Canada’s third National Policy: The epiphenomenal or the real constitution?*

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Abstract

The idea of a National Policy as both a collective endeavour and a framework for detailed policy analysis is more constitutive of the Canadian state and its policy instruments than any of its renamed Constitution Acts. We begin with a descriptive genealogy of Canada’s three national policies, which we then project forward in the second and third sections analysing what we take to be the principles and components of Canada’s contemporary national policy based on citizen agency. In a brief fourth section we consider the notion of multiculturalism, often taken to be a key policy commitment of citizen-focussed governance for the future. Canada’s third national policy is an emerging fact, even if the substantive policy commitments it entails are not predetermined, but are open for political decision. Debating those possibilities will shape the country more profoundly than any attempts to perfect Canada’s formal institutional arrangements, the epiphenomenal constitution.
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Introduction: the nexus of constitutional text and national policy

Over the past half century constitutionalism has become the watchword of politics in many western liberal democracies. However beneficial this preoccupation, it is, nonetheless, not cost free. Citizens and politicians soon lose sight of the fact that constitutions, especially as represented in canonical texts, are metaphors not instructions for assembling bicycles. When Canadians reify the texts, they embalm the collective purposes to which the texts are tributary. They then debate which wing nut should be tightened first, and not why the bicycle needs wheels. Citizens and politicians also tend to forget that other metaphors often provide a richer understanding of the aspirations and accomplishments of their political community. In the Canadian context, the most powerful of these alternative constitutive metaphors is what scholars in the political economy tradition have labelled a “national policy”. In this paper we contrast written texts with policy practice in order to illuminate Canada’s real constitution and its 21st century challenges.

Classically, constitutional lawyers join with politicians and citizens in regarding the formal constitution as the key artefact around which competing interpretations of virtue in a polity should be argued. Hence the importance Canadian constitutionalists attach to the Quebec Act of 1774, the Constitutional Act of 1791, the Act of Union of 1841, and especially the British North America Act of 1867 and the Constitution Act of 1982. In declaring the rationale for asserting national sovereignty and setting out the animating principles, legitimating processes and governance institutions by and through which that sovereignty is exercised, these constitutional documents stand as a formal surrogate for the substantive constitutive conversation about how they choose to understand themselves. Each one was an instantiation of the national policy of its day.

What characterizes the political tradition of a State is not primarily the existence, or the permanence of formal institutional arrangements. It is the stability of the central questions that the constitutional (or constitutive) conversation seeks to address. While the specific constitutive conversation will, like its accompanying texts, evolve in response to changing beliefs, preoccupations and practices, as well as changing material circumstances, its animating themes and objectives -- the negotiation of authority between citizen and state and the fundamental policy presuppositions sustaining that negotiation -- are enduring. Still, it is the formal institutional arrangements that permit the formulation of policy, and the instruments of governance through which law is conscripted in the service of policy that are given pride of place by legal scholars; and these scholars, at the same time, frequently disparage the actual

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1 For an enumeration of the legislative texts that are deemed to be part of the constitution, see s. 52 of the Constitution Act, 1982, being Appendix I to the Canada Act, 1982 (U.K.). The significance of the term constitution in contemporary legal analysis in Canada is evident in the fact that Schedule to the Constitution Act, 1982 renames 13 U.K. statutes in which the expression British North America Act appears in the title as Constitution Acts.

2 Jeremy Webber provides a detailed elaboration of the notion of a constitutional conversation as “constitutive” in Reimagining Canada (Montreal: McGill Queen’s U. Press, 1994).
substantive content of public policy as the “epiphenomenal” constitution. Of course, many of these same scholars acknowledge that constitutional jurisprudence – the living constitution – is not merely a matter of courts applying canonical texts. Cases are driven by policy debates, and outcomes turn on policy issues even if they seem to be compelled by doctrinal analysis. Moreover, these policy debates lead governments to act, whatever the courts might say about how they should do so.4

In this paper we argue against the logocentrism of constitutional lawyers. Textually, the 19th century Canadian constitutional project may well have been crystallized with the BNA Act of 1867. The idea of Canada, however, was better articulated, and better linked to its political-economy foundations, in Sir John A. Macdonald’s 1879 election platform, the National Policy.5 That platform, which simply put a label on a project then already more than three decades old, included both the objectives of the Canadian State-building project and the means by which they could be achieved. Undoubtedly, political discourse in Canada has been dominated by questions about the place of Quebec, by debate about the distribution of legislative powers between provinces and the Parliament of Canada, and by the challenges of fiscal federalism.6 Many believe that the solution to these perennial questions of “national unity”, can be found in formal constitutional texts. Hence, the preoccupation (especially in Quebec City and by Quebec-based politicians like Trudeau and Mulroney in Ottawa) with constitutional reform. We disagree. We conceive the lawyer’s epiphenomenal constitution and the notion of a national policy as a more inclusive overarching metaphor that is not necessarily linguistically or regionally specific, nor linked to competitions between orders of government.

A focus on formal constitutional texts gives priority to the effect desired by political leaders, and to their scrambling when things somehow turn out differently, creating dissonance between daily life and their intentions. We therefore treat the written constitution as epiphenomenal, focusing instead on the policy choices Canadians have made and the social or economic forces that motivated those choices.7 The story we tell is citizen- and society-centric, not political actor-centric; it is about Macdonald, Laurier, King, Pearson, Trudeau and Mulroney (and a score of provincial premiers dating back to Mowat and Mercier) as followers not leaders. We are making an argument about the outcomes of the actions of Canadians, not the outcomes intended by politicians and their advisers. Our sense of how Canadians understand their country and the

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3 The OED defines epiphenomenal as relating to a secondary or derivative characteristic. Whether it is the text or the policy practices that constitute the epiphenomenal constitution is, we acknowledge, a matter upon which political scientists and constitutional lawyers are likely to disagree.

4 This said, for most constitutional theorists, the text of the constitution is primary; this text “constitutes” Canada but neither it nor its interpretation entails particular policies. One of the few constitutional scholars to write about the formal constitution as a policy instrument was Albert Abel. See J. Laskin, ed. “Albert Abel’s Constitutional Charter for Canada” (1978) 28 University of Toronto Law Journal 271.


6 Peter M. Leslie, Federal State, National Economy (Toronto: University of Toronto Press, 1987)

legal-political arrangements through which it is constituted owes much to a conception of social ordering developed by Lon Fuller:

Some of the most important and complex systems of order we know have come into existence, not by a single act of creation, but through the cumulative effect of countless purposive directions of human effort. Examples of such systems are language, economic markets, scientific theory, the common law, and on a homelier plane, a footpath through a woodland.\(^8\)

Hence the importance of the questions: does Canada still have a national policy? and more to the point, do Canadians have a vision of what they wish to do together that shapes their understanding of the goals and tools of governance? In 2008, some of the signs are discouraging. Citizens tell pollsters they think that government does not work any more. Many observers lament an apparent drift away from conventional politics evident in the attitudes of young people and in their declining turnout at elections. One also hears of confusion and anxiety from older Canadians who do not understand the social world inhabited by people under 30. A number of Canadians feel neither a strong sense of attachment to, nor identity with established collective institutions – whether political, socio-cultural, or economic. The results of the 2007 Quebec election suggest signs of resentment from groups who feel that newcomers do not share what they hold to be traditional values.\(^9\) Conversely, many of these same newcomers feel excluded from society’s mainstream. The subsequent Ontario election seemed to turn on whether minority religions could be trusted to have the same right to run their own schools that has long been enjoyed by the Catholic Church. In brief, public policy as debated in provincial legislatures and the House of Commons is perceived to be disconnected from the concerns of citizens of all ages, of all socio-economic statuses, of all historical and ethno-cultural origins, of all regions.

Worse, some traditional policy instruments no longer appear to be effective. Canadians are still wont to clamour for government to “do something” when things go wrong, especially with the economy, yet generally do not express much confidence in the capacity of politicians to find appropriate responses. Of course, many must love their judges because of the faith they apparently place in the 1982 Charter of Rights and Freedoms. Yet others see the court as an undisciplined agent of unwanted social change.\(^10\) The Canadian political community, perhaps once plausibly conceived as a unitary whole, is now held to be fragmenting; a shared vision or common public policy framework seems impossible to achieve. Everybody wants more choice, and nobody wants to wait, especially not for a new hip. Many young people want it now, want it free, and want it “no strings attached”.

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\(^8\) Lon L. Fuller, "Freedom—a Suggested Analysis" (1955) 68:8 Harvard Law Review 1305

\(^9\) The concern was sufficiently acute to prompt the Quebec government to establish by Order-in-Council 95-2007 (issued February 8, 2007), a Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles (the Bouchard-Taylor Commission).

Finally, the global economy, the increased international mobility of citizens, and the communications revolution resulting from the Internet are powerful centrifugal forces that challenge the capacity of Canadians to discern a vision of their common project. Canadians make their own fate, but largely not in circumstances of their own choosing, not least when as in 2008 the oil price gyrates and financial markets are in turmoil. In a rapidly integrating global context, it is fair to ask whether countries (or at least countries conceived as particular constellations of territory, history, policies and institutions) really matter anymore. States may no longer be the most relevant site for policy formation and implementation.

It may be that the way in which Canadians understand and talk about their contemporary situation is not new – that the witticism “as Canadian as it is possible to be under the circumstances” has always captured the meaning of Canada for Canadians. Nevertheless, it is worth considering whether the conversations and commitments that for two and a half centuries have enabled Canadians to imagine their country are still capable of generating a national policy that would be constitutive for the 21st century. The signal challenge today is how to build a sense of social obligation, social solidarity, social inclusiveness, and concern for fellow citizens, while continuing to respect different attitudes towards religion, culture and the legitimacy of a secular state. What policy role, indeed, does the state play in constituting the groups, attitudes and practices that at the same time constitute the state?

Of course, to characterize the challenges of Canada’s constitutive conversation as a matter of framing a national policy immediately presents a rhetorical conundrum. In such a heterogeneous polity as contemporary Canada, the words nation and national may not point in the right direction for exploring these challenges and discerning policies meant to respond to them. However much people may wish to try, in self-consciously plural societies they cannot erect the state upon singular national mythologies or a common national identity based on language, ethnicity, religion, culture, class or territory. The Canadian state project was initially, and today continues to be, defined by public policy, not by founding myths, flags, national anthems, constitutional artefacts and other symbols, however important these may have become in expressing and communicating public policy. That state project is neither constituted by nor

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11 In this paper, our story goes back only to 1759 because the usual story of pan-Canadian politics until now has imagined the country as the successor in title to a British Colony established on the foundations of a French Colony. This is not to deny the independent pre-1759 antecedents of Nova Scotia and New Brunswick, nor to ignore that, after 1949 a slightly different narrative would include the story of Newfoundland and Labrador dating to the 16th century. In addition, should Quebec accede to some form of internationally-recognized statehood, the narrative of that new State might go back to 1608, if not 1534. And most significantly in the current context, the narrative of the reconstructed Canadian state of the 21st century might well embrace the political dialogue with aboriginal peoples dating to 1497.

12 France and the United Kingdom, to take but two examples, are only now confronting this reality in debates about what it means to be “French” and “British”. By contrast, Canadians have grappled with it ever since General Robert Monckton told King George’s new French subjects in Quebec on September 22, 1759 that they were not expected to abandon either their language or the Catholic Church. For an extended discussion of this point see Roderick A. Macdonald, “The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: the Canadian Experiment” in D. Szabo and K. Kulcsar, eds., Dual Images: Multiculturalism on two sides of the Atlantic (Ottawa and Budapest: Royal Society of Canada and Hungarian Academy of the Sciences, 1996), at 52.
reflected in some essentialist sense of who Canadians are, have been, or must be. Rather it lies in the things Canadians have chosen, are choosing, and will in the future choose to do together. Together, these choices comprise a national policy.

Our goal in this paper is to investigate the idea of a National Policy as both a collective endeavour and a framework for detailed policy analysis. We believe that the idea of a national policy is more constitutive of the Canadian state and its policy instruments than any of its renamed Constitution Acts. In the first section we essay a genealogy of Canada’s three national policies. We project this descriptive genealogy forward in the second and third sections analysing what we take to be the principles and components of Canada’s contemporary national policy. Here we argue that national policies change because Canadians and their political economies change. Canada’s third national policy is an emerging fact. Nonetheless, because the substantive policy commitments it entails are not predetermined, but are open for political decision, there is an inescapable normative dimension to this essay. Given the path through the woodland that Canadians now seem to be following, what policies do we think meet the test of political virtue? Debating those possibilities will shape the country more profoundly than any attempts to perfect the institutional arrangements and allocation of legislative powers set out in the Constitution Act, 1867. In a brief fourth section we consider the notion of multiculturalism, often taken to be a key policy commitment of citizen-focused governance for the future. As authors, we think that the term multiculturalism, however important it may appear to be in itself, is inadequate within a conversation that acknowledges the inescapably plural sense of Canada.

In exploring dimensions of Canada’s current national policy, we do, nonetheless, take our cue from the concerns that drive preoccupation with multiculturalism: identity and agency matter in the constitution of states. We acknowledge that many legal scholars claim that “equality” is (or should be) the central policy motif for Canada’s third national policy. By grounding our understanding of this emerging national policy in the idea of citizen agency we do not ignore the equality claim. Rather we attend to it by focusing on the challenge of multiple identities for all Canadians, rather than for just a select (whether privileged or disfavoured) few. Our argument will be that choosing a thick, socially-embedded, conception of citizen agency as the register for our analytic framework gives us a policy notation in which we can consider alienated immigrants, disaffected pur laine Québécois, members of longstanding cultural and religious communities that have chosen to live apart from their fellow citizens, unemployed fish plant workers in Newfoundland, seasonal migrant farm-workers, and same-sex married couples in Toronto in the same key, without privileging any identity as either a problem or a solution.

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1. Canada’s three national policies

The title of this section poses a perennial dilemma for political economists and constitutional theorists. Do states exist to pursue public policies (Canada’s governments pursue national policies in the interest of Canadians), or does the pursuit of policies by social, cultural, linguistic, religious and economic interests – that is, purposive action of citizens -- lead to the creation of states (the Canadian government is a result of national policies pursued by Canadians)?\(^\text{15}\) If just the former our attention would be focused on institutional questions: who, or what, constitutes the state and what territory does it claim? If just the latter, our attention would be focused on people and their projects: what factors induce particular individuals and groups to imagine particular states as privileged policy vehicles? The answer is not self-evident, as a brief overview of Canada’s three national policies to date reveals.\(^\text{16}\)

One national policy instantiated by three “National Policies”

It can be argued equally plausibly either that Canada’s first national policy (NP1) of tariffs, immigration to the prairies and transportation infrastructure was simply a project of the late-19\(^\text{th}\) century Canadian federal government, or that the reconfigured and reinvented Canadian state flowing from the \textit{BNA Act} in 1867 was the fruit of an arrangement between the Montreal anglophone commercial bourgeoisie and the francophone leadership of the Roman Catholic Church, aided and abetted by the Colonial Office in London. In other words, a self-conscious state-building policy may be articulated first by economic elites and political opportunists, in their own interests, but it only works when it is appropriated by citizens and instantiated in all policy domains large and small. Whatever the origins of policies that shape the collective enterprise, successful governments both wrap themselves in these collective understandings, and


\(^{16}\) The arguments of the next three sub-sections are summarized schematically in Table I (below, text at footnote 26). We acknowledge that the periodization of the idea of Canada’s constitutive national policy into three particular “National Policies” is contested by some scholars who accept neither the fact of periodization nor the dates suggested. Nonetheless, all periodization in history is an analytical convenience. Moreover, Fowke’s analysis of the transition between at least the first two “national policies” is broadly agreed upon and we adopt it here. See V.C. Fowke, "The National Policy—Old and New" in W.T.Easterbrook & M.H.Watkins eds., \textit{Approaches to Canadian Economic History: A Selection of Essays} (Toronto: McClelland and Stewart, 1952/1988) 237.
find ways to build upon them. Sir John A. Macdonald’s “National Policy” of 1879 was a superb election slogan, one that still captured the imagination of Canadians more than a century later.17

NP1 was not, of course, a uniquely Canadian endeavour. Its core elements were similar to the ways all governments of the Atlantic area responded to the Great Depression of 1873. For the better part of half a century this approach to governance dominated public policy in Canada.18 Nonetheless, whether polity drives policy or policy drives polity, by the mid-1930s both had run their course: the transcontinental polity had been constituted by the accession of Prince Rupert’s Land and British Columbia to the Confederation (by 1905 only Newfoundland and Labrador and the territories above the 60th parallel had not become provinces); and the national policy was constituted through the peopling of Canada by immigrant farmers and the completion of three transcontinental railways.

A similar ambiguity of means and ends attends the story of Canada’s second national policy (NP2) of strong (especially federal) spending on social welfare and the institutions of cultural and economic nationalism. On one account, these programmes were a project of the mid-20th century Canadian state seeking a post-British Empire political identity. On another account, the institutions and symbols of that identity (for example, 1947 Governor-General’s Letters Patent, abolition of Privy Council Appeals, NATO, the Maple Leaf flag, National Anthem, the “Canada” wordmark, the Federal Identification Programme and the appearance of Canadian political figures on paper currency) were a project of Toronto interests that sought to make Ottawa as well as Ontario tributary to their anti-U.S. economic and cultural nationalism. The contemporaneous decline of the Montreal anglophone bourgeoisie and the rise of the francophone elites of an emerging Quebec, Inc. that looked more to Quebec City than to Ottawa as their state reveal the causal ambiguity.19

NP2 was a clear example of the move to the welfare state throughout the Atlantic area in the response initially to the Depression of the 1930s and then to the twentieth century’s Second World War when states took on greater responsibility for the economic welfare of their citizens.20 The closed international economy of the 1930s was widely seen to have contributed both to making the Depression worse and to hastening the onset of another war. To avoid a

17 Provincial politicians have also exploited pithy statements of collective projects. For example, Jean Lesage’s “Maitres chez nous” of 1962 was an equally brilliant election slogan that still animates many francophone Quebeckers nearly 50 years on.
18 While our focus in this essay is on Canada as a whole, a similar story could be told about the policy endeavours of the Quebec and Ontario (and to a lesser extent, the Manitoba and British Columbia) governments during the same period – territorial expansion in 1912; colonization roads, railroads and resource exploitation, and subsidies to domestic manufacturing industry.
20 Franklin D. Roosevelt’s “New Deal” and the policies of Clement Atlee’s government in the U.K. implementing the broad thrust of the Beveridge Report are parallel responses. At the time, these developments were theorized by Karl Polanyi as instances of what he called the “double movement”: see Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (Boston: Beacon Press, 1944).
repetition of those two perils policy-makers prescribed more open markets globally with the goal of ensuring that trade was not a source of inter-state conflict, and as a concomitant local counterbalance, the creation of a robust welfare state. They also argued for a central bank to manage economic shocks coming from outside Canada and the fiscal instruments needed to allow resources to flow gracefully between slower and faster growing regions of the country. This paradoxical “compromise of embedded liberalism” is still reproduced in the values and ideologies of Canadians. The second national policy put the power of the state, and state-recognized institutions of collective welfare – unions, socio-cultural groups, charities, professional associations, etc. -- at the service of individual welfare, an enterprise that was only broadly realized in the 1960s, and was largely complete by the 1970s. Its hold on the imagination of Canadians was then assaulted in the 1980s as globalization undermined the large government social welfare agencies, and the regulatory apparatus of the administrative state.

We argue that Canada is now in the course of elaborating a third national policy (NP3) appropriate for the late 20th and early 21st century. Like its predecessors, this third national policy can be seen both as a project of the state, and as a project of Canadians. So, for example, some scholars find significant policy coherence in the inventory of contemporary state action. Constitutional rights, multiculturalism, equality-seeking, and free trade are all policy prescriptions self-consciously adopted by political elites and meant to empower citizens as

23 Some scholars argue that by the mid-1970s, when the federal government began to renege on promises of fiscal transfers to provinces, the demise of NP2 had already begun. See, for example, T. Kent, Federalism Renewed (Ottawa: The Caledon Institute of Social Policy, 2007). This view assumes, wrongly we argue, that the instruments of the “national policy” were exclusively those of the federal government. Each province built up its own social-welfare bureaucracy, and in many cases involving federal spending programmes in fields of provincial jurisdiction – pensions, health care, post-secondary education – attempts to preserve provincial policy autonomy were made. There is an enormous literature on the question whether the manner in which the federal government sought to fund these initiatives was politically or constitutionally justifiable. See, most recently, “Symposium on the Federal Spending Power” (forthcoming Queens Law Journal, December 2008). The point, of course, is that however important Ottawa’s role may be, one also has to look at policies and programmes of at least the four most populous provinces for evidence of the manner in which any national policy is instantiated.
24 Many scholars date the beginnings of NP3 in the North Atlantic region to the final collapse of the Keynesian consensus in economics after the second oil shock of 1979 as OECD members grappled with recession and high inflation in the early 1980s. As with the beginnings of NP2, transformations in the international economy played a significant role, although the domestic politics of "Ronald Thatcherism" was not a necessary policy response to these transformations. See generally Fritz W. Scharpf, "The Viability of Advanced Welfare States in the International Economy: Vulnerabilities and Options" (2000) 7:2 Journal of European Public Policy 190. Nor do we think that the rediscovery of the virtues of Keynes in fall 2008 will change the basis of NP3. For a discussion of the limited impact of neo-Keynesian thinking on questions of instrument choice (by contrast with its impact of specific policies pursued through these instruments see P. Gosselin, High Wire: The Precarious Financial Lives of American Families (New York: Basic Books, 2008).
individuals. Others characterize major constitutional and quasi-constitutional developments like patriation, the Charter of Rights and Freedoms, multiculturalism, the Quebec Secession Reference, the Clarity Act and the Aboriginal Healing Foundation as consequences of citizen demands. They were the political project of an increasingly diverse, dispersed, mobile, organically unstable urban citizenry, less anchored to the land, earning wages not farm income, often living in rental accommodation not owner-occupied homes, frequently changing jobs and domestic partners, and building more anonymous virtual networks promoting a single interest rather than face-to-face, multi-faceted affective communities.

The common domestic elements of Canada’s three national policies are economic policy (monetary and fiscal policy, including taxes and subsidies), communications (including transportation infrastructure), and social policy (including migration from within the country as well as from abroad). In the Table that follows we attempt to schematize these common elements. Our claim is not only that Canada’s national policy has been instantiated through three inter-related policy components, but also that these three dimensions have gone through three iterations with three different emphases over the past 250 years.

25 We acknowledge that these three elements are present in almost every state’s conception of its purposes. What distinguishes Canada’s national policy is the centrality that these, rather than other, policy initiatives such as (1) the promotion of empire, or civilization or culture, (2) the extirpation of religious or ethnic minorities and (3) the creation of a socialist paradise, have played in shaping the geopolitical unit now known as Canada. To take one contrasting example, consider how James Monroe’s idea of “manifest destiny” performed a similar role to Macdonald’s National Policy – both describing past territorial acquisitions (for example, Jefferson’s Louisiana Purchase) and providing a political slogan to justify future expansion (the annexation of Texas, Polk’s Mexican-American War). On the period 1815-1848 in U.S. history, see Brian Walker Howe, What Hath God Wrought (New York: Oxford University Press, 2007).
Of course, several caveats must immediately be entered. First, the particularities of these national policies do not have to be federal; both the Parliament of Canada and provincial legislatures are implicated in their pursuit. Second, the list of programmes in each cell is not comprehensive; we focus on policies that serve to bind the country together, leaving aside other policies that fit the paradigm, but that do not serve such a purpose. Third, in our right-hand column we identify the main governing instruments through which these policies were effected during the corresponding policy era; again, while many other instruments were deployed at each period we highlight only those that we believe were dominant at the relevant moment.

Already some disparage many elements of the third national policy with the epithet of “neoliberalism,” not least for the way it appears to undermine the large centrally-managed organizations and programmes created in pursuit of the first two, but especially the second, national policies. And yet, such neoliberal economic policies as trade liberalization, NAFTA, the creation of a consumption tax (GST), deregulation and privatization have been accompanied by other equally “neoliberal” socio-political developments dear to many who disparage trade liberalization, notably the 1982 Charter of Rights and Freedoms. We see a commonality in the assumptions about citizens and states that underlie Charter patriotism and the globalization of

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26 For scholarly discussion of the periodization suggested here, see supra, footnote 16. A similar tabular presentation is set out in Lorraine Eden & Maureen Appel Molot, "Canada's National Policies: Reflections on 125 Years" (1993) 19:3 Canadian Public Policy 232 at 234. We differ, however, both in the characterization of the relevant National Policy, in its primary policy instantiations, and in our conception of the central traits of NP3.
the economy. In our view, these assumptions reflect how Canadians understand and respond to the social and economic world they now inhabit. They are not the reflection of a normative claim we make. It follows that progressive critics of “neo-liberalism” need to adjust their critique. While the Reaganite mantras of individual responsibility and ownership society have shown their limits (namely the transfer of the burden of ensuring social solidarity from the strong to the weak), and confront policy-makers with the need to re-invigorate policies aimed at collective action, it is not possible return to NP2, to make the assumptions and instruments of NP2 the centrepiece of public policy for the future. The challenge is to think about the institutional design problems of mobilizing support for common projects in new ways. In our view, the deployment of collective power to enable the self-directed agency of citizens in a manner that not only permits, but induces and promotes, a just distribution of the economic and cultural resources of society, an objective nobody would disparage as “neoliberal”, is at the heart of Canada’s emerging NP3.27

Why do national policies change?

Countries and states are social creations, not facts of nature. Canada was not inevitable; neither is it immutable. We now try to make explicit, therefore, what has so far been a set of implicit assumptions about why a national policy (or, at another level, any governance institution) changes.28 Geographic circumstances such as the Great Lakes-St Lawrence system shaped the possibility of continental transportation and thus shaped Canada, but the country owes its existence to the attempts of foreign capital (often at the behest of the Canadian government) to exploit first the east-west network of waterways and then a transcontinental railroad. Change is due to the interaction among the social, economic and ideational factors that are the basis of current policy: new ideas about what states can or should do; change in the technological opportunities and constraints; change in the nature and industrial organization of the economy; change in the health status of the population – morbidity and mortality; change in the demographic pyramid; change in citizen expectations; and, not least, change in the global context.29

In the discussion that follows, we have consciously adopted a domestic focus, looking mostly at social interaction among Canadians. While there are extensive debates in international relations

27 The distinction between policy objective and policy instrument is nicely explored in Robert Solow, “Trapped in the New ‘You’re on Your Own’ World”, New York Review of Books, November 20, 2008, 79. Of course, not all instruments can equally well serve all policies, a discussion we take up Section 2.
28 The first sub-title to this section has already foreshadowed our view that, at least since the North-American political upheavals from 1759 through 1783, Canada has only ever had one overarching national policy and that this national policy has been instantiated through the detail of three “national policies”. In such light, apparent change from one NP to the next is an analytic artefact of reinterpreting past events in light of a crisis in which one redefines a sense of one’s self, and thus of personal history as Augustine did when he converted to Christianity.
29 These times of change may be drawn out, yet could be thought of as “critical junctures”, moments when long-established social processes can change direction. See Paul Pierson, Politics in Time : History, Institutions, and Social Analysis (Princeton, NJ ; Oxford: Princeton University Press, 2004)
about related questions, we do not attend directly to changes in the world economy or the climate of political ideas. For example, we do not consider how changes in the security context through participation in two world wars, Korea, and the Cold War affected Canadians' sense of themselves during the 20th century. Nor do we explore the impact of ideas about the possible identities of states, whether through dis-aggregation (as in the USSR and Yugoslavia) or re-aggregation (as in the EU).

The idea of a “nation” inhabiting it’s own territory was a peculiarly 19th century idea that reached its apogee in the 1919 Treaty of Versailles, although the real explosion in the numbers of states, all thought to be of equal status, took place with the international decolonisation process in the 1950s and 1960s. Many writers have since struggled with the question of whether Canada could be a “nation” as the term is understood elsewhere. The question is important for assessing not just the narrative of the explicit constitution (e.g. the BNA Act of 1867, the Statute of Westminster of 1931, and the Canada Act of 1982) but also for analysing the “constitutive conversation” of Canada’s national policies. Recall that NP1 was the project of an imperial colony and its main features involved the conscious continuation of the UK’s North American colonizing project. Recall also that NP2 was a project of a country defining itself as an independent and sovereign state attempting to chart a distinctive socio-economic project even as it came increasingly within the hegemonic sphere of the USA. NP3 emerges in the era of globalization, when the links between nation, sovereignty and territory become ever more problematic.

Lastly, we have chosen not to expand on the characteristic dimensions of each national policy as played out in Canadian foreign policy. But worth noting perhaps is the fact that in NP1 the country was not responsible for its own diplomatic relations while in NP3 Canada has approximately 160 diplomatic missions abroad and belongs to dozens of international organizations. This international activity is a reflection both of how the country sees itself, and of the nature of the international system.

Changes in patterns of trade, or in the sources of migrants, or in telecommunications, will change the basis of a given NP, since it is shaped by these instrumental possibilities as much as it is characterized by the manner in which relations between citizens and the state are conceived under its paradigmatic policy tools. NP1 aimed at creating a transcontinental national economy

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30 See Audie Klotz & Braden Smith, "State Identity as a Variable" American Political Science Association annual meeting, Chicago, August 2007) [unpublished]
31 In this respect the essays of Charles Taylor are particularly enlightening. See C. Taylor, “Why do Nations have to become States?” and “Alternative Futures: Legitimacy, Identity and alienation in Late-20th Century Canada”, both in Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism (Montreal: McGill Queens University Press, 1993) 40 and 59.
by using the tariff to preserve the Canadian markets for Canadian manufacturers, largely in Ontario and Quebec, populating the prairies with central and eastern European peasants, and providing the transportation infrastructure to get raw materials to processors and to foreign markets. NP1 created a branch plant economy where trade by Canadians with each other was significant and the cross-subsidization from consumer to farmer and from farmer to manufacturer was a collateral effect of entrepreneurial activity.

NP2 built its social programs on the same assumption that wealth earned in one part of the country could be redistributed to other parts. In NP2 the cross-subsidization was less of the market (except the Autopact and broadcasting policy) than of intergovernmental transfers and national income policies like Unemployment Insurance (1940s), Old Age Pensions (the 1950s), the Canada Pension Plan and the Canada Health Act (1960s).

Now, in NP3, the primary market is North American, and globalization with its global supply chains has lessened the importance of how much Canadians trade with each other, even if that trade is greater than gravity models would predict.34 As late as the time of the signing of the original Free Trade Agreement with the U.S. in 1989, interprovincial exports and international exports both represented roughly a quarter of GDP. By 2001, interprovincial exports had fallen to 20% of GDP, while foreign exports had risen to over 40% for Canada, and over 50% for Ontario.35 Commercial exchanges with each other matter less to Canadians, and have less effect on their collective life, than they did in the past.

We assume that human interaction is the source not only of law but of society, community, and the state.36 We therefore also assume that the technology of communications sustains any particular national policy. In NP1 it was physical transportation by water and then rail. Canadians have clearly been great readers of newspapers. As a mass medium they depended on the telegraph as a source of information and physical infrastructure for distribution. In NP2 these policies continued, but were complemented by broadcast networks for radio and television (one–to-many networks), improvement of the highway network to subsidize truck transport, and physical travel by air.

In NP3, all these modes still matter, but less so than in the past, because of ongoing change in the technology of communications. CBC/Radio Canada, and CN/CP are still instruments of national policy, but they are no longer the only networks that facilitate interaction between Canadians.

35 Statistics Canada: Table 386-0002: Interprovincial and international trade flows at producer prices; Canada; Interprovincial exports; Total goods and services; Table 386-0001: Interprovincial and international trade flows at producer prices; Canada; Interprovincial exports; Total goods and services (dollars - millions); Statistics Canada, "Interprovincial trade in Canada 1984-1996 Catalogue no. 15-546-XIE.
Many forms of hierarchy have been flattened by many-to-many networks. The changes start at the level of the family, and affect business as much as government. When everyone blogs, or has a personal website, or spends time on Facebook, MySpace and YouTube, everyone is a producer and distributor of information as well as a consumer. This has significant implications for the character of human interaction. Young Canadians like to be doing multiple things at once, but do not always like to be part of a collective. Paradoxically, many-to-many technology often translates into one-to-many communication, where the citizen and not the institution is the initiator. It also affects how remote information is transmitted. Canada has been losing daily newspapers steadily from 130 in 1919 when the population was 8.3 million to 121 in 2005 when the population was 32.3 million. Many Canadians now get their news on the Internet. Fewer than half of Canadians had any form of internet access in 2000 but in 2005 more than two thirds had access, and over 50% had a broadband connection, a level above the OECD average.

Society too has changed. These changes are not just socio-demographic, but also are reflected in the expectations that citizens have of each other and of the state. Migration, the traditional social register for a national policy, is a mix both of an individual’s decision to move on, and the opportunities in a new place. In the nineteenth century, migration was driven by famine, pogroms and rural depopulation in Europe and was used to take control of the country’s vast extent, typically by policies encouraging farm settlement in the west, and forestry elsewhere. The social and economic disruption of WWII drove the mid-twentieth century movement from Europe. In NP2 migration was used to mine Canada’s newly discovered resources (especially in the north and Alberta) and man its factories (especially in Ontario and Quebec). In the twenty-first century, a growing and well-educated middle class in developing countries seeks new opportunities in Canada, and they overwhelmingly settle in three cities. More than ever, Canada is a diasporic society, one where citizens have connections to a “mythic” homeland, and sometimes fraught challenges of political, social or economic integration without race or

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37 The claim is that communications hierarchies have been flattened by these technologies. By ricochet, social and political hierarchies are also being reduced and the sense of a “standard interpretation” of events has been lost. The decline in circulation of national newspapers, and of audience ratings for national evening news broadcasts attests to this loss of “interpretive authority”.

38 New technologies obliterate space and time for some forms of social interaction by allowing people to communicate from anywhere on the planet at a time of their own choosing. The telephone (at least as unaccompanied by an answering machine) is synchronous; email and websites are asynchronous.


41 An overview of these changes and their implications for the character of regulatory action is set out in R. A. Macdonald, “Understanding Regulation by Regulations” in A. Lajoie and Y. Bernier, eds. Regulations, Crown Corporations and Administrative Tribunals (Toronto: University of Toronto Press, 1985) at 81.
ethnicity being a factor. The results are striking. For the past quarter century immigrants have not just been white-skinned Europeans who seem to blend into the majority. In consequence, by 2001, 13% of Canadians identified themselves as “visible minority”, up from 5% in 1981. A large portion of recent immigrants (79%) are “allophones”, meaning their mother tongue is neither English nor French. Immigrants are also different from each other, in their appearances, in cultural backgrounds and in religious commitments.

These changes have institutional implications. To the longstanding challenge of creating and maintaining an east-west state in opposition to a north-south natural geography, is now added the challenge of mapping political institutions meant to promote an east-west fiscal transfer system onto a north-south economy. To the longstanding challenge of filling up empty spaces in the west and north, Canada now faces the challenge of building a country where population nodes are fewer, but bigger, and intervening populations are becoming sparse.

**Constitutional dimensions of three national policies**

Our story is not the usual narrative of Canadian constitutional evolution. We therefore pause briefly to situate our claim within traditional constitutional discourse. While the expression National Policy first saw light as a particular political platform in 1879, it has succeeded as part of Canada’s constitutive conversation because it is much more than a partisan polemic. The central themes of both NP1 and NP2 were reproduced in the policies of successive federal governments – both Conservative and Liberal, in complementary policies of provincial governments of all stripes, and in the quotidian actions of Canadians. It is no different with the emerging NP3. Government programmes in Canada are not just what the state offers to citizens to gain electoral favour; they are in a real sense what Canadians understand themselves to be. In this sense, programmes are constitutive of the state.

Legal scholars, however, incline to see things differently: for them the state is constituted by its constitution, not the policies it pursues. The claim appears especially salient in federal states, where different orders of government compete for authority and recognition, and it is perhaps unassailable in “multi-national” federal states like Canada. Still, it bears close scrutiny. A first difficulty flows from the word “national”. The word is highly charged in Canada, not least

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42 See Rima Berns-McGown, "Redefining “Diaspora”: The Challenge of Connection and Inclusion" (2007/08) 63:1 International Journal 3 at 8 and 13


because “nation” in English and “nation” in French are not synonyms.\footnote{The theme is nicely explored in D.V. Verney, \textit{Three civilizations, two cultures, one state: Canada’s political traditions} (Durham: Duke University Press, 1986).} We sidestep much, although not all, of this debate by defining the objectives of successive national policies as “state building” not “nation building”. Yet the two projects are not easily dissociable. Sometimes in Canada (especially in the transitions from NP1 to NP2 and NP2 to NP3), state-building has also constituted an attempt at nation-building, an attempt that twice has run head-long into a parallel project of nation-building through state-building in Quebec.

The key components of NP1 were national policies only in the sense that they applied to the whole country. Not surprisingly, they tracked the distribution of legislative powers to the Parliament of Canada by the BNA Act of 1867. After all, this allocation was driven by contemporary assumptions about what powers a government pursuing such a national policy would require. Any action not needed for building a transcontinental state and economy was left to the provinces -- a relatively easy constitutional compromise between the commercial ambitions of anglophone capital and the social ambitions of the francophone Catholic Church.\footnote{Of course, the compromise over legislative jurisdiction in 1867 contained various hedges – both economic (the declaratory power, the power of reservation and disallowance, etc.), and social (marriage and divorce, education appeals, etc.) – meant to reassure provincial minorities by vesting authority in the Canadian Parliament. See A. Abel, “The Neglected Logic of 91 and 92” (1969) 19 University of Toronto Law Journal 478.} Few allocational disputes relating to the core elements of NP1 reached the Privy Council in London for resolution.\footnote{A cursory review of Privy Council jurisprudence reported in Olmstead, \textit{Canadian Constitutional Decisions of the Judicial Committee} (three volumes) (Ottawa: Queen’s Printer, 1954) uncovers only 6 cases that could plausibly be understood in this way between 1867 and 1930.}

The story of NP2, however, was one of continual conflict between provincial and federal governments because the allocation of legislative authority under Canada’s 19\textsuperscript{th} century written constitution, an instrument of NP1, was ill-adapted to the state-building policy challenges of the mid-20\textsuperscript{th} century, and difficult to modify. The 1867 compromise did not imagine that the state (whether federal or provincial) would enter onto the social terrain then occupied by religious and charitable institutions and by rural and neighbourhood collective assistance organizations. When, in response to the economic crisis of the 1930s, Canadians felt the need to create the institutions of the welfare state, most provinces had neither the tax base, nor the population, nor the governance capacity to manage these institutions.\footnote{This is the traditional story (see T. Kent, “The Federal Spending Power is chiefly for People, not Provinces”, \textit{Spending Power Working Paper Series}. 2008-2 (Kingston: Institute of Intergovernmental Relations, 2007); T. Kent, « The Harper Peril for Canadian Federalism » (2008) 29:2 Policy Options 12; T. J. Courchene, “Proposals for a New National Policy,” in Tom Kent, ed., \textit{In Pursuit of the Public Good} (Montreal and Kingston: McGill-Queen’s University Press, 1997) although many scholars today are less convinced of its accuracy. After all, it is true that all provinces were able to manage workers’ compensation, labour standards agencies and collective bargaining through labour relations statutes from the beginning of the 20\textsuperscript{th} century, as well as landlord-tenant agencies, and public utilities. In addition, several provinces also had the necessary economic infrastructure, tax-base and managerial expertise to expand upon these existing institutions in response to the challenges of the depression. See Sécrétariat aux affaires intergouvernementales canadiennes, \textit{Québec’s Historical Position on the Federal Spending}} But federal instruments were limited by how
the “watertight compartments” doctrine of constitutional competence announced by the Privy Council in the *Labour Conventions* case came to be understood. Successive federal governments sought to avoid these limits by promoting constitutional amendments (as with Unemployment Insurance in 1940 and Old Age Pensions in 1951), and developing new governance tools such as tax-rental agreements (1942), federal-provincial agreements on shared-cost programmes (1957), tax expenditures through an increasingly important income tax regime, and using the federal spending power to provide direct subsidies to citizens, groups and corporations.

Some surveys argue that francophones in Quebec today do not see Ottawa as their state, but that claim remains to be tested by asking similar questions of citizens in other parts of the country. Undoubtedly, only a few see Ottawa as the seat of their “national” government. Still, if NP2 did not exist, it is possible that much constitutional conflict with Quebec over the past half-century could have been avoided. The NP1 objective of extensive growth and the tools it used benefited Quebec economically, did not encroach on provincial powers, and left untouched the role of Quebec City to be a centre for francophone identity (to be the “national” government of “French-Canadians”, whatever their province of residence). By contrast, the objectives and tools of NP2 brought Ottawa into provincial domains. The resulting conflict was rooted not just in

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49 *Attorney-General of Canada v. Attorney-General of Ontario* [1937] A.C. 326 (P.C.) (Labour Conventions); see also *Attorney-General of Canada v. Attorney-General of Ontario* [1937] A.C. 355 (P.C.) (Unemployment Insurance Reference). Of course, it can also be argued constitutional doctrine was invented as a cover for debates about public policy. So, for example, if the Privy Council dislikes federal attempts to shape labour policy, it will declare the matter to be one of provincial jurisdiction. This is the fundamental argument of those who find Supreme Court decision-making in the 1950s (for example, *Saumur v. City of Quebec* [1953] 2 S.C.R. 299; *Birks v. Montreal* [1955] S.C.R. 799; *Switzman v. Elbling* [1957] 2 S.C.R. 85) to simply evidence its commitment to an implied Bill of Rights. But this is beside the present point. Our argument is that, notwithstanding what courts decided, governments sought ways to implement a desired policy agenda.


52 An early example of Quebec spending to this effect can be found in *An Act to authorize school commission to make contributions from their funds for patriotic, national or school purposes* S.Q. 6 Geo. V (1916) c. 23, s.1, under which the Quebec legislature undertook to assist the financing of patriotic, nation or scholarly endeavours in Quebec, or elsewhere.
differing conceptions of the locus of responsibility for providing certain governmental services, but for a time also in differing conceptions of role of the state. Nowhere has this understanding of federal-provincial relationships been better explored than in the Tremblay Commission Report of the 1950s, a largely forgotten (but equally persuasive) Quebec complement to the hugely influential Rowell-Sirois federal Royal Commission of the 1930s.53

Until the end of the 1950s, Quebec resistance to federal action was grounded in ideological conflict between a small-government regime in Quebec and a welfare-state governmental regime in Ottawa about the respective roles of the state and institutions of civil society. Ottawa’s post-war taxation and spending policies were anathema to the Union nationale. After 1960, however, the conflict was less about ideology and more about which government should take responsibility for providing the policies and programmes of the welfare state. Thenceforth, federal action that trenched on provincial jurisdiction directly challenged the ability of the Quebec government to shape patterns of interaction and redistribution within the province, and by ricochet its capacity to make “national” sovereignty seem real. In these latter phases of NP2, programmes and their financing were largely negotiated under existing constitutional doctrine rather than through the pursuit of formal amendment to the distribution of legislative powers. Moreover, during the 1970s and thereafter, modifications to expand Parliament’s constitutional jurisdiction occurred exclusively through programmatic judicial interpretation of federal power.54

In the NP3 era, it should be possible to see that national purposes may be served by policies that do not require national regulatory programmes, or at least not programmes managed by federal regulatory institutions. Indeed, it is generally acknowledged that a key political purpose of the 1982 Charter of Rights and Freedoms was to found a new Canadian nationalism — built on a conception of citizenship, not artefacts (NP1) or redistributive programmes (NP2).55 Our argument is not so much an attack on the federal government as being too centralist, as it is a critique of an unexamined claim for any highly-bureaucratized policy. Today, the federal and provincial governments are in effect competitors in providing alternative aggregations of the bundles of services that citizens most want. Yet the competition need not be a competition to provide more by aggregating more; it may be that the competition is about how best to provide more by aggregating less. That is, even were the federal government to dismantle its various programmes that seem to trench on provincial jurisdiction and to surrender the tax room that such dismantling produces, it does not follow that these dismantled programmes should immediately be replicated by Quebec or any other provincial government. Indeed, given contemporary judicial understandings of how the Charter of Rights and Freedoms should be

54 For a general discussion of Supreme Court jurisprudence from the Anti-Inflation Reference through to the Oldman River case, see J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2006) 34 Supreme Court Law Review (2d) 307.
interpreted\textsuperscript{56}, the federal government will be increasingly seeking indirect and non-bureaucratic governance tools to effect a policy agenda, and few of these instruments will run afoul of the jurisdictional constraints that plagued the programmes of NP2.\textsuperscript{57}

\textit{National policy tools}

We know any national policy by its conception of collective purpose, the policies it identifies as worthy of governmental efforts, and the questions it invites citizens to ask of themselves. We can identify changes in successive national policies through changing ideas of the relation between citizens and the state. But we can also see changes in the mechanisms promoted to enable citizens to interact with each other. Over the past 150 years there have been significant changes in the instruments of government deployed to advance these three national policies. Because policy tools will also embed a policy objective, the challenge is not to lament the passing of the old instruments,\textsuperscript{58} however attached we may have become to them, but to think of what new tools will serve new objectives. The beginning of the move away from NP1 came with the move from tariffs to personal income tax as the source of revenue; now tariffs are almost gone and consumption taxes are thought to be the best way to raise revenue,\textsuperscript{59} which affects the ways in which tax measures can be used for policy purposes. A physical post office in every hamlet was both a means to implement the “universal service” norm for the delivery of paper mail, and a symbol of the local relevance of the distant federal state. But if the physical links between the largest cities are no more relevant than the links between those cities and the other great cities of the world, but infinitely more relevant than links with contiguous rural communities, policies based on physical infrastructure may no longer have much utility.

Many policy analysts loved NP2 and continue to mourn its passing, or at least the passing of an era when the state and its agencies engaged in the top-down (social democratic) task of improving the welfare of citizens. These policies were visible, universal, uni-directional rather than interactive, and rational rather than experimental. But just as it is possible to imagine policy analysis as diffuse, experimental, incremental and bottom-up, so too it is possible to imagine like strategies to facilitate human agency in the service of collective action.\textsuperscript{60} What sort of

\textsuperscript{56} Chaoulli \textit{v. Quebec} \textsuperscript{[2005]} 1 S.C.R. 791.


\textsuperscript{58} In an important sense George Grant was correct to anticipate (even in the mid-1960s) the passing of a “Tory” nation and its transformation into a liberal state, although we would argue that his prognosis was exaggerated and his nostalgic policy prescription was misguided. See G. Grant, \textit{Lament for a Nation} (Toronto: McClelland and Stewart, 1965), and compare S.M. Lipset, \textit{Continental Divide: the values and institutions of the United States and Canada} (New York: Routledge, 1990).

\textsuperscript{59} The expert consensus can be seen in the ridicule heaped by columnists and economists on the Harper Government’s cuts to the GST in 2006 and 2007; for the analytic arguments in favour of consumption taxes, see OECD, \textit{OECD Economic Surveys: Canada} (Paris: Organisation for Economic Co-operation and Development, 2008)

\textsuperscript{60} In the United States, the development of a theory of democratic experimentalism is a parallel reflection of the idea suggested here. See, for example, M.C. Dorf & C.F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Columbia Law Review 267.
interactions, and mutual obligations, now sustain the communities that sustain the state? Can we discern the possibility of a national policy that could sustain a 21st century welfare state? The question matters. If the unceasing efforts of the market to be self-regulating succeed, the inevitable social response may not be pretty. Put more positively, just as the advent of NP2 did not signal the abandonment of programmes and policies of NP1, in NP3 the primary instruments for delivering welfare-enhancing policies will no longer be those of NP2, but will be new tools layered upon surviving programmes and instruments of both NP1 and NP2. In the next section, before engaging in normative analysis of this type, we advance a set of descriptive claims about the already existing elements of NP3.

2. The principles underpinning a third national policy

Over the last 25 years, we have argued, a third national policy has begun to emerge, a collective project that puts the transcontinental country (NP1) and the bureaucratic institutions of the welfare state (NP2) in the service of the dreams and aspirations of every Canadian. Any national policy is a story about how members of a political state frame or characterize problems as much as how they tackle them, though the two go together. No politician, no poet, no pundit has yet provided an enduring label for this new national policy for the 21st century. Still, we can see its elements emerging in the actions of governments across the political spectrum in all parts of Canada.

In this section we reflect on the conceptions of citizenship that will drive governance in the future, and articulate the principles that can be derived from current policy initiatives and that, we believe, will guide instrument choice in the NP3 era. In the next section we try to show these principles at work in the three main domains of Canada’s previous national policies. Our objective remains largely analytic, but we do suggest how these emerging principles can be consistent with political virtue. The first governance question is not about economic efficiency but about the relations between citizens, and the second is about their relations with the state. With these two concerns, consequently, we begin.

Our fundamental hypothesis is that the distinctive feature of NP3 is its enhanced focus on citizens. Citizens constitute the state, and they do it to serve their individual and collective purposes. NP3 will be characterized by policies that aim: (1) to facilitate agency; (2) to privilege real choice about identity; (3) to mediate multiple, fluid identities and to broaden lateral interest-based affiliations rather than reinforce totalizing, territorial institutions; and, therefore, (4) to unbundle programmes and services managed by centralized bureaucracies (both public and


private). Together these policies will be implemented in ways that enhance the ability of citizens to lead self-directed lives in concert with others, surely the litmus test for a liberal democracy.

To facilitate agency

The promise of the 18th century revolutions was that life chances and life choices of human beings could be freed from the accident of birth and belonging. No longer would religion, ethnicity and social pedigree differentiate the worth of citizens. The promise has, however, been two centuries in the realization. Only now can Canadians really imagine what it might mean to live a life not dominated by the structure pole of the structure-agency axis. Of course, the exercise of agency presupposes meaningful institutional forms within which Canadians can pursue their aspirations. Unlimited choice, unpredictability of outcome, and highly contingent futures do not conduce to human freedom. 

What kind of policy instruments and what types of institutions do Canadians need in a citizen-centered national policy? Remember that the point is no longer just to create a wealthy transcontinental country (NP1), nor is it simply to ensure that a robust administrative state has the governance tools needed to re-distribute widely the fruits of the country’s wealth (NP2). Without abandoning earlier objectives and achievements, indeed by building upon them and maintaining the material basis for individual prosperity, the point now is to enable citizens to live rich lives of their own choosing. Effective governance today is no longer a matter of social control – of announcing policies and programmes that are overly prescriptive of particular outcomes. Admittedly, those who would pursue a neo-liberal agenda also frame the resulting tools in the language of “freedom”: people should be entitled to make their own choices; the State should not do what is good for them. But here is the point. Just as the instruments of NP2 did not necessarily command a welfare-state (although in Canada – by contrast with the United States -- they most certainly did), so too the instruments of NP3 do not necessarily command a neo-liberal State. In claiming that the already existing programmes of NP3 reflect a citizen-focused conception of governance our objective is to signal the instruments and institutional forms that such a conception implies, not to support the conscription of those tools in any ideological project.

Debates about public morality and economics in such a conception of human interaction focus less on enforcing a list of prohibitions, and more on discussions about the kinds of actions that conduce to virtue. The question is less, “what can’t I do” than it is “what ought I to do?” In the first conception, law is seen primarily as a club to bludgeon others into singularity and conformity. Adjudicative and quasi-adjudicative institutions are the perfect instruments for achieving the goal. If ownership, markets and chance were key processes of social ordering in NP1, top-down managerial direction and regulatory control came to be an important mode of social ordering in NP2. In the second conception, law is conceived as offering institutions and processes that conduce to diversity and creativity. In NP3, one imagines that non-hierarchical processes such as mediation, consultative processes, and contract will play central roles.  


64 That is, the policy instruments of NP3 are not those of NP1, however much certain analysts with a particular political agenda would seek to re-invent 19th century governance. The appropriate choice of
is not to say that the political foundations of these newer social ordering processes will be different: legitimacy, transparency, the opportunity to participate in the process, the recognition of the importance of unbiased decision-making and the offering of reasons for decision are equally important in all such processes. Nor is it to say that hierarchically organized courts adjudicating detailed rules of duty and entitlement will no longer play a governance role. Policing the boundaries of fairness in interaction and constraining pathological disproportion of economic power in exchange is even more significant in the policy regime of NP3.65

Voting will also remain central to NP3 governance, which might normally lead one to think that some form of proportional representation would best allow the representation of multiple identities. But Canadians mistrust proportional representation systems (surely the message in referenda on electoral reform in B.C. and Ontario). This suggests a commitment to place-based voting in the official political process. Canadians continue to believe that their representatives in a geographically distant capital should have local roots. Nonetheless, NP3 policies must be aimed at finding and enhancing other disaggregated forms of engagement with people whose voices are under-represented in a first-past-the-post electoral system. One might anticipate increased recourse to direct voting through referenda, and to greater procedural structuring of voting in non-governmental institutions like agricultural marketing boards, self-regulating professions, and trade unions, to name only a few dispersed “constituencies”.66 Finally, ad hoc institutions and instruments build upon appropriate representation of affected constituencies and broader, direct consultation will become much more powerful vehicles of political action by citizens.67

An agency-enhancing policy framework is not without its critics. Some social democrats who agree that allowing people to lead self-directed lives is a fine objective in theory still worry that people make bad choices in practice. Others worry that policies and programmes of this type put too many demands on citizens who may not either have the capacity, energy or time to take advantage of the opportunities on offer. We respond that élites may be misguided when they think they infallibly know what makes choices “bad” and when they presume ex ante how much choice citizens are capable of managing. By contrast, some libertarians might think that it does not go far enough. They assert that the only reliable principle is that bad choices are ones that


65 In other words, the types of concerns that lie behind consumer protection, business practise and landlord-tenant legislation will be even more strongly reflected in policy initiatives of NP3. This is also true of non-national decision-makers, and more to the point, even non-State decision-makers. Indeed, many NGOs, unions and corporations need to begin to act more like the ideal of modern democratic governments, and less like the hierarchical, authoritarian bureaucracies that these governments have come to adopt in the pursuit of government acting more like corporations.

66 These issues are canvassed in Law Commission of Canada, Voting Counts: Electoral Reform in Canada (Ottawa: Supply and Services Canada, 2004).

67 For a description of an exemplary attempt to engage aboriginals, northerners, industry, and academic experts in policy deliberation, see Mr Justice Thomas Berger’s “Letter to the Minister” in Canada, Northern Frontier Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry, vol. One (Ottawa: Minister of Supply and Services, 1977).
externalize the costs of individual action to other people. We respond that while such a principle works for restrictions on second hand smoke, it begs the question of why Canadians place high taxes on tobacco, or require seat belt use. The state has a role, we argue, because not all citizens desire to make all choices all the time. Some may be happily conferred on experts, or on social institutions that offer a consciously-limited range of standard options. Moreover, our choices impose externalities that have to be accounted for and reconciled with choices of others: my self-directed life cannot come at your expense. The more the state assumes redistributive responsibility for health, the more it finds itself obliged to seek second-order regulatory instruments like taxes to encourage “good” choices.

To recognize the multiplicity and fluidity of identity

Political theorists have traditionally argued that the Canadian state was an amalgam of diverse political ideologies, at least some of which rested on an organic conception of society in which citizens were conceived as members of identifiable socio-cultural communities. The BNA Act explicitly recognized the salience of language (French and English) and religion (Roman Catholicism and “dissentient religions” in Quebec, for example). Even certain policy instruments of NP1 and NP2 reflected these organic identities. For many Canadians today, however, personal identities and the relationships they imply (geographic, employment, familial, religious, cultural, even linguistic) are typically shorter, instrumentalized and more intense. Non-State social structures are less and less the result of history and inheritance and more and more the consequence of conscious affiliation – identity is less given, more chosen.

We see the role of the state in NP3 therefore as facilitating meaningful choice about identities, and as providing meaningful engagement with the multiple identities Canadians choose for themselves. The pressure is on Parliament and courts to rethink regulatory policies relating to both home and work: adoption, marriage, employment and jobs, religion, and life-style. The challenge is to imagine “excluded” Canadians as being included within mainstream socio-political structures – most notably, gays, aboriginals, the physically disabled and visible minorities. Of course, the very description of these “excluded” constituencies by reference to traditional categories simply reinforces a NP2 conception of identity as other-defined. Should not all NP3 initiatives be cast in iconoclastic language like “close personal relationships” that

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69 Of course, it is important not to overstate the extent to which people can “choose” their identities. However much Felix Leclerc may consider herself to be a female, hispanophone, lesbian, dancer of sub-Saharan African ancestry, it is difficult for others not to see him as a male, francophone, heterosexual, *Québécois de souche*, singer. Moreover, were Felix Leclerc to make such claims, it is obvious that he is mobilizing certain acknowledged identity categories to present himself to others. Whether those who also make such identity claims recognize him as one of them and whether those who disparage such identities will visit disadvantage upon him cannot be known in advance. The example is taken from R.A. Macdonald, "The Legal Mediation of Social Diversity" in A. Gagnon, et al. eds. *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) 85.
enable governments to disaggregate policies parasitic on inherited status categories and allow citizens to select from a menu of options that meet their aspirations and expectations? After all, personal identity is relational in the same way that personhood is socio-culturally embedded.

Canadians all live with multiple sites of authority and multiple points of affect. Canadians care in different ways about their family, their employer, their city, their province, their country, and the world. Today, these sites do not stand in any fixed hierarchical relation to each other. Sometimes one predominates, sometimes another. The governance challenge is facilitating the ability of individuals to reconcile these multiple, frequently overlapping and sometimes conflicting identity claims. Who, then, chooses the lexical ordering of these claims? How, for example, is one to know whether, for any given purpose, s/he is a professor, a spouse, a Canadian, a classical music lover, or a vegetarian – especially when in these different roles, different outcomes seem to be indicated?

In the past, under policy regimes of NP1 and NP2, government programmes tended to be based on ascribing to citizens certain fixed identities – for the purpose of school support or adoption, a religion; for the purpose of voting, a residence; for the purpose of taxation, a family status; for purposes of a driver’s license or passport, a gender. These identities, once ascribed, were fixed. Moreover, fifty years ago, given the organization of social services, apostasy was hard to negotiate, especially in rural communities: divorce was difficult; inter-provincial migration in search of jobs was less prevalent; and recognition of sex-change impossible. No longer. In the NP3 era, citizens are not reluctant to claim many defining identities for themselves. These multiple identities sometimes carry demands that are difficult to reconcile. They are also increasingly understood as fluid and changing. Large, centrally-organized programmes that require a stable, unitary primary identity are ill-suited to 21st century citizenship. This does not mean, however, that some identities (whether or not involuntary) historically and still associated with social and economic disadvantage should not be acknowledged and protected as such. But in the world of NP3, programmes should be designed so that people will have an enlarged scope to decide, and to redecide if necessary, whether they wish to conceive themselves as, for example, poor, handicapped, of colour, or aboriginal. And in doing so, they will have an expanded scope to decide whether they wish to access, or to refuse services and policies directed to such identities, be these as individuals or representative collectivities.

To broaden lateral interest-based affiliations outside comprehensive institutions

If a significant feature of NP3 thinking is the disaggregation and disanchoring of personal identity from ascribed, hierarchical sites of belonging, there will be significant implications for the organization and delivery of programmes and services. In particular, because the monolithic territorial state will no longer be understood to assert an exclusive claim on citizenship,

70 These issues are canvassed in Law Commission of Canada, Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships (Ottawa: Supply and Services Canada, 2001).
71 Canadians are lucky that they already have institutions desperately needed elsewhere. One committee of “wise men” observes that ending conflict in war torn societies requires the “sides” to recognize that all of them have multiple identities—society need not split on religious or racial lines—or on any other basis. See Amartya Sen et al., Civil Paths to Peace: Report of the Commonwealth Commission on Respect and Understanding (London: Commonwealth Secretariat, 2007).
geography will no longer be the main driver of affect. The federalism of policy instruments will cease to be grounded exclusively either in “physical territory” as in NP1 or in “personal territory” as in NP2. Federal governance will, rather, be “kaleidoscopic”.72

The federalism of the BNA Act and NP1 was indisputably physical, represented in the notion of Canada comprising several colonies and seeking to exercise “dominion from sea to sea”. Notwithstanding increased immigration to “Canada” on the one hand, and to a particular city on the other, and notwithstanding increased mobility and often temporary interprovincial migration, territorial federalism still dominates the political imagination.73 In NP2, the concept of territory underwent a transformation, as federalism became less about place and more about jurisdiction. In this new, more personal, federalism programmes began to mediate citizenship across physical space. Even though certain regulatory domains continued to be organized by reference to the lines of physical territory, the services being delivered were meant to be nationally similar, portable and attached to persons, not bricks and mortar institutions.

In NP3, the idea of territory as geography is further attenuated. When people live in ways that do not respect geography – finding residence in one location, employment in another, and family in a third -- more than one authority may ostensibly claim jurisdiction over the same class of acts in the same physical place.74 Policy is no longer organized comprehensively either by physical location or by personal identification. Because what matters most is who I choose to be, not where I live or what others claim I necessarily am, the policies and programmes of NP3 will no longer be about singular aggregations of compulsory services delivered exclusively by pre-determined political units defined by geography.75 Citizens could live in Toronto but receive certain social services from an entity based in their ancestral First Nation on James Bay. Whether it makes sense for them to do so would depend, among other things, on the nature of the service, its relative efficacy and cost, and whether its receipt requires physical displacement. Similarly, the oil sands worker may choose to retain a previous identity and opt for health-care, pension, and other social services taxed and funded by Newfoundland rather than Alberta. Does it matter now (in the era of cell-phones and iPods) which company provides local land-line telephone services? Is it still necessary that the locus of an investment account must be the domicile of its holder? Indeed, in the logic of NP3, the concept of a provincial domicile is useful only as a default indicator when domicile is not otherwise “elected”.76 Fewer and fewer services are


73 The continuing commitment to a model of federalism that is only territorial enormously complicates efforts to recognize claims for aboriginal self-governance. See G. Otis, “Territorialité, personnalité et gouvernance autochtone” (2006) 47 Les Cahiers de Droit 781).


75 The idea is briefly adumbrated in R. Janda and D. Downes, “Virtual Citizenship” (1996) Canadian Journal of Law and Society

76 It might be argued that where an investment account is held or a person declares a principal residence does matter because this will affect the capacity of both states and communities to provide services and to allow happenstance to determine the policy of the Canadian state. This perspective rests on two dubious assumptions: one, that taxation cannot be organized to follow service delivery; and two, that geography
necessarily tied to geography, and most that are fall within the remit of municipalities, rather than provinces or the federal government.

This more disaggregated, fluid, multiple and self-selecting federalism is already apparent in the decline of large and comprehensive mediating structures and institutions. Both big-tent thin pre-commitment organizations like political parties, trade unions or Boy Scouts, and totalizing thick pre-commitment organizations like religions and cultural groupings, are less and less significant as sites in which meaningful interaction with others may be found. Today, engagement and participation in collective activities tends to be more strategic, episodic, focused and results-oriented. Organizations have narrower mandates, a constantly churning periphery of members and, when most successful, meaningful processes for continuous participation by members in both tactical and strategic decision-making.\textsuperscript{77}

\textit{To unbundle programs and re-aggregate policy goals in negotiated regulatory programmes}

The implication of the first three animating principles of NP3 is that, together, choice, multiple and fluid identities, typically located in multiple, interest-based sites of interaction will radically change how citizens imagine their relationship to the state. For many Canadians, the state today is less about a series of singular, comprehensive, bundled, outcome-related aspirations, programmes and services (health care, hospitals, National Parks, CBC) than it is about process aspirations and about the freedom to allocate resources and spend money (taxes and subsidies) on unbundled, self-reaggregated purchases.

Every tool of governance has an (implicit) conception of: the definition of the problem, the objective, the nature of society, legal authority, the possibilities of the organization, available funds, and human nature. Instruments can be embodied in public agencies, crown corporations, private firms, NGOs, banks, courts, or expenditures. For example, modern governance theory acknowledges that giving private monopolies in various forms, from self-regulating professions, to exclusive operating franchises, to the recognition of intellectual property rights is a regulatory decision. In a traditional conception, the collective will of Canadians is expressed in their vote for a representative to a jurisdictionally distinct order of government where these representatives are able to articulate a simple collective will through a legislative act. The public service, administrative agencies and non-governmental delegates of state power then translate this expression of regulatory will into action ultimately supervised by the courts to ensure no inappropriate assumption of jurisdiction, procedural unfairness or abuse of discretion in its exercise. Conventional policy analysis assumes a world where we can know the government agent that “acts”, we can determine the nature of the action, and we can assume a unique action meant to achieve identified purposes. But the assumption of the centralized bureaucratic state is usually misleading, when the unit for policy analysis is not the bureaucratic agency in a

will always ensure (and is the only way to ensure) aggregations sufficiently large to overcome disparities resulting from unequal economic endowments. The modern tools of international taxation regimes and the increasing use of consumption and other user-related taxes belie the first assumption, and the very existence of Prince Edward Island as a province serves as a counterpoint to the second.

\textsuperscript{77} Again, it might be argued that such a conception is too unstable to ground the type of social solidarity necessary to sustain a political community. In our view, the reverse is true. By pluralizing the \textit{loci} of political affect, the state creates the conditions for the flourishing of Tocquevillian mediating institutions.
hierarchical relationship to other actors but horizontal collaborative relationships. In this new world, sometimes economic actors will seem like agents of government in implementing a particular policy while at other times economic actors will appear as principals instructing the government to pursue particular policy goals. NP3 involves sharing of discretion over public authority and funds. It is a story about hetarchical relationships (networks) not hierarchies.78

Contemporary governance acknowledges that public agencies can do little or nothing on their own. The implication of this claim is that no ministry is hermetically sealed from its environment. The ministry can never have enough information to act without talking to others, and can take few actions except through others. Moreover, the success of any action assumes that mutual intendments between governor and the governed; governance is not a top-down projection of authority.79 We see this reality in the evolution of international trade policy in Canada, where trade negotiations involve many federal government departments, provincial governments, and even municipal officials.80 Trade negotiators need these other officials for ideas, for supporting the adoption of a proposed deal, and for implementing new agreements. Negotiators need to engage economic actors for the same reasons. Trade officials must understand the views and needs of all the participants in the trading system because new rules incongruent with the expectations and practices of the relevant actors will fail to be implemented or respected.81 To the extent that these rules are respected, it is not because they are capable of coercive enforcement in a legalized dispute settlement system.82 Indeed transparency is becoming one of the most effective trade policy tools.83 The bright line between government and the private sector erodes as the two blend together: collaboration replaces competition between public and private.

78 Our perspective is shaped by both legal theory and governance theory. In The Morality of Law (2d) (New Haven: Yale University Press, 1969) at 106, Lon Fuller characterized law as “the enterprise of subjecting human conduct to the governance of rules”. The theme is governance, not government. This insight is carried further in The Tools of Government: A Guide to the New Governance (New York: Oxford U. Press, 2002), where Lester Salamon argues that a governance “tool” should be thought of as a bundle of attributes, only some of which are in the formal control of government. A “tool” is a policy that can comprise many instruments, each of which embeds assumptions about the relations between citizens and the state.


80 More broadly, we see it in the way relations with the USA are the responsibility of all Canadians (in their firms, associations and families) and not just the Prime Minister. Robert Wolfe, "See You in Washington? A Pluralist Perspective on North American Institutions" (2003) 9:4 Choices 1


83 Robert Wolfe, "Regulatory Transparency, Developing Countries, and the WTO" (2003) 2:2 World Trade Review 157
In this fluid and uncertain new world, many Canadians worry about the legitimacy and democratic accountability of all political institutions, not just Parliament and legislatures; likewise, governments at all levels are experimenting with new policy instruments, new forms of civic engagement, and new processes and channels through which bi-directional communication and understanding may be negotiated and refashioned. The political challenge of NP3 then lies in finding models of participation and accountability that ensure a continuation of the democratic ideal of citizen equality in a fluid, plural, relatively boundaryless universe of policy implementation.84

3. The third national policy in action

The traditional elements of a national policy, as noted in section 1, are economic policy, communications, social policy, and policy processes (mechanisms of legitimation, participation and adjustment).85 Our focus in this section is on the reciprocal interaction between policy and tools (or more conventionally, ends and means). Throughout, we also consider how, if at all, the pursuit of these policies and the deployment of these tools by both federal and provincial governments may be constrained by the formal constitution. Our objective is still to discern the NP3 patterns in Canadian policy. Our analysis is now more explicitly normative, however, in that we are concerned with the policy choices Canadians ought to make if they are to give life to the NP3 principles identified in the previous section. Governance should not try to work at cross-purposes to the underlying forces that change national policies. While much, much more could be said about the policy domains we discuss, and the ones we ignore, our focus as in Table 1 above is on policies that serve an integrative purpose.

Recollect the aspirations and instruments of NP1 and NP2. NP1 was characterized by extensive growth (an increase in GNP) through macro-infrastructure supported by macro-policies meant to support that macro-infrastructure. NP2 was characterized by the promotion of intensive growth (an increase in GNP per capita)86 through large governmental organizations. In both, the objective and the available tool went together, each shaping the other. Moreover, the information content of a tool was largely held by the state, with the consequence that the design and execution of the infrastructure and redistributive programmes were fundamentally supply driven: “build the railway, the harbours, the canals, the highways, the airports, the telecommunications networks, the hospital, the university, the museum, the mortgage subsidy

84 In other words, the challenge is not to force “new governance” back into the forms and processes of top-down governance legitimated exclusively by the exercise of a periodic electoral franchise. It is to take the lessons of legal pluralism to heart, and develop legitimating institutions across the multiple sites of contemporary governance. See R.A. Macdonald, “‘Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism” (1998) 15 Arizona Journal of International and Comparative Law 69; R.A. Macdonald, “Triangulating Social Law Reform” in Y. Gendreau, ed. Dessiner la société par le droit (Montreal: Les Éditions Thémis, 2004) 119.
85 See Table 1, supra note 26, for a summary of these four features in the three iterations of Canada’s National Policy.
programme, and they will come”. Of course, especially in NP2, popular clamour for medicare, social housing, labour standards legislation, consumer protection regimes, pensions, access to higher education and the like provided significant impetus for governments to adopt policies to achieve them; but the manner in which agitation was translated into specific policies and the aggregation of policies into particular programmes was both centralized and top-down. In such a model of governance, everybody has to want the same thing, and the same thing has to be delivered equally well to everybody -- hence the need for big, bureaucratized, expensive command and control organizations.

The socio-demography of NP3 Canada is not like that of NP1 and NP2. Canadians are better educated, more mobile, less deferential and of demonstrably more diverse ethnic, cultural, linguistic and religious affiliations. The challenge is to achieve appropriate political outcomes through policies and programmes that are predominantly demand-driven, and responsive to providing particular services where and when people want them. Once again, it bears repeating that while not all tools of government can serve equally well all political ends, to recognize the transformation of policy instruments (and the need to do so) is not to accept that the ends they serve must also be transformed. In particular, even though the discourse of those who argue for increased citizen participation in the implementation of policies is often grounded in a desire for smaller government and the dismantling of egalitarian redistributive programmes, this does not mean that demand-driven tools must necessarily redistribute upwards. There is no incompatibility between a substantively egalitarian politics and the policy instruments of NP3.

Of course, in order for demand-driven programmes to succeed, governments must also find ways to give people the information and the wherewithal to make their own meaningful choices. This often requires embedding information in the tool. We believe that having access to such information, the analytical capacity to do something with it, and the economic security to exercise real choice are fundamental requirements for, and attributes of, modern citizenship. In this conception of the bilateral relationship of citizen to state, a primary means for states to convey information about programmes is through price and availability, and a primary means for citizens to convey information is through their patterns of expenditure of money, time and effort. Money and time are not just resources states and citizens have to acquire or transmit information; both are information in themselves.

**Economic policy**

One goal of NP1 was the creation of a single market from coast to coast. That goal is yet to be fully achieved—to take but one example, Canada still does not have either a single securities regulator or a co-ordinated multijurisdictional “passport” process. The *Competition Act*, passed in 1889, remains an important NP1 tool. In NP3 it is also important to allow nimble small firms to thrive, and to think about citizens as economic actors. A single market does not necessarily

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87 See, for an early attempt to illustrate how means and ends could be dissociated, R. Howse, J.R.S. Prichard, M.J. Trebilcock, “Smaller or smarter government?” (1990) 40 University of Toronto Law Journal 498.

require a single policy agency. NP3 goals can be equally well-served by measures to eliminate interprovincial barriers to employment and to dismantle protectionism that serves the interest of regulated professions by excluding qualified foreign trained doctors, lawyers, accountants, etc.

Economic instruments directly aimed at citizens work best for policy purposes when analysts think about how the information in an economic measure, including but not limited to material incentives, shapes outcomes. The choice among instruments is not just about preferring on moral grounds one or the other of criminalization, state ownership, franchises, regulation, taxation and redistributive spending, but about the information contained in criminal prohibitions and sanctions, regulatory processes, tax measures and the framing of spending decisions.\textsuperscript{89} So, for example, the classical tools of NP1 -- state ownership, franchises, regulatory tariffs and tolls -- were information rich only for those directly targeted. Likewise, the classical tools of NP2 -- the use of command and control regulation, income taxation and general programme spending -- also served to hide the manner in which the true cost of policies were differentially externalized.

What then should regulatory, fiscal and monetary policy for NP3 look like? It begins with a move from place-prosperity to people-prosperity, a move from province-to-province equalization leading to duplicate bureaucracies to “a negative income tax” that puts money where it is needed; a move from locked-in agricultural and fisheries subsidies (including seasonal Employment Insurance spending) to mobility subsidies that support people moving from declining industries and regions in search of new opportunities elsewhere; from supports to production to direct support to people; from permitted, universal cost-shifting in production processes to pricing externalities at the point of consumption.\textsuperscript{90} Consider the management of tax-funded investment pools. Today the Canada Pension Plan (CPP) is not yet a capital investment pool in the manner of the Quebec Pension Plan; imagine the possibilities, were that to occur. The CPP could offer citizens, in the same manner as a number of employment pensions, various options as to investment mix, along with a default position. Why should the state pension plan not be as responsive to citizen choice as Registered Retirement Savings Plans, and even company pensions (whether public plans like the giant Ontario plans for teachers and municipal employees, or private plans like those for General Motors and General Electric)?\textsuperscript{91}

\textsuperscript{90} For example, railway franchises typically contained liability exemptions for fires caused to adjoining owners’ property, or flooding caused by grading, or injuries caused to co-workers, etc. all of which buried the cost of operations. Likewise, information is buried in long-distance tolls that cross-subsidized local telephone infra-structure, differential truck licensing fees, and discounted hydro rates for industrial users. By contrast, the NP3 approach of subsidizing producers not production is also consistent with the likely evolution of multilateral trade agreements, which for one example in Canada would allow continued support to dairy farmers while constraining the deadweight burden of the supply management system.
\textsuperscript{91} The point here is not that people should be entitled to negotiate and manage their own pension schemes, as in the United States, although that is not impossible. Rather, the point is that the CPP could retain all the benefits of lower unit costs of administration, leverage in negotiating fees for financial services, and privileged access to a wider variety of investment opportunities but still offer Canadians a variety of investments options as well as a default programme for those who choose not to invest their time in portfolio management.
While consumption taxes let the federal state tax activity wherever it takes place, the only information general undifferentiated consumption taxes contain is that consumption attracts more tax than saving. The Goods and Services Tax is therefore neutral on where Canadians should live or what goods and services they should buy, while recognizing their mutual obligations to each other as Canadians. As an information-poor tax, the GST should be a hidden tax (like the Manufacturers Sales Tax that it replaced) that can readily be raised or lowered as fiscal needs change. By contrast, a visible, point of sale carbon tax is information-rich. Climate change policy should therefore be based not on top-down regulation or large bureaucracies but on price signals that convey information to citizens about their choices. While a patent GST provides no data to facilitate comparison shopping, a visible difference in the carbon tax on otherwise seemingly identical goods – from refrigerators to cars -- and services – from haircuts to rock concerts -- will help citizens as consumers make environmentally aware decisions. Visible policy-driven taxation is not the only alternative to command and control regulation. Tort law and the criminal sanction – for example, using liability rules to compel polluters to internalize environmental costs in the price of their products, or banning gas guzzlers – aim at similar ends. Yet the former provides much less information than a point of purchase fee or deposit – for example, on bottles, tires, cell-phones and computers, and the latter, however information rich it may be, is a regulatory instrument that is significantly less respectful of citizen autonomy.

Successful policies require combining information-based instruments (e.g. labels, mandatory advertising content) with measures that more directly target the social and environmental externality (e.g. tax; contingent user fees, direct regulation). Where an identifiable cost can be easily associated with an identifiable policy, and providers are enabled to compete on cost, both types of instruments, informational and monetary, are more effective.

Thinking about asymmetries of information helps with respect to both environmental and energy issues. Since natural monopolies do not exist, power utilities should let anyone sell electricity to the grid, and make sure through pricing that consumers understand the environmental and other consequences of where they buy power. Similarly, true pricing of water consumption lets users make real decisions, as do economic incentives to landowners to preserve wildlife habitat. Large centralized organizations may not be needed for simple things like drinking water. The best means of economic regulation (price of water and entry to the distribution market) may differ from effective social regulation (water safety and quality). Privatization and competition may well be an optimal policy for water provision, since the risks are low and easily monitored. Conversely, regulatory inspectorates may be optimal for environmental testing, since the risks are significant and the technical information is not readily accessible to citizens. Unbundling the

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components of the water supply system would make it easier for Canadians to acquire and digest information in a useable form.\textsuperscript{94}

\textit{Transportation and communications}

Traditionally, Canadians have imagined a national policy of transportation and communications primarily in terms of its hardware and structure: railways, canals, airports, roads, pipelines, mass transit (to move people and goods); post office, telegraph, telephone, radio, television, CB radio, cell-phones, Blackberries, iPod and internet (to move information). It is easy to think in these traditional NP1 and NP2 terms about how such infrastructure can serve NP3. First, make it the best in the world – an objective we are far from achieving. Second, ensure “universal service” in all media -- access to the equivalent of dial tone should not be dependent on where Canadians live.

Transportation and communications policy, however, is also about software and content, even when we think transportation. Canadians rejected Hugh Allan’s proposal to route the CPR across Michigan from Sault Ste. Marie. Canadians insisted that canals and roads have Canadian routes. While Canadian governments never embarked on an Interstate Highway programme, massive subsidies for the Trans-Canada Highway’s multiple routes, all-Canadian pipeline routes, and hub-and-spoke air services to promote regional economies served analogous purposes. The NP2 goal was to create symbols of interconnectedness as well as the reality. In NP3, transportation infrastructure may well be best served by cost-of-service pricing – garbage, sewers, water, highways, railways, pipelines, airports, harbours.

It is less easy to think about how the NP2 concern about substantive “Canadian” content in communications can be cast in NP3 terms.\textsuperscript{95} In the past, Canadians wanted Canadian-owned magazines and electronic mass media, even if they only vaguely understand the implications of Can-con regulation, differential tax deductibility for periodical advertisers and postal subsidies for the content of these vehicles. Today, this is less clear. Does ownership of infrastructure or content matter? Should Canadians no longer think of infrastructure and content in the same regulatory terms? Put differently, should CBC prefer Robert Charlebois to Chopin, Alanis Morissette to Mozart, Carol Shields to Shakespeare, Jack Bush to Breughel, and Denys Arcard to Robert Altman? And if the regulatory framework that sustains the lucrative private networks still serves a public purpose, which combination of requirements with respect to content, ownership, employment and production at CTV, TVA and Global best serves that purpose?

If the communications revolution means that increasingly concentrated media conglomerates (both in Canada and elsewhere) treat Canada as a branch plant of the United States, making advanced technologies available only when profitable to do so, and purveying cheap programming to a captive market, one may regret the development. This said, the appropriate NP3 response is neither prohibition nor strict content regulation. It might be a consumption tax

\textsuperscript{94} On transparency as a regulatory tool, see Archon Fung, Mary Graham & David Weil, \textit{Full Disclosure : The Perils and Promise of Transparency} (Cambridge ; New York: Cambridge University Press, 2007).

\textsuperscript{95} On “cultural industries” in the new era, see Patricia M. Goff, \textit{Limits to Liberalization : Local Culture in a Global Marketplace} (Ithaca: Cornell University Press, 2007).
on foreign product, redistribution to facilitate market entry of new outlets, product labelling, and the removal of the implicit allocational privilege afforded to the first entrant.

Social policy

Social policy may have replaced the railroad as a symbol holding the country together, as Tom Courchene has often argued. In this sense the NP2 welfare state could arguably be seen, at least by social democrats, as creating the material basis for individual agency and autonomy. Those NP2 objectives have not been fully achieved, but here too we wish to focus on the new NP3 agenda using the traditional policy domains. Do the instruments and policies of NP3 threaten these objectives and leave people more dependent and vulnerable than previously? Migration and immigration policy will remain a part of NP3 as they were of NP1 and NP2, but no longer just as tools to achieve some other objective. Canada still accepts substantial numbers of immigrants, even if the annual totals are smaller in absolute terms (let alone relative terms) than what they were a century ago. But the policy issue will neither be a corollary of economic policy as in the NP1 goal of filling up Canada’s empty spaces with people in order to build a national economy, nor will it be principally a humanitarian endeavour aimed at family reunification and refugee protection.

The first social policy issue for NP3 is to determine the purposes of immigration. Should Canadians seek to replicate themselves in ethno-cultural and religious dimensions? Should they seek to skim the most-educated, highest-skilled, and healthiest from elsewhere? Should the goal be to invite the most interesting and dynamic people in the world (regardless of ethnicity, religion, education, skill and health status) to bring their ideas and energy to Canada? Focussing on the social outcomes of immigration under NP1 and NP2 and not just on ex ante criteria of admission offers an answer for NP3. It is about seeking out those who will not only be changed by us, but who will in their own way, change us ourselves. To assist Canadians to understand, and in situations of enrichment to welcome, changes to what it means to be a Canadian flowing from immigration requires educational, employment and community action policies (especially in cities) that enable and encourage all Canadians to inquire collectively into who they are and who they want to be.

The second issue is about how Canadians support immigrants after they arrive. Of course, the integration of newcomers is relevant for all migrants, whether from abroad or from within. Canadians move around a lot. In the 2001 census, over 900,000 people had changed provinces in the past five years, with over 240,000 going to both Alberta and Ontario, the only two with a net increase in population from internal migration. Newfoundland lost the most people. Quebec’s deficit even applies to those who have French as a mother-tongue (ie. more francophones leave Quebec for another province than come to Quebec from another province).96 Most Canadians now live in cities; as do most new immigrants. Most new immigrants live in or around only three cities, and most internal migrants move from rural areas or small towns to cities and their suburbs.97 The biggest cities are growing, but small towns and rural areas are not. The two key

96 Statistics Canada, Languages, Mobility and Migration, 2001 - Canada, Provinces and Territories (table), 2001 Census of Population (Provinces, Census Divisions, Municipalities) (database)
97 Statistics Canada, Census of Population: All Tables, 2001 - Large Urban Centres in Canada (table), 2001 Census of Population (46 Large Urban Centres, Census Tracts (neighbourhoods))
challenges for building communities, practices and institutions of social solidarity are the ability of internal and external migrants to find a place and a means to integrate into those cities, and the growing divide between those cities and smaller places. Canada’s big cities are more diverse than almost any other places on earth. The smaller places whose populations tend to be long established are both older and much less diverse. These differences have social, political and therefore policy implications. For example, “immigrating” to Montreal from the Gaspé is in some respects as big a move as “immigrating” to Montreal from a developing country. What kinds of supports should be available in the two cases?

A different kind of question, on which data is hard to access, is about transient labour flows within the country. Do significant numbers of Newfoundlanders spend part of the year in Fort McMurray and part on the Rock? In which province do they pay taxes, or get a health card? And if these types of labour are transient, why should not others be as well: nurses, teachers, social workers, tax accountants should not have less mobility than general labourers; neither should plumbers, plasterers, electricians, and carpenters. Labour mobility is a challenge in a time of labour shortages in parts of the country, migration is more important than immigration, and Canadians need better designed organizations and processes. Why, for example, do Canadians have language training for immigrants but not citizens who may need it because they have moved within the country? The recognition of foreign professional qualifications in Canada, an objective constantly stressed by Jean Charest as Premier of Quebec and promoted by Fair Access Legislation elsewhere, would allow us to benefit from the contribution of high-skilled immigrants without compelling them to become so heavily invested in Canadian accreditation that a return to their countries of origin is foreclosed. Internal migrants also need more mutual recognition, allowing skills and credentials to travel with individuals not province of residence.

It follows that a national policy to support the inclusion of migrants encompasses an extensive social policy agenda. The common characterization in Canada’s largest city associates violence and crime either with ready access to hand guns or with black immigrants from Jamaica, but the victims of the violence are often also black Canadians living in urban ghettos. Approaches to policy in NP3 should look for a set of citizen-centred policies that facilitate the development and replication of institutions of social solidarity that will in turn facilitate their ability to build healthier communities.

Given this orientation to overcoming the social exclusion of immigrants and second–generation visible minorities, we are sceptical of calls for black-centric schools. The public school system designed by Egerton Ryerson in the 1850s to assimilate rural migrants to an emerging industrial society still serves the pluralist objective of ensuring that Canadians grow up knowing that other people are also holders of multiple identities. That means that NP3 schools must rest on plural foundations, even if the education (or day care) need not be delivered by large NP2 bureaucracies. The current federal government thinks that social policy is about empowering individuals not building state delivery. This is consistent with NP3 thinking. But how

98 See “Educated newcomers struggle to find work, study shows” (Canadian Press, July 19, 2008). Developing countries would be delighted if Canada made formal commitments to allow more such movement, known in the jargon of the General Agreement on Trade in Services as “mode 4”. Such a policy has the further benefit of not permanently denuding other countries of skilled labour.
99 See “Towards a single labour market” (Globe and Mail, July 18, 2008).
individuals are empowered matters, since there are diverse ways to accomplish this policy goal. One solution to income inequality, and delivery of proliferating social programs through large state bureaucracies, can be a guaranteed annual income delivered as a negative income tax through the existing tax system. In supporting students, are grants or loans better? Does needing to pay off the loan that funded high medical school tuition alter the new physician’s view of her public role? How easily can interprovincial migrants benefit from such systems? It matters if citizens are merely holders of rights to consume public services, as opposed to citizens who take collective responsibility for the community action. It matters if the chosen tools bring people together or push them apart. Some social democrats would argue that all policies since the 1960s – from multiculturalism through the Charter to the GST and NAFTA – push people apart by creating a disempowering anti-collective false consciousness. In this logic, since all individual choices will be manipulated and constrained, if not dictated by more powerful interests, no tools, policies and institutions that are not explicitly communitarian and counter-hegemonic can preserve the achievements of NP3. We obviously do not agree.

Myriad policy fields and myriad policy ideas for NP3 can be imagined as supporting the basic orientations that have animated Canadian public life during NP1 and NP2. Given the continuing challenges of overcoming inequality of life chances and providing support to marginalized populations, one can imagine increased attention to programmes that put resources and options in the hands of citizens: early childhood and family support programmes; young adult educational and vocational training; and a targeted focus on preventative health measures. Of course, in all these fields, the goal is not to turn social policy into self-serve cafeteria where “junk-food” has equal prominence with “food”. Many such programmes require accessible default regimes (a *menu touristique* if you will) against which alternatives may be measured and compared.

*Health care*

We conclude this section with a consideration of the bureaucratic health care system, the ultimate in NP2 policies. Through the OECD, the delivery of health care is under re-

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100 Hugh Segal, "Guaranteed Annual Income: Why Milton Friedman and Bob Stanfield Were Right" (2008) 29:4 Policy Options 46
101 Harry Arthurs has been a leading exponent of this position. See, for example, “The Administrative State Goes to Market – and cries wee, wee, wee all the way home” (2005) 55 University of Toronto Law Journal 797.
104 This does not mean that health policy was absent from policy reflection in NP1. To the contrary, health and social welfare were consciously left to the family, the church, benevolent associations,
The difficulty with some of what we have said about NP3 when it comes to health is that putting money in people’s hands risks moral hazard: patients lack information and providers lack incentives to control cost. This said, however, it is notorious that the system cannot respond to current concerns about cost, choice and wait times. Canada’s health care system rests on large NP2 organizations delivering a standardized product.

As with many such systems, the health care system is failing because it uses resources inefficiently and inflexibly. Emergency rooms can be a nightmare of waiting to be seen and then waiting for a bed, but the problem is not primarily in the ER—the blockages happen because patients who should be seen by a family doctor are diverted to emergency rooms, and then beds are occupied by patients who need some continuing care, if not at the level of a general hospital. Nursing homes are an egregious example. In classic NP2 terms they are equipped to offer roughly similar care to a roughly similar group of patients. If an elderly woman suddenly needs a little more care, she is shipped to the emergency room of the local hospital. Even if hospitalization is needed to stabilize her condition, she spends longer in a regular hospital bed than needed because the nursing home cannot manage the follow-up care she needs.

One can imagine a better system that puts the patient at the centre, and uses new technologies to track and allocate all available resources wherever they happen to be located in the health care system. The politics of wait times can be either organization-centric or patient centric. When we look at patients, the issue is not how long they wait for a specific procedure, but how long they wait from reporting a symptom to an outcome. Rather than managing hierarchical agencies, the task becomes orchestrating all nodes in a network to provide services when and where needed. If the emergency room intake service could effectively redirect arrivals to appropriate accessible service providers, and if the nursing home could identify the unique set of services needed to support that elderly woman for a few days of recovery (for example, portable oxygen or a nurse to provide a daily injection), and had a flexible budget that set the extra costs of that care against the hospital’s costs for keeping her, everyone would be better off, including the accident victim waiting in emergency for a bed. Some problems are solved not by internalizing all health functions in large bureaucracies, like hospitals, but by the capacity to allow each part of the system to do what it does best in close collaboration with the other parts. We will return to the implications of this example for NP3 public administration in the conclusion, but first it is

immigrant aid societies, and charitable corporations. Programs have both an explicit policy purpose and an implicit constitutional purpose.

All OECD countries have some sort of health care system that can be arrayed on a continuum of degrees of public-ness on finance (redistribution) and delivery. The place on the continuum is a choice that is not merely instrumental: it is also constitutive.

Libraries face a similar transition from managing large repositories of information on paper where readers are almost a nuisance—think of closed stacks—to virtual entities whose task is to help readers find information wherever it is located on the web.

As with our view of the current government’s child-care programme, we are sceptical of the decision of the Supreme Court of Canada in Chaoulli. See Chaoulli v. Quebec [2005] 1 S.C.R. 791. On the other hand, by contrast with many legal scholars, we do not take a chicken-little view of the case. Compare, for example, C.M. Flood, et al, eds. Access to Health Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada (Toronto: University of Toronto Press, 2005). Better information about the health implications of life-styles, addressing issues as diverse as smoking, diet, exercise and consumption of pharmaceuticals, though long a part of public health theory, are a particularly NP3 approach to
helpful to consider something that falls outside the conventional schema by which Canada’s national policies have been pursued and explained.

4. From multiculturalism and reasonable accommodation to plural identities

Like all formal constitutions, all national policies presuppose a citizenry: a citizenry that seeks them, shapes them, responds to them and ultimately moves beyond them. In NP1, the mass of citizens were typically perceived with the class prejudices of the 19th century; they were simply individualized, discrete subjects of the policy process who would do what they were told by religious, economic and political élites. In NP2, citizens were primarily perceived as involuntary consumers of predetermined programmes; they were construed as the aggregated objects of state policy. From the 1860s through the 1960s, very few direct policy instruments apart from funding for education in Canada’s initial four provinces were tied to determinations of personal identity such as religion, language, gender or age. None were dependent on self-identification by ethnicity, race, place of origin, sexual orientation, physical disability or any other identity criterion now found in most Human Rights Codes. The theory was that the optimal mechanism for promoting a democratic politics was to insist on citizen equality through enforcement of anti-discrimination norms. By the 1970s, however, formal equality was revealing its analytical limits and outcome equality moved to the centre of the policy agenda. Consequently, for the past third-of-a-century, identity (and especially a certain kind of labelled identity – multiculturalism) has loomed large in the policy framework.

Multicultural musings

The origin of the term “multicultural” in Canada was the dissenting opinion by a member of Ukrainian origin on the Royal Commission on Bilingualism and Biculturalism. It rightly meant to challenge the view that Canada had only two cultures. In a two solitudes model, English and French are linguistically-based spatially dominant mono-cultures, and the “multi” cultures are deviants who must adapt to one or the other. In a spatially agnostic pan-Canadian view with no dominant mono-cultures, “multi” becomes mere (mis)description of cultural reality.

population health. Moreover, local, community-based preventative medicine and broad investment in neo-natal and early childhood health are examples of context-specific interactive non-hierarchical policies for the delivery of Medicare.

108 There were, however, some exceptions. Children’s aid societies in many provinces were religiously based; family allowance cheques were initially made payable only to mothers; Old Age Security, as the name implies, was directed to the elderly.

109 For an example of prohibited grounds, see Ontario Human Rights Code, ss 2- 9.


111 Assimilationist policies towards aboriginal peoples were even worse, and lasted well into the 1990s. See Royal Commission on Aboriginal Peoples, Vol. 1 (Ottawa: Supply and Services Canada, 1996).

112 The same argument holds for the alternative label adopted in Quebec: “communautés culturelles”. See Ministère des relations avec les citoyens et de l’immigration, Shared values, common interests – to ensure the full participation of Quebecers from cultural communities in the development of Québec. Shine among the best. (Quebec: Gouvernement du Québec, 2004).
Nonetheless, in our view, the very idea of multiculturalism is a vestige of NP2 thinking. It is a flawed policy descriptor because it ignores too many of the challenges to be addressed in designing and implementing policies to promote social inclusiveness. First, it evokes only one of the relevant dimensions of individual identity, and distinguishes only some Canadians – those who assert an identity based on ethno-cultural or religious distinctiveness -- from the rest. Second, it tends to essentialize identity. Legislated multiculturalism requires people to self-identify as (or to be seen by others as) only one of their multiple identities. Third, multiculturalism implies the creation of policies and programmes that are supposedly “multicultural” in themselves. Affecting resources to multiculturalism means identifying the appropriate agents and guardians of a particular culture. It produces insistent claims for recognition and arguments by ricochet about whom and what is deserving of official recognition.

Over the past two decades multiculturalism has often been asserted in opposition to “charterism”. In such usages, it becomes a designation of ethno-cultural minorities, often visible minorities, and particularly visible, religious minorities. That is, in popular understandings of the Charter of Rights and Freedoms, all Canadians have the same rights and are constitutionally equal. Since multicultural groups are, by definition, an aggregation less than the whole (and in practice, invariably a minority aggregation), their constitutional recognition amounts to a new deviation from liberal universalism. In this new incarnation, multiculturalism requires reification of social, cultural and perhaps racial identities that may well be alien for most citizens. Surely the members of the local curling club in Saskatchewan, or the Knights of Columbus in Nova Scotia, or the Masonic Temple in Ontario, or the Société Saint Jean Baptiste in Quebec do not see themselves as “multicultural”.

Recognition and accommodation

On this reading, the current preoccupation with the idea of “reasonable accommodation” is curious. It imagines that the public policy issue is simply to delineate the circumstances under which exceptions from Charter principles must be allowed. Yet it asks only some people to defend their cultural preferences. It seems to assume not only that all citizens have rights, but

113 For an argument that cultural is only one of the many characteristics of Canadians that could be modified by “multi”, see Robert Latham, "From a Multicultural to a Multiversal Canada" (2007/08) 63:1 International Journal 23.

114 In early 2007, following a provincial election in which the issue of reasonable accommodation of “immigrants” loomed large, the Government of Québec appointed a “Commission de consultation sur les pratiques d’accommodement reliées aux différences culturelles” (the Bouchard-Taylor Commission) to “(a) take stock of accommodation practices in Quebec; (b) analyse the attendant issues bearing in mind the experience of other societies; (c) conduct an extensive consultation on this topic; and (d) formulate recommendation to the government to ensure that accommodation practices conform to the values of Quebec society as a pluralistic, democratic, egalitarian society.” The mandate of the Commission was established by Order-in-Council 95-2007, issued on February 8, 2007 and reproduced as Appendix A of the Commission’s Report, Building the future: a time for reconciliation (Quebec: Éditeur officiel, 2008) released on May 24, 2008. For a more detailed discussion of the Bouchard-Taylor Commission Report, from which parts of this section is drawn, see Roderick A. Macdonald and Thomas McMorrow, “Myths of Miscegenation” in B. Iancu, ed., The Law-Politics Distinction in Contemporary Public Law Adjudication (forthcoming, December 2008).
that they all have the same rights. Instead of changing a rule that is in some way failing some group, the dominant mono-culture must make an “accommodation”. The appeal to accommodation stigmatizes, for certain contexts, everyday features of legal life. All legal rules change, all the time – whether through legislative amendment, judicial interpretation or simply changing practices. Moreover, most legal rules are not prohibitive, but rather facilitative. To imagine that reasonable accommodation creates differential classes of citizens is to adopt a view of citizenship that is overly thick, singular and static. In other words, framing issues as reasonable accommodation is an NP2 response to the fact that all legal rules change, all policies evolve, and all absolutes become relativized through the experience of particularity.

Considering differences in the experiences of internal and external migrants underscores the point. Do issues of social exclusion apply in the same way to Caribbean guest farm-workers in southern Ontario as to Newfoundlanders in Fort McMurray? Or equally to Bangladeshi immigrants in Toronto and to Gaspésiens in Montreal? Typically the internal migrant – the Newfoundlander and the Gaspésien – is afforded recognition as a full member of the political community, but receives no services meant to foster participation in the new socio-cultural community; typically the external immigrant – the Mexican farm-worker and the Bangladeshi – receives the services but is denied the recognition. To imagine that the issue is one of “reasonable accommodation” underscores the paradox. How ought a society to accommodate a displaced Gaspésien migrant? Does it even make sense to talk of adjustments Alberta makes in the tar sands as “reasonable accommodations” for those from Newfoundland? From these examples, one might well conclude that Canadians agree to a policy of “accommodation” in relation to something they don't recognize or don’t like, while in other situations the same policy may not even be perceived as a “policy” or may be benignly labelled as a “labour market” inducement.

Plural identities

By casting NP3 as aimed at recognizing the plurality and fluidity of identity, we seek to avoid the trap. Taking a pluralist approach we are much less inclined to define categories or identity and much less inclined to see any such categories as monolithic and necessarily comprised of definable traits. So, a pluralist would neither ask the long established Canadians of Chinese origin to pretend to be white, nor pretend that calling them a “visible minority” is a primary characterization of their place in Canadian life.115 Neither would a pluralist think of requiring a pale-skinned Muslim woman who has emigrated from Ireland to wear a headscarf if she wants to

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115 We are indebted to Keith Banting for this observation. There is a further point that flows from this reflection. To the extent that any identities are essentialized in Canada today, it is not those of cultural, religious or ethnic minorities that are recent immigrants. Rather, it is the identities claimed by certain “québécois de souche” or aboriginal peoples that are primarily directed to exclusion. See, for example, Charles Taylor, Multiculturalism and “The Politics of Recognition” (Princeton: Princeton University Press, 1992); W. Kymlicka, Multicultural citizenship : a Liberal Theory of Minority Rights (Oxford ; New York : Clarendon Press, 1995); James Tully, Strange multiplicity: Constitutionalism in an Age of Diversity (Cambridge ; New York : Cambridge University Press, 1995); Daniel M. Weinstock, Le Défi du Pluralisme (Montréal : Département de philosophie, UQAM, 1993-1994); Keith Banting & Will Kymlicka (eds.) Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies (Oxford: Oxford University Press, 2006).
be a Muslim, nor conversely, of requiring her to “act white” because she “looks white”. Finally, a pluralist approach enables us to ask about all the Canadians who may be marginalized in our cities, whether they migrated from Calcutta or Corner Brook, Guyana or the Gaspé.

The fundamental question for NP3 is one of identity: how to foster positive, not negative, identity for all, because that—rather than assimilation—is the basis of social inclusion. In the lens of NP3 the Canadian state will not presume a single model of what being a citizen entails. The world doesn’t have to look the way “wise people” think it should. Even more to the point, in the universe of NP3, singular, thick conceptions of citizenship such as those presupposed by advocates of policies to promote “social cohesion” will have no place. Just like the un lamented NP2 mantra of “national unity” as an excuse to arrogate power to the centre, the mantra of “social cohesion” evokes a conception of citizen and state radically at odds with the normative agenda implied by NP3. Canada’s future will lie, we believe, in policies that aspire to privilege real choice about and mediate among mediate multiple, fluid identities that find expression in lateral interest-based affiliations. It may be that the very nature of traditional public bureaucracies – the organization of specialized offices applying *ex facie* neutral rules – prevents their easily adjusting to an NP3 world of multiple, fluid citizen identities, but if this is the case they may well themselves be transformed into less hierarchical, more experimental organizational forms.116

**Conclusion: social inclusion through citizen agency**

Do Canadians have the Canada they want? Does Canada now provide appropriate opportunities for self-fulfilment and appropriate services to sustain those opportunities to all its citizens? The jury is out. It is still hard to live in poverty, and hard it is to use the apparatus of the welfare state to your own advantage when you lack time, money, education and skills. The prosperity promised by NP1 still has not reached large numbers of Canadians, and the welfare institutions of NP2 are too often defined by operational boundaries that might once have made sense, but that today seem capricious; that seem designed for the benefit of service providers, rather than by the needs of citizens. And yet, despite the continuing salience of certain policy prescriptions of NP1 and NP2, we also see elements of a different approach – a third national policy -- in the emerging thinking of Canadians and in the experimental practices of our governments. We illustrate this conclusion with an example drawn from the world of trendy business books, the “long tail”.117 In the NP2 era of large organizations, selling large quantities of a small number of standardized products to a mass market, firms made money following Henry Ford’s dictum that you could have any colour Model T you wanted as long it was black.118 Now the iPod

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generation is accustomed to a reversal of that logic—firms make money by being able to link consumers with the exact product they want (or at least think they want) at the lowest price.

The big idea of the “long tail” hypothesis about the marketplace is that we have reached the end of mass-everything. While some mass-services or mass-products may survive, because the easily accessible internet democratizes information, publication, and access to data, the dominant market metaphor is now the “niche”. Control of mass distribution is effectively impossible, which undermines all elites. Place does not matter when long tail services can be delivered in Gaspé in the same way as in Toronto. Services are becoming “unbundled” because in-built cross-subsidies are no longer needed to maintain inventories. This places the consumer at the top of the pyramid, lessening the conflict of interest between providers and consumers, or agency cost. Phenomena like Amazon, eBay, and iTunes allow the buyer to decide what will eventually become popular, instead of only taking directions from industry or sales people. The fact that those familiar brand names are all foreign does not lessen the significance of their ubiquity in Canadian life. The key question implied by the long tail is epistemological. Where choice is limited ex ante, and presented episodically as a discrete event in quotidian life, the capacity to manage this choice makes few demands on citizens. Where everything is up for grabs, all the time, a great deal more is required of citizens in order for that choice to be meaningful. Somewhere between a 200 item Chinese food menu and a “Today’s Specials” menu of limited choice, lies a range of decision options that ordinary people can ordinarily handle. Somewhere between the unthinking repetition of daily modes of being, and the possibility of remaking oneself at every minute of every day, lies a range of choice that is not paralytic.

Governance and public administration are affected in the same way. Information is widely available, and services can be delivered at a time and place of citizens’ choosing, ideally through a “one window” physical or virtual entry point to government services. Citizens (and nursing homes) should deal with one intermediary who helps government adapt to their needs, rather than that intermediary being a gatekeeper forcing citizens (and nursing homes) to re-cast their question in the way the government structure understands. Of course, in such a conception of service delivery, much still depends on citizen initiative. Available information still has to be accessed; options for future conduct still have to be assessed; opportunities to reconfigure the interaction of state and citizen still have to be promoted. So while NP3 thinking can point to the general contours of policy and the optimal agency-enhancing tools of governance, the specific mechanisms needed to achieve these goals are as yet indeterminate.

Here is one example of what may emerge as a key feature of NP3 instruments. Service Canada is a relatively new delivery agency based within Human Resources and Social Development Canada (HRSD). The agency now performs all department service tasks (e.g. delivery of

119 See the discussion of models of front-office and back-room call-centres as a tool of access to government services in Roderick A. Macdonald, "Call-Centre Government: For the Rule of Law, Press #" (2005) 55 University of Toronto Law Journal 449
120 Maryantonett Flumian, Amanda Coe and Kenneth Kernaghan, 'Transforming Service to Canadians: The Service Canada Model,' 73 International Review of Administrative Sciences, December 2007, 557-568. We cite this example fully aware of the pitfalls of call-centre government, and the failure so far of the organization to live up to its promise. Critics of Service Canada note several problems with certain operations of the agency. First, the people who staff the call-centre don’t know anything substantive.
Employment Insurance checks) but it is also starting to develop services for other departments. Access to services is available at multiple sites (328 offices, 211 new outreach points of service, 55 community partner locations), and in multiple modes (over-the-counter, or by mail, or phone, or through the web) as citizens choose. A post office in every town handing out passport applications is no longer enough; and it is not good enough for people with no passport office in their community to have to pay $15 to get a post office to accept their application. The objective is first to save money, but it is also to deliver seamless citizen-centred (not “client”-centred) service, for example a simple single application for multiple services and programs that can be completed at birth for: new child care allowance; provincial birth registration and certificate; Social Insurance Number; Canada Education Savings Grant; and Canada Child Tax Benefit.

The Service Canada initiative is an approach to service that starts with individuals, not the needs of government agencies. We earlier argued that a thick (or socially-embedded) conception of citizen agency provides a powerful analytic register for understanding the complex identities of all Canadians, and an operable policy notation for the emerging collective project that could be called Canada’s third national policy. Generating an approach to public policy, and to its delivery by public servants, that sees citizens as sites of multiple interactions with multiple communities of affect, catered to by multiple government programmes is a necessary feature of state-building for the Canada that now exists. Because, Canadians are no longer the “hewers of wood and drawers of water” imagined under NP1, nor the entitlement-driven consumers of bureaucratic social welfare programmes imagined under NP2, there can be no returning to a rural, monolithic, deferential and organic arcadia. What is more, the challenges for NP3 go well beyond questions of immigration, religion, race, and language or the post-modern anomie of globalization. The NP3 objective is individual autonomy with mutual obligation for all citizens without asking the state to choose among their multiple overlapping identities as, say, Muslim, female, working class, or francophone. That does not mean that policy should privilege those aspects of any community or religion that limit the agency of other members of that community. To recognize the plurality of normative communities does not presuppose that these communities are of equal weight or worth. To recognize Sharia courts (or the authority of the Catholic Church or rabbinical tribunals) is not to say that other normative orders (and particularly the official legal system of the state) must see all its pronouncements as legitimate and deserving of “full faith and credit” — quite the reverse.

Where NP1 and NP2 assumed that because Canadians were all different, the goal was to make them all the same as citizens, NP3 assumes that because Canadians are all now the same as citizens (at least in theory), they must be allowed to flourish in their differences. A number of

They therefore can’t and don’t probe, pick up nuances etc. Second, they are strictly monitored to respond in a standard unit of time to any question, regardless of the type of “customer” or question. And third, callers are cut off from the actual service providers who therefore don’t have a chance to receive or send the important signals associated with front-line service provision. On these failures of the call-centre model generally, see Lorne Sossin, “Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields and Discretionary Justice in Social Assistance” (2004) 42 Osgoode Hall Law Journal 363; D. Mullan and A. Ceddia, “The Impact on Public Law of Privatization, Deregulation, Outsourcing and Downsizing: A Canadian Perspective” (2003) 10 Indiana Journal of Global; Legal Studies 199.

corollaries flow from this prescription. First, it aims at maximizing the opportunities for citizens to actively shape their interactions with government. Not all citizens have either the desire or the capacity to hold all these choices open for decision. But NP3 opens the possibility for choice; governments will still have a role in providing default positions to structure ranges of choice according to the wishes of particular citizens. Second, it does not presume that the state will wither, or that certain functions of the state may not even become more centrally managed. Many of the policies and programmes of NP1 and NP2 are still relevant; but many are not. In imagining new policies and programmes and in reconfiguring existing policies and programmes the logic of NP3 will be the ground upon which public policy choices will be made. Third, some features of the Canadian legal and political landscape – provincial boundaries, bilingualism, regional equalization, a Parliamentary governance regime – are less open to reconfiguration than others; for this reason, some identities require more attention than others. None, however, are unchangeable. Fourth, the collaborative project (the social project) that is celebrated in NP3 is not an individual project. It is every bit as collective as the projects of NP1 and NP2, but it celebrates the diversity of life projects that Canadians seek for themselves and focuses on providing the material conditions and the opportunities for Canadians to turn their aspirations into accomplishments. If there is nothing anti-social about a country that invests resources to enable all citizens to derive the benefits of its recognizing linguistic duality, there is nothing anti-social about a country that extends that logic to other thick identity claims. Finally, many of the federal-provincial jurisdictional conflicts precipitated by the objectives, programmes and instruments of earlier national policies are fated to disappear. Jurisdictional trespass, conditional transfers and shared-cost programmes will be wound down as the federal government seeks to interact directly with citizens, deploying taxation and expenditures to achieve policy through information-rich governance instruments.

We have argued that the story of Canada’s constitutive conversation is best understood as a story of its national policies. Sometimes, however, the story has been less than explicit in the consciousness of Canadians. Indeed, each of Canada’s national policies was born before it was conceived. Lord Durham’s Report, the Act of Union of 1841, the Annexation Manifesto of 1849, and the British North America Act of 1867 can be seen as competing diagnoses of and competing legal responses to articulating the first National Policy that was given a name by Macdonald in 1879. The Rowell-Sirois Report of 1940, the constitutional amendments of 1940 and 1952, the Tremblay Report of 1956 and the shared cost programmes of the 1950s and 1960s can be seen as competing diagnoses of and competing legal responses to articulating a second National Policy that, unfortunately was never baptized with a high-sounding name: both the federal (co-operative federalism) and the Quebec (fédéralisme rentable) alternatives were instrumental, and law-focused, slogans; neither spoke the in the aspirational language of policy. Most recently, the Constitution Act of 1982, the Macdonald Royal Commission, the Free Trade Agreement, NAFTA, the GST, the Royal Commission on Aboriginal Peoples, the Nisga’a Final Accord and the Kamloops Agreement can be seen as competing diagnoses of and competing legal responses to a perceived need to articulate a third National Policy that has neither been conceived nor baptised, yet surely has been born.

122 Although as suggested above, province-to-province equalization makes less sense than a negative income tax now that Ontario will be a recipient of equalization payments. Some services (infrastructure) have a regional dimensions, but others (health) might be better equalized in other ways.
The constitutional (constitutive) conversation of the future will be couched in the rhetoric of policy, purposes and human agency, not jurisdiction, power and imposed authority. In this conversation about how Canadians choose to understand their political community, the epiphenomenal constitution will be the formal institutional arrangements of lawyers, not the third in the country’s series of aspirational national policies.