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# FOREWORD: O CANADA

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Nineteen eighty-one was a year that passed without commemorative notice in the United States, unlike 1976 (the bicentenary of the Declaration of Independence), 1989 (the bicentenary of the Constitution), and 1991 (the bicentenary of the Bill of Rights). Nineteen eighty-one was nonetheless a benchmark date of sorts in the constitutional history of America. For 1981 marked the bicentenary of the original constitution of the United States, the Articles of Confederation, of 1781. Approved by all thirteen states and boldly proclaimed as articles of "perpetual union," ironically the first American constitution nonetheless lasted less than a mere ten years. In that light, of course it is hardly surprising that no one felt much inclined to raise a toast to the bicentenary of our failed first constitution ten years ago, in 1981.

Today, when remembered at all, the Articles of Confederation are remembered principally (and perhaps only) as America's constitutional false start. The limited federation the states were willing to accede to in 1781 proved to be too weak. Today the Articles of Confederation survive principally in some few leftover tribal claims[1] but very little else. For the most part, when judicial references to our original constitution appear in modern cases (which is not often), they appear just for sharp contrast rather than comparison, typically to contrast the stronger powers vested in Congress in article I of the Constitution of 1787 with the weaker powers originally conceded six years earlier in the abandoned Articles of Confederation.[2] The



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1. Certain land claims have been actively pressed in recent years partly on the strength of certain early treaties originally entered into between those tribes and the government of the United States acting under the original Articles of Confederation, treaties several tribes now argue the United States has not abided by as it originally promised to do. When the Constitution of 1787 came to succeed the Articles of Confederation, these tribes point out, article VI of the new Constitution was drawn to preserve these treaty rights. There is little doubt that this is correct.

2. Indeed, in the 20th century article I powers have been construed in a manner effectively enabling Congress to legislate substantially at will. By treating Congress as having the primary role

Articles of Confederation were never amended. Rather, they were simply abandoned. One by one, the original states stepped out from the embarrassment of the Articles of Confederation to enroll under the new document delivered from the constitutional convention that met in Philadelphia during the summer of 1787.

North of the American border, Canada now struggles with what may turn out to be its own collapsing constitution. In Canada, in many ways it is still early constitutional dawn. In fact it was just yesterday, in April of 1982, that Queen Elizabeth II proclaimed the first formal passing of constitutional government in Canada. The Queen's proclamation in Ottawa was the culmination of a century-long effort to secure constitutional sovereignty in Canada, untying Canada from the North American Act of 1867. The ceremony in Ottawa officially established the patriation of the Canadian Constitution. Hardly was this done, however, when major expressions of dissatisfaction in Quebec (which had not formally accepted the Constitution) were renewed. Skepticism of certain provisions in the Constitution were likewise voiced in several other provinces. Altogether foresightedly, in his introduction in this journal to the symposium issue on the new Canadian Constitution, Paul Davenport summed matters up. "The Canada Act of 1982," he wrote, "represented the culmination of a century of constitutional wrangling and will likely be the prelude to another century of legal and political infighting in Canada."[3]

Now it is merely the spring of 1992. Already Davenport has proved to be only too correct. In fact, "events of legal and political infighting in Canada" have moved more swiftly, and possibly far more seriously, than even he had originally thought. Indeed, the questions in Canada now seem quite to transcend just the usual sorts of settling-in political infighting one might expect when a new constitution comes to meet its first test. Rather, the question in Canada now seems to be whether the 1982 Constitution of Canada will soon go the way of the original Articles of Confederation in the United States—and not toward greater union, rather quite in reverse.[4]

Those of us in the United States who recall our own original Articles of Confederation now look worriedly to constitutional differences that appear to be threatening our great neighbor to the north. Is this new Constitution of Canada so soon to be abandoned within its own first decade as was ours? If

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in determining the scope of its own powers, and by acquiescing in virtually any view Congress has presumed to assert of its wide-ranging regulatory claims, the Supreme Court has effectively left Congress to make such laws as it wants. Essentially, the Court tends to regard federalism questions as primarily "political" rather than "constitutional" in the United States. The result of this shift, first openly rationalized in the 1930s by the Court under Chief Justice Harlan Fiske Stone, has been to install Congress as its own constitutional monitor. In brief, constitutionally speaking, because of the Supreme Court's abdication of federalism review responsibility under the Constitution, essentially the United States retains only such measure of real federalism as Congress desires to retain.

3. Paul Davenport, *Reshaping Confederation: The 1982 Reform of the Canadian Constitution (Introduction)*, 45 L & Contemp Probs 1, 2 (Autumn 1982).

4. See, for example, the elaborate review of recent developments in Canada by Mordecai Richler, *A Reporter At Large (Quebec)*, The New Yorker Magazine 40-92 (Sept 23, 1991).

so, then in favor of what? Will it be succeeded by some "more perfect union" as was ours? As of this spring, in 1992, assuredly this seems unlikely. If not, however, then will Canada move in quite the opposite way, for example, even in the manner of a dissolving country, and if so, to be replaced by what? Will Canada give up its federal union (perhaps with some sort of novel Quebec nationality arising from the scheduled provincial referendum this October)? Despite its current, seemingly strong disposition evidently to do so, in dour remembrance of the failure of our own original Articles of Confederation during a similar period of mistrust and uncertainty, two centuries ago, we hope this centripetal force in Canada will not succeed.

Diversity and unity should yet be possible within Canada as one nation. To be sure, Canada struggles with the elusive balance of nationhood, federalism, and guaranteed personal (and group) rights. Nor do Americans necessarily have much to say that can be both concrete and constructive for their northern neighbor on the main matters that threaten to pull it apart. Still, remembering our own failed Articles of Confederation, it is surely not altogether unfitting to share the hope that there will be a resolve and an intelligence at work in Canada to save itself as one nation. Canada does not need the American example for doing this task (namely, the use of force and the bloodiest civil war ever fought out on this continent), but we hope it will find a way.

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In the meantime, there is this symposium on comparative Canadian and American constitutional law to consider, a symposium one hopes the recent events in Canada will not somehow render obsolete. In a fine variety of ways, moreover, this symposium attests to the play of many constitutional doctrines and complementary distinctions of these two, already developed, constitutional systems. Produced entirely through the dedication and energy of one person, Dr. Clark Cahow,[5] the symposium lays out virtually all of the principal areas of active constitutional engagement now current both in Canada and the United States. The table of contents quite satisfactorily provides a suitable reader's guide to the topics and authors. All are very well known to serious students of constitutional law in both countries. Summarizing their views would be more pretension on my part than help. Best, then, to let the excellence of these subjects and authors speak for themselves, after having now invited the reader to begin.

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