Federation and National Identity in Canada and Australia: A Comparative Perspective

John Kane and Haig Patapan
Griffith University
Can representative democratic government work where there exist significant and enduring differences of group identity? It is sometimes suggested that one of the answers to the tensions between identity politics and democracy might be the creation of federal structures. In this paper we use a comparative study of federation and identity in Canada and Australia to point to the possible limitations of federation as an institutional means of resolving such tensions.

John Stuart Mill was the first to suggest, in *Considerations on Representative Government*, that federation might be an answer to the threat that "nationality", as he termed it, posed to free institutions (Mill, 1972). Nationality has various causes for Mill, being the effect of race and descent, language, religion as well as the strongest cause, the "identity of political antecedents" (which includes "community of recollections" and the "possession of a national history"). Mill puts the problem in these terms:

"Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist. ... The same incidents, the same acts, the same system of government, affect [the different sections] in different ways; and each fears more injury to itself from the other nationalities than from the common arbiter, the state (Mill, 1972, 392).

For Mill, race, religion, language, and generally nationality, are formidable obstacles to representative government. The grave implications of this observation become clearer when we recall that Mill regards representative government as the ideally best form of rule—only properly constituted representative institutions pursue the common good as well as advancing the moral, intellectual and active faculties of the people (1972, chs 3, 5). It is for this reason Mill states that "it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities" (1972, 394). Where this is not possible, Mill offers as one solution the "merging" or "absorption" of one nationality by another. But when this proves impracticable and where the alternative of complete separation is impossible, Mill proposes federation as an arrangement which may preserve free institutions. The constitutional model for a federal government which he recommends, calling it "exceedingly judicious," is that of the American Constitution.

In this essay we argue that this Millian theoretical perspective provides important insights into the different ways federalism was appropriated and deployed in Canada and Australia. More specifically, we claim that both the Canadian and Australian founders accepted Mill’s view that ‘nationality’ posed a threat to representative institutions and both adopted federation as a solution to the problem of nationality. But here the similarity ends. The Canadian founders did indeed adopt the Millian proposal of federation as a solution of the problem of ‘two races’ (French Catholic and English Protestant). Federation was conceived in part as a means of securing the group rights and thus the separate identities of national
minorities or ‘races’ within an overarching ‘political identity’ provided by a federal government. The Australian founders, in contrast, used federation not to accommodate and perpetuate separate identities, but to found a national government that would guarantee homogeneity by securing a singular ‘thick’ national identity against the threat of incursion by ‘alien’ races.\(^\text{IV}\)

**CANADIAN AND AUSTRALIAN FOUNDINGS**

For both countries defence and economic union were important motivations for federating. Moves toward the British North America Act (BNA Act) of 1867 (renamed the Constitution Act in 1982) were a response to the threat that the American Civil War represented to the security of the provinces. Australians, for their part, were galvanised toward federation in the 1880s by German and French imperial interest in the islands of the South Pacific, and in the 1890s by fear of the rising power of Japan. In both countries there was a strong conviction that, beyond defence, commercial progress and prosperity required the economic union of provinces or colonies. In neither country was there any question that the constitutional development needed to secure these aims implied a radical break with the mother country or its traditions. John A. Macdonald, in his opening address to the Legislative Council of the united province of Canada, promised that the proposed union would “ensure for us British laws, British connection, and British freedom.” (*Confederation Debates*, 31). Similarly in Australia, ‘Britishness’ was a key aspect of an identity colonists desired to preserve, partly because it asserted a connection that ensured the continuing protection of the Imperial fleet. The founding constitutional documents of both countries were Acts of the British Parliament, and the federal structures created were conceived as both continuations and creative developments of valued British and American traditions within the particular contexts of colonial history. Australians argued, indeed, that their share of the inherent British ‘genius’ for democratic constitutionalism ensured their moral and psychological fitness to extend tradition in distinctive and progressive ways (*Huttenback 1976*, 15).

Developing a valued tradition meant that each country had to face the serious question of imposing a divided federal structure on the unitary British model of responsible government. In fact, the Canadian union marked the first attempt at such a political experiment. The Canadian founders expected the responsible system to safeguard traditional British liberties, and it was even argued that it provided the solution of the so-called war of the races since it placed “all inhabitants, without distinction of race or creed ... on an equal footing.” (*Taché, Confederation Debates*, 345). But federalism was expected to continue the protection and accommodation of different cultural communities. This marked a significant difference from expectations in Australia three decades later. Colonial policies there had succeeded in establishing a culture that was believed remarkably and satisfactorily homogeneous, at least with respect to a characteristic which, even more than Britishness, was an obsessive subject of concern for colonists whatever their class, origin or religion. This characteristic was ‘whiteness’. Australians were, as Donald Horne (1994) has put it, “not only white, but whiter than white: the best people in the world at being white.” The
differences that Australians wished to protect by means of a properly constituted federal system were those of colonies that varied greatly in size, economic policy and development, each of which possessed a jealous sense of its own independent identity. In terms of culture, however, Australian federalism aimed at strengthening and safeguarding the racial uniformity that the bulk of colonists desired.

**CANADIAN FEDERALISM**

For the Canadian founders the great weakness of federalism, unambiguously demonstrated by the American civil war, was the “absurd doctrine of state rights”. V The solution was to strengthen the ‘General Government’. This was achieved by arranging the terms of federalism in such a way that the central government would have the dominant legislative and fiscal position within the federation. Contrary to the United States Constitution, the provinces were given only enumerated powers to make laws, residual powers going to the federal government. As well, the federal government was given broad powers that were in the United States Constitution either qualified or given to the States. VI It was also anticipated that financially the federal government would be dominant. VII In giving the federal government “all the great subjects of legislation” and limiting provincial power to specific subjects, Macdonald thought that the great source of weakness in the American government had been avoided. VIII

That the Canadian founders regarded responsible government as one of the most important means for securing liberty accounts in large measure for the absence of a bill of rights or specific rights provisions in the BNA Act. IX The Act was not, in any case, intended as a final constitutive enactment and so did not need to provide definitively for individual rights and freedoms. The Act’s silence on the subject also revealed a preference for the unwritten conventions of responsible government over statutorily entrenched measures. The BNA Act explicitly acknowledged the continuation of British constitutional principles and in doing so implicitly adopted and incorporated the rights and liberties the colonists had come to expect from their association with England. As Macdonald put it:

> We will enjoy here that which is the great test of constitutional freedom – we will have the rights of the minority respected .... In all countries the rights of the majority take care of themselves, but it is only in countries like England, enjoying constitutional liberty, and safe from the tyranny of a single despot or unbridled democracy, that the rights of minorities are regarded (Confederation Debates, 44).

There were, however, practical and theoretical tensions between responsible government and federalism that were raised but not resolved by the founders (Vipond 1991). The Upper House assumed an ambiguous position in the arrangement, X and posed a particular problem regarding financial bills. XI Juridically, the notion of parliamentary sovereignty appeared to be fundamentally undermined by federalism. XII Yet simple legislative union was rejected in favour of a federal arrangement, in part because it promised a solution for the ‘problem of
the races' in Canada: "It was precisely on account of the variety of races, local interest, &c., that the Federation system ought to be resorted to, and would be found to work well" (Cartier, *Confederation Debates*, 57). According to Macdonald federal union took into account the unique position of Lower Canada, "being in a minority, with a different language, nationality and religion from the majority" (Confederation Debates, 29). The distinction between the races could not be eliminated and the "idea of unity of races was utopian - it was impossible" (Cartier, *Confederation Debates*, 60). The only possible solution to this diversity of races - which Cartier regarded as good because it allowed a "healthy spirit of emulation" - was a federal union, which effectively neutralised the problem. In this most fundamental sense, federalism was a way of resolving the major problem of the combined presence of the French and the English in Canada; it mediated the demands of autonomy and unity.

The BNA Act thus made provisions, not for individual rights, but for the rights and entitlements of groups such as Natives, the English and the French, Protestants and Roman Catholics. Furthermore, the recognition accorded to these groups in the BNA Act were in substance no more than a confirmation and acknowledgment of principles and concessions that had already been settled by the time of Confederation. That is, they represented an accommodation of conflicting claims that arose in the course of colonising British North America and thus addressed problems that were unique to that settlement. As Scott (1977, 15) notes, the "framers of the statute [BNA Act] did not have to battle over the principle of minority rights, but only over its formulation and extent". The Act acknowledged and provided for certain specific rights such as Native rights, language rights, and denominational education entitlements, and we will look briefly at each of these in turn.

The only specific provision in the BNA Act based on and recognising race is section 91(24), which gives exclusive legislative authority over "Indians and Lands reserved for Indians" to the Parliament of Canada. This section does not of itself secure the rights and interests of Natives. The *Royal Proclamation of 1763* is regarded as the legal foundation for aboriginal rights adopted and continued by the BNA Act. This was intended to stop the abuses and frauds against Indians by prohibiting private individuals from purchasing lands from them and laid down a procedure governing the voluntary cession of Indian lands to the Crown. According to the *Report* of the Royal Commission on Aboriginal Peoples (1993, 17), the *Proclamation* portrays the Aboriginal nations as autonomous political units living under the Crown's protection, holding authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement. It views the links between Aboriginal peoples and the Crown as broadly 'confederal'.

Though the subsequent history of such land dealings reveals much injustice, the provision in the BNA Act was intended to acknowledge the fact that Confederation, far from overriding these well established principles, was in fact meant to confirm their continued application.

There was continuity too with respect to language rights. Section 133 of the BNA Act was the first constitutional recognition of bilingualism in Canada, but it confirmed a history of
customary and statutory bilingualism. New France had been ceded to Britain in 1763, and the first response of the British had been to try to assimilate the French inhabitants of the new colony (as the Royal Proclamation of 1763 revealed). The Quebec Act of 1774, however, confirmed the failure of this policy and restored pre-conquest French civil law as the law of Quebec. As a consequence, bilingualism became the rule in judicial proceedings and records. Moreover, the Quebec Legislative Council used French and English so that from 1777 the debates and records of the Council were in both languages (Sheppard, 1971, 39). When Quebec was separated into Upper and Lower Canada by the Constitutional Act of 1791 again both languages were implicitly recognised by accepting that oaths of members of the Assembly or Council could be in either language. In Lower Canada, with its predominantly French population, English and French continued to have the same unofficial status in Parliament and the Courts. Statutes were printed in both languages from 1791. In Upper Canada where English-speakers dominated, there was respect for bilingualism although no official provision was made to adopt it.

This tradition was briefly interrupted as a result of Lord Durham’s Report on the Affairs of British North America, which attempted to resolve the discord in Canada by reinstating an assimilation policy. It led to the Act of Union of 1840, which united Upper and Lower Canada and required English to be the only language in the Legislative Assembly and Legislative Council. The harshness of this measure was unofficially attenuated and the section was finally repealed in 1848. Thus the United Province of Canada was bilingual some eighteen years before Section 133 of the BNA Act provided for the use of both English and French in the legislatures, courts and reporting documents of Canada and Quebec. This constitutional entrenchment of 1867 was supposed to safeguard equal language rights against possible repeal by a majority. As Macdonald noted:

This was proposed by the Canadian Government, for fear an accident might arise subsequently, and it was assented to by the deputation from each province that the use of the French language should form one of the principles upon which the Confederation should be established, and that its use, as at present, should be guaranteed by Imperial Act (Confederation Debates, 944).

The provision was also meant to protect the English minorities in Lower Canada from the majority composed of French Canadians (Confederation Debates, 945).

In matters of denomination as in matters of race and language, the BNA Act confirmed and continued already existing settlements. The principle of denominational schools was well established in Lower Canada as early as 1846, though not until 1863 in Upper Canada where the issue was much more controversial. But even George Brown, who had opposed what he called “sectarian education”, was prepared to have the settlement of 1863 recognised in the BNA Act (Confederation Debates, 94-5). Under Section 93, therefore, education was treated as a provincial concern, subject to rights and privileges possessed by Protestant and Roman Catholic minorities at the time of Confederation. Concerns were
raised, nevertheless, by the Protestant minority in Lower Canada which demanded greater constitutional protection (Schmeiser, 1964, 134-7; Macdonald, Confederation Debates, 18). An amendment was proposed which, according to Sir John Macdonald, would “operate as a sort of guarantee against any infringement by the majority of the rights of minority” (Confederation Debates, 18). This was seen by George Etienne Cartier as unnecessary, but at the London Conference in 1866 John Galt proposed that all provinces share in the privilege, and that it apply to denominational schools that might be established after the union. The amendment was passed unanimously.\textsuperscript{XVII}

Native rights, language rights, and denominational schools provisions in the BNA Act thus acknowledged and secured the status quo prior to Confederation. And, strikingly, these provisions secured not individual rights but group rights: protection was afforded on the basis of very specific features that existed in groups such as race (Indian) or religion (Christian – Roman Catholic or Dissentient) and language (English and French).\textsuperscript{XVIII} These rights revealed the extent to which assimilation had proved a failure in Canada and to which difference had simply to be acknowledged and confirmed.

**AUSTRALIAN FEDERALISM**

The Australian Constitution, like the Canadian, did not include a bill of individual rights, a fact that may seem surprising given that it was closely modelled on that of the United States. The founders offered essentially the same reasons for this omission as the Canadians had done: namely, that the rights of Australians were adequately protected by British parliamentary government and by English common law (Williams 1999; Parapan 1997b). A further reason, though, was that the Australian federation intended to be highly discriminatory against persons of non-white races, and a bill of enumerated rights in the hands of the courts might inevitably produce thorny problems for such a policy. Nor, needless to say, was there anything in the Australian Constitution that could be interpreted as grants of group rights such as those found in the BNA Act. There did not need to be, for circumstances in Australia at the time of its federation were in marked contrast to the Canadian.

The population in the colonies was far from entirely uniform, but no major groups had emerged with either the social coherence or political weight to force adjustments that demanded constitutional protection. Though immigrants had come from many countries, the majority of the population was from Britain and Ireland and the use of the English language was virtually universal. Remarkably, given the history and geography that separated one colony from another, there was not even much local variation in the distinctive Australian accent that had evolved during the 19th century. The writers of the Constitution did not feel it necessary even to mention the subject of language in their debates; English was simply assumed.

Though a variety of religious denominations was represented in Australia, the only overarching cleavage that had significant potential to reproduce a conflict that continued in
the old country was that between the dominant majority from an English Protestant background and the nearly twenty-five percent who were of Irish-Catholic origin. Though it was a division that had important historical consequences, a mixture of political settlements and cross-cutting cleavages had forestalled the political emergence of denominational group requiring the specification of group rights for its protection. General protection to the free exercise of religion was assured by the Constitution under section 116 which states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification of any office or public trust under the Commonwealth.

Some found it curious that the Constitution should deny a power to the Commonwealth that it had never been granted, but the inclusion of this section had been a matter of political expediency. During the 1890s, religious groups had campaigned successfully to have inserted into the constitutional preamble the phrase “the people... humbly relying on the blessing of Almighty God”, and delegates to the 1898 Convention introduced section 116 as a means of reassuring non-religious voters as well as members of minority religions of the new government’s disinclination to impose or interfere with religion in general. Of more pressing concern at the time than the rights of any particular minority was the fear that the Commonwealth might seek to prescribe Sunday observance laws for all of Australia (Booker, Glass and Watt, 1998, 219-220).

Nor did the Aboriginal inhabitants of the continent seem to the Australian founders to merit special attention. There had seldom been any question in Australia of an indigenous power to make treaties or to cede land to British settlers, and no political authority or native title to land had been admitted. Australian Aborigines never received even the limited recognition as “autonomous political units” that Canadian groups had gained. Their treatment was perhaps no more brutal, their fate no more catastrophic, than that of indigenous peoples elsewhere, but in Australia they were granted not even that modicum of dignity that recognition of independent legal and sovereign status affords. From the start they were regarded as individual subjects of British authority and British law, and by the late 19th century their defeated remnants had become the rather pathetic subjects of colonial ‘protection’ and discrimination. Indeed it was widely expected that, as a race, they were on the high road to extinction. The Constitution of 1900 would contemplate them only to leave them and their welfare to the doubtful ministrations of the States. They would not be treated as citizens, actual or potential, of the new nation for the purposes of either counting or voting, even less would they be regarded as independent or semi-independent sub-national groups. For constitutional purposes they would be all but invisible (Galligan and Chesterman 1997).

The greater issue of race that troubled colonial Australians derived from the country’s proximity to Asia and its ‘teeming hordes’. The dangers for a large but underpopulated ‘white’ continent had been revealed in the 1840s and ’50s, when the forced ‘opening’ by Britain and America of China and Japan to the West coincided with gold discoveries in Australia. Though prospectors of every nationality poured into the goldfields and had a
tremendous impact on Australian development, it was the influx of large numbers of Chinese via Hong Kong that proved most traumatic. A combination of extreme cultural differences, racial prejudice buttressed by widely held ‘scientific’ theories of racialism, and the threat of economic competition worked to arouse the rancorous and sometimes violent hostility of white colonials. Most Chinese intended, as a matter of fact, to return to China as soon as they had made whatever fortune they could, but white Australians remained obsessively afraid of what they termed the ‘mongrelisation’ or ‘Asianisation’ of their society. Beginning in the 1860s, the separate colonies began piecemeal legislative steps to limit the number of Chinese immigrants. In 1888, in an unusual display of colonial unanimity, they agreed to uniform legislation to restrict severely the entrance of further Chinese and simultaneously sought to persuade Britain to prevent their exit from China.

By the time of federation, therefore, the ‘Chinese problem’ had been effectively dealt with and Australia was overwhelmingly white. One of the attractions of the proposed federal union, therefore, was the capacity that a central government would have for ensuring that it staved that way. Australia’s concern for its own defence was always closely linked to its general fear of Asia. Though fear of the Chinese had receded, an industrialising Japan loomed fearfully in Australian minds. Japan represented a special threat because, in addition to being an Asian nation, it was rapidly becoming a powerful military one with imperialistic designs in the region. A representative of the Queensland parliament put the anti-Asian case for a federal defence force very clearly in 1899:

> When we consider that Queensland has an immense coastline with a large number of ports that require to be fortified, and when we think that Queensland is the nearest colony to Asia, where possibly complications may arise in the future as they have in the past, it seems to me that Queensland has perhaps more to gain than any other colony from the point of view of defence (Johnston, 1988, 333).

A federal government was also expected to have greater power to deal with two other race-related questions, free immigration and the question of ‘alien labour’. With regard to the first, it was highly significant that one of the first major pieces of legislation passed by the new Commonwealth parliament was the *Immigration Restriction Act 1901*, a key foundation of the White Australia Policy. The beauty of this Act for Prime Minister Barton lay in the fact that the exclusion of non-Europeans from permanent settlement had become a settled principle among all groups and classes, ensuring an immediate popular success for his government. The burning political question at the time was economic protectionism versus free-trade, one that had the potential to cause a bitter split that might undermine Commonwealth authority before it could be effectively established. The general agreement on restricting immigration (via the expedient of a dictation test in any European language the immigration officer might choose) was thus a godsend for the government.\textsuperscript{XXIV}

The question of alien labour had been running since the 1840s when ‘coolly labour’ from either India or China had been mooted as an answer to Australia’s labour shortage problem.
In the north of Queensland it had become the answer to the problem of developing the tropics, where climatic conditions were believed to be inhospitable to white labour. From 1863 until 1900, various Melanesian peoples, known as Kanakas, were imported into Queensland, often by highly dubious methods. Kanaka labour was criticised by many on a mixture of humanitarian, economic and racial grounds, and the issue caused a serious division between the south of the colony (which opposed it) and the north (which threatened secession). Samuel Griffith was elected Premier of Queensland in 1883 largely on a promise to prohibit South Sea Island labour, but his action plunged the sugar industry, already threatened by a fall in world prices, into crisis. Attempts to replace Melanesians with Malays, Tamils, Chinese, Javanese and Italians all failed, and Griffith was forced to permit the revival of the Pacific Island trade in 1892. Cheap Kanaka labour in fact saved the Queensland sugar industry from collapse, but the whole issue remained a sore point in the divided colony and had the important effect of changing many minds on federation. Southern Queenslanders, fearful of domination by the more developed colonies of New South Wales and Victoria should intercolonial tariff barriers be removed, had largely opposed the federal movement. But now, realising that a federal government would be committed to a white Australia, they offered a State committed to white labour in return for a promise that the federal government would protect the sugar industry from foreign competition (Clark, 1986, 149). Federation thus marked the final settlement of the alien labour issue, and in 1906 the Commonwealth government passed the Pacific Island Labourer's Act which authorised the (often reluctant) repatriation of resident islanders.

Though careful to preserve as far as possible the jealously guarded interests and independence of the colonies, federation in Australia was aimed in the larger sense at confirming and perfecting the drive toward cultural homogeneity that had been the dominant trend of colonial history. Australians were less uncomfortable with the idea of states' rights than were the Canadians, and, again in contrast to their North American cousins, not at all concerned to preserve the group rights of particular minorities with distinct racial, cultural or linguistic identities.

THE QUESTION OF NATIONAL IDENTITY
Canada's federalism was an admission that a 'thick' national identity – one characterised by the shared features as race, language, and religion identified by J. S. Mill as necessary for representative government – was impossible in Canadian circumstances. Canadians tried to substitute instead a federal political identity that would overarch particular national identities. As Cartier said:

Now, when we were united together, if union were attained, we would form a political nationality with which neither the national origin, nor the religion of the individual, would interfere (Confederation Debates, 60).

The underlying assumption here was that, as well as the particular differences of race, language and religion, there existed a general interest of all groups with which the federal or 'general' government was identified and which it would serve. Part of this general interest
was exactly the interest each minority group had (whether a French minority in an English province or an English minority in a French province) in enjoying its constitutionally guaranteed rights. But the Millian problem of nationality and responsible government was reproduced at provincial level, for the founders were very aware of the potential there for despotic majoritarianism. They did not turn to the judiciary to protect minority rights, but attempted to remedy the deficiencies of responsible government at provincial level with responsible government at the federal level. They believed that the general government would never sanction local injustice, and that its own majorities would themselves be constrained to refrain from oppression. Cartier argued:

Under the Federation system, granting to the control of the General Government these large questions of general interest in which differences of race or religion had no place, it could not be pretended that the rights of either race or religion could be invaded at all (Confederation Debates, 60).

As the main mechanism for ensuring this, the BNA Act gave to the federal government the power to disallow provincial legislation that oppressed minorities. The founders thus hoped that the virtues of responsible government within a federal arrangement of finely balanced checks and liberties would bring justice and autonomy to all. More than that, they hoped that by creating an overarching political identity that represented the general interest they might elevate and diffuse the powerful human concerns with particular identities based on nationality, religion and language.

The Australians, by way of contrast, were intransigently sceptical about such a possibility, and their different history enabled them to avoid the need to confront it. What they wanted to secure was a singular, thick national identity. They desired equality, but the Enlightenment doctrine of the ‘equality of man’ seemed invalid to them except as it might apply within races, and then only within those races sufficiently advanced in evolutionary terms to warrant and demand equality. Their thick racial identity — white, linguistically English, of British character modified by colonial toughening — was simultaneously a political identity, for only people of such a race were held capable of operating a representative governmental system (Kane 1997a). Australians argued in Millian fashion that the democratic polity they wished to see preserved and developed was unthinkable in a mixed race society. Alfred Deakin, speaking in the new parliament, argued that:

no motive had acted more universally ...and more powerfully in dissolving the technical and arbitrary political divisions which previously separated us than did the desire that we should be one people and remain one people without the admixture of other races. ... A united race means not only that its members can intermix, intermarry and associate without degradation on either side, but implies one inspired by the same ideals...a people qualified to live under this Constitution – the broadest and most liberal perhaps the world has yet reduced to writing – a people qualified to use it without abusing it...(Gibb, 1973, 103-4).
The founders anticipated there would be many differences among the new States and the Commonwealth which would need to be arbitrated (one of the central purposes of the High Court), but racial and national differences would not be among them. Racial homogeneity was seen as a necessary condition for the success of the Australian nation, and the federal government was in turn seen as a powerful means to ensure this condition continued to be met. It would not only restrict immigration to prevent 'admixture', but be an effective agent in promoting the white immigration the nation would need for successful development (Johnston, 1988, 333).

FEDERATION AND IDENTITY
All federal systems strive to occupy the difficult, constantly compromised terrain between confederal and unitary systems, trying to avoid, on the one hand, the excessive independence of their compositional units and, on the other, their excessive subservience to the central power. But in addition to the questions of how much and what kinds of independence a federation may permit its States, provinces or cantons, there is the question provoked by the Millian thesis of what kinds of differences among them it may successfully tolerate. The Australian and Canadian foundings reveal that it is possible to give diametrically opposed answers to this question. Given that the two countries are comparable in so many ways - Westminster traditions of responsible government, English common law, liberal democratic practices and institutions, similar size and population - it is tempting to regard them as providing a unique opportunity for a comparative study to evaluate the efficacy of federalism in resolving the problem of nationality. But the subsequent histories of the two countries reveal the significant limitations of such institutional solutions for enduring political problems.

The Australian imposition of homogeneity as a solution to nationality appears distasteful to modern sensibilities. Nevertheless we cannot dismiss the fact that these policies were for a long time successful in removing the question of identity from the political agenda. White Australians opted for a policy of radical simplification, fostering and maintaining a society which was as racially and culturally homogeneous as it was possible to attain by using a selective and discriminatory immigration policy and by encouraging already resident 'aliens' to depart. Only thus did they think it possible to prevent the formation of social cleavages that might prove fatal to the preservation of the democratic federal order. The resilience and endurance of the Australian federal system could be seen in the nature of constitutional disputes that were brought before the High Court. In general almost all these cases concerned questions of demarcation between the States and the federal government; federalism remained a dispute about co-sovereign partners in the federal settlement and rarely about individual or group identity concerns.

This attempt to oust problems of identity proved unviable in the long run, for Australia changed along with the world around it. White Australians became aware of the claims and interests of indigenous peoples, and also of post-war immigrants from southern Italy and Greece who had been encouraged to come when the flow from Great Britain seemed
insufficient for Australian needs. Once Aboriginal Australians began to find a resonant political voice, and once non-racial immigration and multicultural policies had displaced White Australia, the nation was forced to confront profound questions of group rights and differential identity it had hitherto avoided (Kane 1997b). The democratic political structures that had been presumed to depend for their successful operation on the maintenance of racial and cultural homogeneity had now to demonstrate they were capable of meeting this challenge.

The Canadian solution to the problem of nationality, which seemed to be most promising and most acceptable, did not prove to be any more successful. Within a short time after Confederation the working of the Constitution assumed a character that was unanticipated by most of the framers. Macdonald reduced the disallowance power to a merely federal device, abandoning any scope it had for the protection of minorities in the province and implicitly relying on responsible government as a better means for securing minority rights. The view that responsible government was sufficient protection strengthened provincial rights and led to the introduction of the newly instituted Supreme Court as the impartial adjudicator of the terms of federalism. Moreover, the decline in the use of the power of disallowance coincided with a larger provincial rights movement that was supported by the judgments of the Judicial Committee of the Privy Council. The two major aspects of the Privy Council’s jurisprudence—a restrictive interpretation of the federal Parliaments powers under the BNA Act, and a literal, limiting articulation of the minority rights provisions in the Constitution—had the combined effect of expanding provincial powers and autonomy, and indirectly encouraging the view that provincial autonomy was an adequate protection for the rights of French Canadians. Influential legal scholars were critical of both developments, but were particularly concerned with the civil liberties implications of the jurisprudence which they held had grave consequences for minority protection (Scott, 1930, 677). Provincial rights and minority rights were not identical because the French minority was not confined to the province of Quebec, and voices were raised, long before Trudeau’s, demanding greater federal powers to protect the French presence in Canada.

The Privy Council’s jurisprudence made direct federal oversight of the provinces politically less feasible, and liberated the provinces from the specific rights provisions in the Constitution. In effect, the limitations that had been imposed by the founders on the federal experiment in order to protect the minorities had been, piece by piece, dismantled. The outcome of these developments was manifold. Constitutionally and juridically, responsible government, judicial review and hence the rule of law, and classic federalism were strengthened and entrenched. Politically, provincial rights assumed a rhetorical authority that would gain strength over time, and the claim that cultural rights could be identified with provincial rights gained currency. Quebec could one day claim the mantle of the cultural defender of the French in Canada. The ugly obverse of this coin was, of course, ‘Manitobization’. The founders’ attempts to use federalism to solve the problem of the two races had backfired; freed of the limits they had imposed on provincial autonomy, provincial rights came to be equated with group rights and in the process re-introduced the problem that the founders had tried hard to avoid: ‘state rights’ and disunity.
CONCLUSION

Australian and Canadian foundings show the importance the founders in each country placed on democracy and representative government. They also reveal the enduring salience of questions concerning identity, understood in Millian terms as the problem of ‘nationality’. Each country perceived a tension between representation and nationality and therefore turned to federation as a possible solution; Canada by adopting it as a Millian remedy, Australia by regarding it as a unifying and therefore exclusionary device. Thus federation proved to be the flexible institutional device that could be used to address the same concerns but in a remarkably divergent ways. As subsequent history demonstrates, however, both uses of federation proved to have grave limitations. A study of federation and identity in Canada and Australia thus provides a necessary reminder – at a time when globalisation is strengthening regional governments and when sovereign states are combining to form ever-larger federal entities – of the everpresent tensions between democracy and identity and of the limitations of federation as an institutional means of resolving them.

NOTES

1 John Kane, School of Politics and Public Policy, Griffith University; Haig Patapan, Key Centre for Ethics, Law, Justice and Governance. Research for this paper was supported by a Griffith University ARC Small Grant. The authors also wish to thank the anonymous reviewers for their helpful comments.

2 Such an admixture tends to “benefit the human race,” according to Mill, because it retains the special aptitudes and excellences while not exaggerating the vices (395). It is not clear why Mill discounts the concentration of vices as a possible outcome unless one appreciates that Mill also requires superiority in civilization as a condition for the merger (396-8).

3 He devotes an entire chapter: “Of Federal Representative Governments” (ch 17) to federalism. Generally, Mill sees federal union as beneficial to the world since it promotes cooperation and undermines the temptations to aggressive policy. As to the choice between a complete or merely a federal union, Mill favours union unless different parts of the nation require to be governed so differently that the same legislature or same ministry or administrative body is unable to give satisfaction to them all (407). The closeness of the federal tie is a matter of judgment in each case. In turning to the American example, he notes that federation requires a Supreme Court that has supremacy over the various governments in its role as the umpire of federal disputes (402-4).

4 There is of course an extensive scholarship on federalism. For the major works see for
example Sawyer 1969; Riker 1962 and 1987; Wheare 1963.

VIII For an earlier formulation of the arguments concerning Canadian federalism see Patapan 1997a. With reference to the question of state rights see Confederation Debates, Cartier (62), Morris (440), Cameron (457), Walsh (807), Jones (818).

VIII See Hogg’s (1992, 108-110) discussion of the nature of Canadian federalism. For example, the federal government was given the power to regulate “trade and commerce” without qualification (s. 91(2)); and Banking (s. 91(15)), marriage and divorce (s. 91(27)), and the criminal law were allocated to the federal government.

VIII As Hogg (1992, 109) notes, the federal government could levy indirect as well as direct taxes (s. 91(3)) while the provinces were confined to direct taxes (s. 92(2)). At the time, indirect taxes accounted for 80 per cent of the unifying colonies’ revenues.

IX Some, like Dorion, opposed these centralist tendencies, arguing for a “real confederation, giving the largest powers to the local governments, and merely a delegated authority to the General Government” (Confederation Debates, 250).

X Note also that the common law was also considered to be another major source of protection (Macdonald, Confederation Debates, 29).

XI The election of members was rejected as was the creation of a hereditary Upper House. The compromise that was effected was to give the Crown the power of appointment but that the appointments were to be for life. To avoid sectional interests Western Canada, Lower Canada and the Maritimes were to be represented equally (the Quebec Conference had decided that representation in the Upper House was to be based upon regions) (Macdonald, Confederation Debates, 35).

XII At the London Conference it was decided that deadlocks between the Commons and the Upper House would be resolved by the appointment of additional members. The British believed that no fewer than twelve additional members would be needed to break a deadlock, “but the majority of delegates, strong in their belief that the Senate was the final safeguard of sectional interests and ‘racial’ customs, reduced the number to six” (Creighton, 1964, 420).

XIII The legal position was that within their spheres the federal government and the provinces had plenary power, and that all power was exhaustively distributed. See Hodge v The Queen (1883) 9 App. Cas. 117, Reference Appeal [1912] AC 571.

XIV The legislative union in the United Provinces had led to acrimony and political impasse, suggesting a federal solution to the problem. Combined with this was the Maritime insistence on independence. It is well to recall that Prince Edward Island and Newfoundland rejected Confederation and that the Quebec resolutions were debated but never approved by Nova Scotia. New Brunswick approved after two elections, the last dominated by Fenian threats (Lapin, 1951).

XV According to the scholarship the BNA Act provides for an extensive range of rights — including economic and democratic rights (Schmeiser, 1964, 8-12; Tarnopolsky, 1975, 29-31), a “mini Bill of Rights” (Hogg, 1992, 772-3), and even human rights (Scott, 1959).

XVI According to Clark (1990) the Proclamation continued by force of sections 129, 109 and 146 of the BNA Act. Lord Denning in R v Secretary of State (1982) 2 All ER 118 at 125 agreed with the decision in Calder v A-G of BC (1973) 34 DLR (3d) 145, that the
Proclamation was analogous in force to the Magna Charta.

XVII As a consequence of the Proclamation, a number of treaties were entered into between Native groups and the government regarding land use: for example, the Robinson Treaties covering southern Ontario and the “Numbered Treaties” covering Ontario, Manitoba, Saskatchewan, Alberta, Northwest Territories and parts of British Columbia (Jackson, 1979).

XVIII Webber (1994, 72) observes that the nature of aboriginal claims has changed over time from demands for equality to land claims and finally self-government. The important milestones were the Supreme Court’s decision in Calder [1973] SCR 313, the 1975 James Bay and Northern Quebec Agreement with the Cree, Inuit and Naskapi, and the 1974-77 Berger Inquiry (Berger, 1981).

XIX The Quebec Act also reasserted freedom of religion for Roman Catholics and removed all religious handicaps to public office.

XX The status of French in the courts was unaffected (Sheppard, 1971, 56).

XXI That Lord Elgin gave the Speech from the Throne in 1849 in both languages indicates the extent to which bilingualism was accepted in Canada. As well, from this time the official texts of all laws passed were in both languages (Sheppard, 1971, 59). The real statutory forebear of section 133, however, was section 46 of the Quebec Resolutions of 1864.

XXII The provisions of the 1859 Common Schools Act, were made to apply to separate schools by the Separate Schools Act, 1863, restoring to Roman Catholics in Upper Canada rights they formerly enjoyed with respect to separate schools. See Reference Re Bill 30 [1987] 1 SCR 1148; Schmeiser, 1964, 134-7.

XXIII According to Waite (1962, 291-2), Archbishop Connolly of Halifax supported the right of appeal but in his view this was not enough. He wanted the Maritime Roman Catholics placed in the same position as the Protestants of Canada East regarding education. This was something the delegates were unable to grant (Morton, 1964, 208; Creighton, 1964, 412)

XXIV Each taken on its own may arguably be seen as an individual entitlement. Leaving aside the counter argument that such rights could not be exercised “individually”, the fact that these rights for the most part coincided, that is, Roman Catholics spoke French and were taught in denominational schools suggests that, for the founders at least, the question was obviously that of “race” expressed in terms of language and religion.

XXV The dictation test, derived from Natal, was instituted to avoid giving offence to the Japanese, who did not object in principle to the policy, but did not wish to see themselves classified with races they themselves held to be “inferior”. Pressure from the Japanese government and from the Colonial Secretary in Whitehall, Joseph Chamberlain, who was concerned at the slight implied on Indian subjects of the Empire, ensured that the indirect “Natal dictation test”, pioneered in South Africa precisely to exclude Indians, won the day (Yarwood, 1962).

XXVI As well as disallowance, the federal government had powers of reservation, power to appoint the Lieutenant-Governor as well as judges of each province, to entertain appeals and make remedial legislation with respect to denomination education, and finally, to bring unilaterally local works within exclusive federal jurisdiction by simple declaration. See
sections 90, 92(1), 96, s. 93, 91(29) and 92 (10)(c) respectively.

XVII Bruce Smith's was a rare voice raised in the parliamentary debates of 1901 to oppose this narrow reading of the doctrine. He criticised colleagues' liberal use of the phrase "equality of man" because, when asked "What man?", the reply was "Australians", and beyond that "important distinctions" were invoked (Yarwood, 1968, 99-100).

XVIII Between 1901 and 1958, when the dictation test was abolished, the proportion of foreign-born non-Europeans actually declined from 1.25% (47,014) to 0.11% (9,973) (Palbreman, 1958, 50). By 1966, when the policy was officially abandoned, Australia (excluding Aborigines) was calculated as being 99.7% white.

XIX The Manitoba Official Language Act enacted in 1890 provided that only English would be used in the records and journals of the Legislature and pleadings and process in the courts. Though the Act was held invalid by county courts these decisions were disregarded by the authorities. The Act continued in force until 1979 when it was held unconstitutional by the Supreme Court in Attorney-General of Manitoba v Forest [1979] 2 SCR 1032.

REFERENCES


WINSOME ROBERTS
Winsome Roberts has an Honours Degree in Social Anthropology from the University of Western Australia and a Doctorate in Political Science from the University of Melbourne. A former policy advisor and long time community activist she is the co-author of *Australians and Globalisation* and is currently working on a book on Australian citizenship with Brian Galligan.
winsome@unimelb.edu.au

JOHN KANE
Dr John Kane is the Head of the School of Politics and Public Policy, Griffith University. His areas of research interest include moral and political theory, political history and political leadership. He is co-editor (with Wayne Hudson) of *Rethinking Australian Citizenship* (Cambridge UP 2000) and his latest book is *The Politics of Moral Capital* (Cambridge UP 2001).
J.Kane@mailbox.gu.edu.au

HAIG PATAPAN
Dr Haig Patapan is Research Fellow in the Key Centre for Ethics, Law, Justice and Governance, Griffith University. His research interests include political and legal theory, democratic theory and practice, comparative constitutionalism and judicial politics. His latest book is *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge UP 2000).