

Then and Now: The Similarities

Canadian Federalism and the Distribution of Powers

In the months preceding the Quebec Referendum of October, 1995, considerable attention was lavished upon the precise wording of the text that would be submitted to the people. At first, the debate focused on the speculative question of what it would be and, once this was known, what it should have been.²⁵ Federalists argued that their opponents had deliberately muddied the waters, misleading Quebecers into thinking that they could live in a sovereign Quebec that somehow remained part of Canada. The federalist strategy was to reduce the question to a stark dichotomy: either you are in or you are out--a formulation separatists wisely ignored. Both sides invoked such powerful symbols as Canadian passports and currency to support their respective positions. Post-election analysis revealed that substantial numbers of "yes" voters thought that a sovereign Quebec would in some way or other remain part of Canada, despite the scoldings they received from stern federalists for being so illogical.

Although no end to the crisis is in sight, I cannot help thinking that when the end comes, it will appear--much to the chagrin of ideologues of all stripes--in some hopelessly illogical compromise, whose sole merit will be that it works. If so, the Confederation Debates on Canadian federalism offer an illuminating precedent. Perhaps Justice Holmes had it right when he said that a page of history is worth a volume of logic.

Americans who study Canadian constitutional history feel right at home when they get around to examining the regulation of commerce because both countries impose an interprovincial or interstate limitation on the regulatory powers of their respective federal governments. Thus, in principle, neither Ottawa nor Washington may regulate commercial affairs that are strictly intraprovincial or intrastate. Despite this similarity in principle, Washington's writ, in fact, runs much further and deeper into the economic life of the United States than Ottawa's does in Canada. Noting this difference, a widely-used textbook on Canadian constitutional law states that "ironically, the express restrictions in