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And No One Cheered: Federalism, Democracy and the Constitution Act, edited by Keith Banting and Richard Simeon

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Reviewed by Patrick J. Monahan[*]

The recent round of Canadian constitutional reform has spawned a veritable flood of legal and political commentary. For students of Canadian affairs grappling with this ever-growing body of literature, *And No One Cheered* stands out as essential reading. This collection of seventeen essays cuts through much of the rhetoric and posturing surrounding the reform process to give an incisive and uncompromising analysis of the struggle and its outcome. The contributors approach the events they describe from widely different and often conflicting perspectives. Yet they all seem agreed in their verdict on Canada's constitutional labors: this moment in the nation's collective history has been a time of lost opportunities and shattered illusions rather than of vision and rebirth. Canadians had an unprecedented opportunity to restructure and revitalize their constitutional arrangements, but their political elites allowed the opportunity to slip through their fingers. Not only have Canada's underlying political tensions remained unresolved but, arguably, they have been exacerbated by the bitterness and polarization created by the reform process.

The first group of essays in the volume examines the

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constitutional reform process from the perspective of federalism. The institutions of federal government are an attempt to accommodate the two great cleavages in the Canadian polity: dualism and regionalism. As the introductory essay by Banting and Simeon argues, these cleavages have generated two starkly contrasting visions of the nature of the Canadian community.[1] Dualism contrasts an image of Canada as two distinct societies or nations with a second image of Canada as a single, bilingual unit. Regionalism expands and develops this contrast in background conceptions. It sees Canada either as a collection of regional communities or as a unified polity that is more than the sum of its parts. The authors of the first group of essays argue that the constitutional Accord[2] failed to reconcile or transcend these contradictory visions of the country. Instead, it was a "blunt and brutal compromise"[3] which, at best, will provide only a temporary ceasefire in the relentless intergovernmental war.

The most negative and angry response comes from the four Quebecers in this first group. Their essays begin with the assumption that the distinctive national character of Quebec society requires an expansion of the constitutional authority of the Quebec government. They regard the constitutional Accord as a betrayal of that vision of Canada. Particularly important is the essay by Daniel Latouche.[4] Although Latouche is fired by a sense

of outrage at the "constitutional mouse" delivered by the "federal-provincial mountain," his essay offers analysis as well as emotion. In particular he argues that Quebecers must share part of the blame for their fate. Quebec's political leaders since 1960 have been unable to agree on a constitutional strategy and pursue it effectively. Instead, they have been obsessed with negotiation: "one partner wanted to negotiate without necessarily reaching agreement, while the other would have liked to reach an agreement without negotiation" (p. 98). In this ambiguity lay the seeds of a constitutional "hijacking." The essay by Gerard Bergeron[5] is less successful. Like Latouche, Bergeron articulates forcefully Quebec's disillusionment with federalism following its exclusion from the constitutional Accord of November 1981. Yet Bergeron makes little attempt to analyze this process or its implications for Quebec. He contents himself with simply recounting the reactions of Quebecers and justifying the tactics and the policies of the Levesque government. Bergeron finds it necessary to reassure his confused readers that "the experience of Quebecers is not as dramatic as that of the Poles, that Trudeau has not imposed the same fate on Levesque as Jaruzelski has on Lech Walesa" (p. 67).

In contrast, Roger Gibbins' perceptive essay is written from a pan-Canadian perspective.[6] Gibbins regards the erosion of federal institutions and political authority as the great crisis of Canadian

federalism. The unrepresentative character of our national political institutions has produced strong sentiments for reform in Western Canada. Yet the West has been unable to generate any coherent, alternative vision of how the country ought to function. Instead, the articulation of Western discontent has been monopolized by provincial premiers whose uppermost concern has been to preserve their own prerogatives and power. In Gibbins' view, a succession of Western premiers has been far more interested in minor refinements to the existing system that would safeguard provincial power rather than in fundamental reform. Thus, paradoxically, instead of generating impetus for change, the alienated West has assumed a "largely defensive posture, protecting an institutional status quo that should not have been defended, not in its present form, and not by the West" (p. 122). Gibbins sees the main failing of the Constitution Act, 1982 as its strengthening of the position of Western Canadian provincial governments. The Act confirms the proposition that "the constitution is the property and prerogative of governments rather than the people governments represent" (p. 127). Gibbins' great strength is his ability to overcome the pervasive tendency to identify existing patterns of hierarchy or privilege as natural or inevitable forms of social oranization.[7]

The second section of the volume is comprised of essays analyzing the role of the Supreme Court of Canada in the

constitutional reform process. The authors of these essays regard the historic judgment of 28 September 1981[8] as one of the most important ever delivered by the Court. William Lederman's essay[9] adopts an avowedly realist stance. He argues that the majority and minority judgments in the case are explicable only in terms of the judges' contrasting conceptions of the nature of Canadian federalism. In his view, this follows from the fact that, although the various judges were reading the same constitutional history and precedents, they came to radically different conclusions on the legal issues. Unfortunately, though, Lederman's analysis raises more questions than it answers. If the essence of constitutional adjudication consists of asking jurists to elaborate their beliefs about the nature of Canadian federalism, how does this process differ from political reasoning in general? Moreover, why should choices of this type be the preserve of an unrepresentative group of elite lawyers?[10] Lederman does not resolve these underlying problems.[11] Noting that the judgments of the court were thorough and scholarly, he concludes that "authoritative judicial review is alive and well and living in Canada" (p. 187).

Peter Russell is more critical of the Court's performance.[12] He rejects the Court's view that constitutional conventions are in no sense part of constitutional law. But, Russell argues, once the Court accepted this stark distinction, it should have refused to answer the

reference question dealing with constitutional conventions. If there is, in fact, a wide gulf separating law from convention, the court was simply engaging in politics by rendering a decision on the conventional issue. As such, Russell regards the court's judgment as lacking intellectual coherence.

The final group of essays examines the reform process from the perspective of democracy. The theme running through these essays is the weak nature of Canada's commitment to any thorough-going form of. popular sovereignty. The recent process of constitutional reform reveals Canadian politics to be a "process of democratic elitism tempered by occasional populist anger."[13] The most prominent exposition of this argument is the essay by Reginald Whitaker.[14] He suggests that Canadian politics has always been an elite affair; the primary role of the constitution having been to maintain peace between governments rather than between government and the people. Whitaker sees the roots of this elitist tradition in the eighteenth century British doctrine that sovereignty lies in the Crown-in-Parliament, as opposed to the people themselves. In his analysis of the most recent reform episode, Whitaker sees faint indications that Canadians were prepared to break with these anti-democratic assumptions. He suggests that there were some significant aspects of the original federal proposals which did recognize elements of popular sovereignty. But these

democratic elements were vigorously attacked and eventually eradicated. In this way, "Canadian traditions were preserved" (p. 260).

The verdict of these essays is harsh, but not unfair. They deserve to be read not just by professional students of Canadian affairs, but by the general Canadian public. Anyone who does so will come away with the conviction that more meaningful constitutional reform is imperative in the near future. The issue, of course, is whether such change is still possible. Most of these essayists seem to believe that the political elites, as well as the citizenry, have been exhausted by the long years of constitutional wrangling and now wish to deal with other matters. It is almost as if the incumbents of privilege, having beaten back the forces for change, have become impregnable. But this view is mistaken, reflecting the "dark fatalism which bids men regard themselves as the sport of fate, their conditions beyond curing, their lot one to endure."[15] This fatalism is only necessary or inevitable if Canadians choose to make it so. The lost opportunities of 1982 need not remain lost forever. They must be a springboard to action and not acquiescence.

Notes

1. Pp. 11-17.

2. The 'Accord' is the agreement reached at the First Ministers' Conference in November 1981. Nine provinces and the federal government signed the agreement but the government of Quebec angrily denounced it as a betrayal of the province's historic claims and aspirations. The November agreement served as the basis of the Constitution Act, 1982, which was enacted by the United Kingdom Parliament as Schedule B of the Canada Act, 1982, U.K. 1982, c.11.

3. Cairns, "The Politics of Constitutional Convervatism," at 42.

4. See "The Constitutional Misfire of 1982," at 96.

5. See "Quebec in Isolation," at 59.

6. See "Constitutional Politics and the West," at 119.

7. For a wide ranging discussion and critique of the 'naturalistic impulse, the view that there is some inevitable or natural structure to society-see Unger, "The Critical Legal Studies Movement," 96 *Harv. L. Rev.* 51il (1983).

8. Reference Re Amendment of the Constitution of Canada (1982), 125 D.L.R. (3d) 1.

9. 'The Supreme Court of Canada and Basic Constitutional Amendment," at 176.

10. Thus Paul Weiler, amongst others, has suggested that judicial review of federalism disputes should be abolished. See Weiler, *In the Last Resort* 155-85 (1974).

11. Lederman may want to argue that the Amendment Reference was atypical and that the vast majority of constitutional cases does not invite such judicial manipulation. For an argument along these lines, see Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," 53 *Can. B. Rev.* 597, 616-20 (1975).

12. See "Bold Statescraft, Questionable Jurisprudence," at 210.

13. Banting and Simeon, supra n. 1 at 18.

14. See "Democracy and the Canadian Constitution," at 240.

15. Hertzler, *The History of Utopian Thought* 259 (1965). This argument is developed in more detail elsewhere: See Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism," 34 *U. Toronto L.J.* 47 (1984).