisan systems." See *supra*, note 59 at 72.

[69]See C. Hosek, "Women and Constitutional Process" in Banting & Simeon, eds, *supra*, note 36, 280; D. Sanders, "The Indian Lobby" in Banting & Simeon, eds, *supra*, note 36, 301.

[70]*Supra*, note 19 at 24.

informal caucuses), individuals have an opportunity to develop relationships that cut across sectional and ideological lines.

Before such relationships can develop, of course, the key sectional and ideological blocs must be convinced to send delegates. Whether and how Quebec might be willing to participate remains a thorny issue in the current Canadian context. Several Quebeckers have taken the position that Quebec should not participate in any constitutional process until "Canada other than Quebec" agrees on and presents a set of constitutional proposals that is generally acceptable to Quebec.[71] In my view, ensuring Quebec's participation poses no greater difficulties for an elected constituent assembly than for any of the other proposed procedures for achieving constitutional change. As Prof. Peter Russell has suggested, Canada other than Quebec could use the assembly process to develop proposals, which if acceptable to Quebec, would serve as the basis for a second assembly with full participation from that province.[72] Another option would see Parliament appealing directly to the people of Quebec by calling Canada-wide delegate elections for a national constituent assembly. The election call could be accompanied by appropriate safeguards to protect Quebec voters, given their minority position, from being swallowed up in a Canadian electorate. For example, Parliament might guarantee that no proposal would become law without first receiving the approval of the Quebec electorate in a referendum election.[73]

I must emphasize that my purpose in raising these possibilities is not to solve the problem of Quebec's participation in the constitutional amending process. It is the far more modest one of demonstrating that the use of an elected constitutional convention is compatible with a variety of different approaches toward ensuring some type of Quebec participation in a constituent assembly.

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[71]See, for example, *Minutes of Proceedings*, *supra*, note 66, issue no. 30 (Ottawa: Queen's Printer, 30 April 1991) at 31-32 (L. Dion); *Minutes of Proceedings*, *ibid.*, issue no. 28 (Ottawa: Queen's Printer, 26 April 1991) at 57-61, 63-64 (A.-G. Gagnon).

[72]*Minutes of Proceedings*, *ibid.*, issue no. 9 (Ottawa: Queen's Printer, 7 March 1991) at 13 (P. Russell).

[73]In order to avoid going outside the textually specified amending formula, Parliament might guarantee that any proposed changes would be submitted to the voters of Quebec for approval before being submitted to the provinces for ratification. To reduce the appearance of "special treatment" for Quebec, this might be done as part of a Canada-wide referendum. Although some non-Quebeckers would consider this to be preferential treatment for Quebec, it seems to me that it merely recognizes the obvious fact that any genuine and lasting constitutional settlement must have the approval of the Quebec people. There is a rough parallel in the American constitutional experience. Before New York or Virginia had voted, the *Constitution* had already been ratified by the minimum number of nine states. Instead of relaxing and celebrating their success, however, the *Constitution*'s proponents redoubled their efforts to win in those states. They understood that, as a matter of political reality if not formal legality, ratification by both New York and Virginia would be essential to the consolidation of the new constitutional order. See generally, R. Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788* (Boston: Northeastern U. Press, 1983) at 213-18.

The distinct status of Quebec is, of course, but one of many sharp contrasts between the United States of 1787 and the Canada of today. But there is one similarity that encourages me to hope that these observations may not be entirely irrelevant. The one condition that, more than any other, made possible the success of the Philadelphia convention is present at least to some extent in Canada today. In 1787, there was a widespread perception that the union might be in danger of dissolving. This threat helped the delegates to put aside minor disagreements and focus on broader issues. As in wartime, the need to pull together can bring forth the better side of people, encouraging them to put aside private interests for the public good. If, despite the threat, this does not happen, then it may be that the federation was not meant to last.

In addition to the sense of crisis, there is also a certain similarity in the problems faced by the Americans of 1787 and the Canadians of today. The main issue is the structure of the federal system. Its most basic features are open to question. The problems are polycentric and subtle; this is no head-to-head clash of moral positions. The questions of multiculturalism, Quebec's status, and regional representation may all be linked. Deliberation, compromise, and collective creativity — the great strengths of the convention form — will be essential.

If conventions are so desirable, then why has the United States not had one since 1787? The short answer is that the conditions for calling a convention have never been met. The American constitutional amendment formula provides that "Congress ... on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments."[74] Never have two-thirds of the states applied for a convention on the same subject in the same period of time.

Why not? To give another quick answer: because the two-thirds requirement is very difficult to meet, and Congress has headed off several convention movements by proposing amendments itself.[75] (In addition to conventions, the amendment formula authorizes Congress to propose amendments on a two-thirds vote of both houses.)

This still leaves the question why, given that extra-textual means were used to accomplish the second and third constitutional transformations, Americans did not simply bypass the two-thirds requirement and call a convention during those crises. Again, there is a short answer. The convention form was not well-suited to the resolution of those crises. No amount of deliberation and compromise could have avoided a showdown between slavery and freedom.[76] As for the

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[74]U.S. CONST. art. V.

[75]Weber & Perry, *supra*, note 60 at 75-76.

[76]On the eve of the Civil War, the state of Virginia issued an invitation for a "Peace Convention" to be held in Washington, D.C. Twenty-one states sent delegates, among whom were former cab-

crisis of the 1930s, Roosevelt believed, probably correctly, that business interests exerted enough influence over state politics to block any formal constitutional amendments.[77] Moreover, a convention would have been an unnecessarily cumbersome method for making changes that could be accomplished merely by having the Supreme Court reinterpret ambiguous constitutional provisions.

Many Americans would strongly disagree with my positive assessment of the convention form. We recently had a very passionate debate over the desirability of calling a national constitutional convention to propose a budget balancing amendment. Many people argued that the convention is a form of constitutional roulette.[78] Once one is called, there is no way of knowing what the delegates will do. Perhaps the convention might "run away" and propose all kinds of drastic changes to the basic law. After two centuries of disuse, the nationwide constitutional convention is almost as unfamiliar in the United States as it is in Canada.

But there are always many risks when a country attempts major constitutional change, especially during times of constitutional crisis. Efforts by leaders to maintain tight control of the process can be just as likely to backfire as a new process. Canada tried the intergovernmental approach in the *Constitution Act, 1982* and the *Meech Lake Accord.* Neither managed to resolve the Canadian constitutional crisis.

Unfortunately, a majority of members of the *Beaudoin-Edwards Committee* resoundingly rejected the idea of a constituent assembly.[79] Convention delegate elections would not, according to the majority, solve the problem of public participation because "[i]f voting provided a feeling of participation, the public should have felt this during the Meech Lake process, when decisions were taken by elected legislators."[80] Moreover, selecting delegates specifically for the purpose of constitutional deliberations might, according to the majority, have the

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inet officers, governors, senators, representatives, and an ex-President. Congress refused, however, even to consider the convention's proposals. President Lincoln was pressured to support a constitutional convention, but while expressing a preference for the convention method as a means of achieving constitutional change, disclaimed any desire for amendments at that time. See R. Caplan, *Constitutional Brinkmanship: Amending the Constitution by National Convention* (New York: Oxford U. Press, 1988) at 52-56.

[77]*Supra*, note 24.

[78]It should be noted, however, that the American debate differed in an important way from the current Canadian debate in relation to the scope of the changes under consideration. Recent calls for an American convention have focused on the need for a single, specific policy change, for example a balanced budget amendment or a ban on abortions. The most persuasive arguments against a convention emphasize the inappropriateness of calling a convention to consider a single, discrete issue of policy. See L. Tribe, "Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment" (1979) 10 Pac. L.J. 627 at 628-29.

[79]*Supra*, note 1 at 47-51.

[80]*Ibid.* at 47.

drawback of locking them into pre-declared positions, thus crippling their ability to compromise. Even if this did *not* happen, and delegates were elected "because of their general values, and their willingness to engage in negotiation about specifics, they would not differ from politicians currently elected in general elections."[81]

The majority report is an impressive document that reflects both broad knowledge and deep thinking about the process of constitutional change. Nevertheless, in my view, it fails to confront adequately the distinction between republican politics and politics-as-usual. The considerations involved in selecting convention delegates and ordinary representatives can be quite different even where the delegate candidates are smart enough not to commit themselves to a rigid constitutional program. Party loyalties based on past performance, patronage, and non-constitutional programs can interfere seriously with constitution-making. During the process leading up to the *Constitution Act, 1982*, for example, Quebec voters rejected the sovereignty-association proposals of the *Parti Québécois* government, yet returned that party to power in the following election. Apparently, the vote for ordinary representatives did not reflect the electorate's constitutional views. The contradictory referendum and electoral results greatly reduced Quebec's influence in the constitutional process, perhaps with serious long-term consequences.[82] By contrast, nonpartisan delegate elections for a constitutional assembly would allow voters to focus their choice on the constitutional process, and thus to obtain both more accurate representation and a more direct experience of participation.

The report argues that political parties could not be excluded from convention delegate elections, and thus that "elections for a constituent assembly would strongly resemble elections for existing political office."[83] Although the report is undoubtedly correct in observing that political parties could not be entirely excluded from the process, the available empirical evidence indicates that their influence could be greatly reduced. The Cornwell study of seven American state conventions, five nonpartisan and two partisan, found that less than half as many party activists were selected in nonpartisan conventions than in partisan ones.[84] Of course, there is no *guarantee* that party influence would be reduced. Since there is no effective way to prohibit informal party participation, the reduction of party influence depends upon the generation of a "spirit of nonpartisanship."[85]

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[81] *Ibid.*

[82] A. Cairns, "The Politics of Constitutional Conservatism" in Banting & Simeon, eds, *supra*, note 36, 28 at 28, 30.

[83] *Supra*, note 1 at 49.

[84] *Supra*, note 59 at 67.

[85] *Ibid.* at 69.

The Committee's concern that convention delegate candidates would be "the ones with the most definite views, and the ones least inclined to compromise"[86] also seems misplaced. The Cornwell study found that in the nonpartisan setting, the delegates tended to be "self-recruited and motivated to run because of a sense of civic duty and a desire to reform state government."[87] People who take the time to run for office and attend a multi-month convention are likely to place a high value on producing a set of proposals. In the absence of compromise, they will be forced to write off their time and effort as a failure. In this light, the report's assertion that convention delegates might be less likely to compromise because they are not accountable to voters[88] seems exactly backward. Even if the constitutional process deadlocks, an ordinary representative might win support from the voters for taking a militant stance in favour of sectional interests, but a convention delegate gets no satisfaction or rewards for participating in a process that fails.

Of course, there is no certainty that a convention would rise above ordinary politics. A study of American state constitutional conventions cannot provide conclusive answers about a nationwide Canadian convention. My point is simply that, confronted with uncertainty, the majority assumes the worst about the convention process while the available evidence, however modest, points towards a more optimistic forecast. Meanwhile, the experience of government-dominated constitutional change over the past few decades has definitely been negative.

Recognizing this, the minority report of the New Democratic Party (NDP) argues that Canada must break with its "tradition of elite accommodation and do something dramatic, something to renew the democratic urge that the people have been expressing."[89] The report proposes a "constituent assembly" half composed of elected parliamentarians and half of representatives from various constituencies, including official language minority communities, racial and "ethno-cultural" minorities, physically and mentally disabled persons, and "other social groups whose important points of view are under-represented within our present electoral system."[90] The proposal calls for gender parity among the delegates, the participation of aboriginal peoples, and "equitable regional distribution, including equitable representation of northern Canada."[91] This assembly would travel the country, gather evidence, and present "consen-

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[86]*Supra*, note 1 at 49.

[87]*Supra*, note 59 at 67. Delegates in partisan elections, on the other hand, reported that they had been asked to run by parties.

[88]*Supra*, note 1 at 49.

[89]*Ibid.* at 74. The NDP members of the *Beaudoin-Edwards Committee* were Lynn Hunter, M.P. and Lorne Nystrom, M.P.

[90]*Ibid.* at 75.

[91]*Ibid.*

sus proposals" for ratification according to the amendment procedure specified in the *Constitution Act, 1982*.[92]

The NDP proposal exhibits the boldness and breadth of vision necessary to accomplish major constitutional change. Unfortunately, the proposal does not follow through on its promise to "break" with the tradition of elite accommodation. An assembly so delicately balanced among regions, genders, and social groups could scarcely be elected; it would have to be selected in advance by a small elite. Appointment decisions, including the determination of which social groups should be represented and in what proportions, would have a major impact on the political character of the assembly, and thus on the content of its proposals. Such an assembly would not, as the majority recognizes, give Canadians a sense of effective participation in the constitutional process.[93]

The NDP's apparent preference for selecting delegates by appointment seems to be motivated by a concern that elections would exclude disempowered groups from representation. Admittedly, it is unlikely that any electoral process would produce the ideal mix specified in the minority report. (It should be noted that it is equally doubtful whether any realistically achievable appointment process would produce such a mix). The electoral process could, however, be designed to minimize the risk of underrepresentation. In such a system of proportional representation,[94] for example, minorities can achieve substantial repre-

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[92]*Ibid.* at 76.

[93]*Ibid.* at 50.

[94]The term "proportional representation" encompasses a wide variety of electoral systems that seek, typically by means of multi-member districts, to "relate seats to votes more proportionately than is possible under a single-member-constituency system." See D. Butler, "Electoral Systems" in D. Butler, H. Penniman & A. Ranney, eds, *Democracy at the Polls: A Comparative Study of Competitive National Elections* (Washington: American Enterprise Institute for Public Policy Researcb, 1981) 7 at 24. Among many proportional systems, probably the most effective at mirroring voter preferences and ensuring minority representation is the so-called "single transferable vote" system, which has been used at the national level in Ireland and Australia, and at the local level in some Canadian and American cities. Under this system, electors number the candidates in order of preference. The ballots are then sorted according to the candidate marked number one. If a candidate has garnered enough number one votes to assure election (according to a mathematical formula called the "drop quota"), all of his or her remaining ballots are transferred to the number two choice. If a candidate has accumulated so few number one votes that she clearly has no chance of winning, her ballots are transferred to the number two choice. This process continues until the number of candidates meeting the drop quota is equal to the number of vacancies to be filled. For a more detailed description with examples, see E. Lakeman, *How Democracies Vote: A Study of Majority and Proportional Electoral Systems* (London: Faber & Faber, 1970) at 107-17.

Critics have identified three major problems with the single transferable vote system. The first — that it reduces the influence of political parties — would be a strengh rather than a weakness in a nonpartisan delegate election. The second — that it does not work well where there is a large number of offices to be filled — can be solved by adjusting the size of the districts to ensure a manageable number of delegate positions. The tbird — that it is difficult for voters to understand — could, in my view, be overcome given the Canadian electorate's high level of education and the

sentation. This solution avoids the extremely difficult problems of deciding in advance which groups should be represented, in what numbers, and by whom. Instead, minority group members themselves decide whether and how strongly they wish to be represented by members of their own group.

Even if the group representation problem can be solved, one might ask, is it really prudent to attempt an approach so drastically different from past practice as a constitutional convention? Given that this may be the last chance to hold the union together, would it not be better to use familiar methods, especially given the urgent time pressures?

To this outside observer, it would be a mistake to plan on the assumption that what happens between now and the Quebec deadline[95] will necessarily determine the future of the Canadian Constitution. It seems that many people felt that way about the *Constitution Act, 1982* and the *Meech Lake Accord*, but here you are today about to embark on another round of constitutional lawmaking. As for Quebec's undoubtedly serious deadline, Quebeckers might be more impressed by the initiation of a relatively cumbersome process with a real chance of success than by a repetition of the more streamlined but as yet inadequate procedures of the past. The calling of a nationwide convention would, at a minimum, serve as a dramatic demonstration that Canada other than Quebec is taking the constitutional crisis seriously.

To indulge in an oversimplification, a constitutional convention can either succeed or fail. In the long run, the cost of a failed convention may not be so large. The lessons learned might alone be worth the effort. A participatory process could reveal much about the temper of the country. Even a failed convention may yield new proposals that advance the debate. By contrast, another failed effort at amendment by intergovernmental agreement is not likely to yield many new lessons.

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ready availability of channels of communication to voters. As for the argument that proportional representation is foreign to the Canadian political culture, so is the idea of an elected constituent assembly; both presuppose a willingness to depart from traditional approaches. It should be kept in mind that both of these innovations are being proposed only for a one-shot lawmaking event, and only after traditional methods have repeatedly failed to resolve the constitutional crisis.

[95]Quebec's deadline can be found in Bill 150, *An Act Respecting the Process for Determining the Political and Constitutional Future of Québec*, 1st Sess., 34th Leg. Que., 1991 (assented to 20 June 1991). With this bill, the government established two committees, one for examining Quebec's accession to sovereignty (see ss 2-3) and another to study any binding constitutional proposals made by the federal government to the province (see ss 4-6). Also, s. 1 of Bill 150 sets out that:

> [t]he Gouvernement du Québec shall hold a referendum on the sovereignty of Québec between 8 June and 22 June 1992 or between 12 October and 26 October 1992.
>
> If the results of the referendum are in favour of sovereignty, they constitute a proposal that Québec acquire the status of a sovereign State one year to the day from the holding of the referendum.

In that sense, Bill 150 sets out the "deadline" for the conclusion of successful constitutional negotiations between Quebec and the rest of Canada.

On the other hand, the gain to be had from a successful convention could be immense. Aside from breaking through the intergovernmental deadlock, a convention might provide the kind of dramatic lawmaking event that could justify circumventing the current amendment process, consummate Canada's constitutional independence from Great Britain, and fix the federal structure for many decades to come.