# Russell, Peter. *Constitutional Odyssey*. Toronto: UTP, 1993.

***Thesis and Summary:***

Peter Russell’s book provides a sweeping summary of Canada’s entire constitutional history, beginning in 1763 and ending with the aftermath of the Charlottetown Accord. The book is written as a chronological account of Canada’s constitutional history, but it focuses on the five rounds of constitutional bargaining which began with the Fulton-Favreau “formula” and the Victoria negotiations. Taken broadly, Russell’s historical narrative is largely accepted by most Canadian political scientists – perhaps because they’ve all studied this book!

Russell’s historical story runs roughly as follows. Canada began as a colony of an imperial power and proceeded through four Constitutions (1763, 1774, 1791, 1840) before the *BNA Act* of 1867. Although the goal of the fathers of Confederation (particularly Macdonald) was a highly centralized federation (modeled on the British Empire), a variety of factors led to a provincial rights movement and a surprising amount of decentralization. The provinces managed to retain some of their power through the centralizing period of the Depression and WWII, and the era of executive federalism began in earnest after the war. Five rounds of constitutional bargaining then commenced, many of which failed (Victoria, Meech, etc.), but one succeeded (Charter). The most recent round of constitutional negotiations (which Russell calls the “Canada round”) reveals the ascendance of the idea of popular sovereignty in Canada. Although the focus of the book is historical and descriptive, Russell’s overall thesis is that Canada has evolved from a constitutional principle of Burkean Parliamentary sovereignty to one of Lockean popular sovereignty. He argues that the collapse of Meech and Charlottetown reveals (in different ways) Canadians’ insistence on this point.

While Canadians may have come to accept the principle of popular sovereignty today, Russell argues that Canadians have nonetheless failed to constitute themselves as a sovereign *people*. The fundamental principles of the Canadian nation-state are still open to dispute, according to Russell, and it is agreement on such principles which makes a people a *people*. Russell doubts that this act of self-constitution can emerge in a Lockean manner in Canada (i.e. through referenda or mega-constitutional change), but he holds out the hope that Canada might live up to its Burkean past by evolving, organically, into a sovereign people.

***Methodology and Theoretical Perspective***

Russell’s method is primarily historical and descriptive; theoretical material is largely confined to introductions, conclusions, and brief asides. Early in the book, Russell explicitly disavows any *explanation* of the recent changes in Canadian constitutional politics, insisting that his aim is to demonstrate “the simple fact that this fundamental change has taken place” (5). In this sense, Russell’s work could be seen as preliminary to that of scholars (e.g. Nevitte, Cairns) who seek to explain the sources and causes of these recent changes.

Still, Russell does not fully refrain from discussing causes and theoretical explanations. His approach is broadly institutional and focuses on the mobilization of various communities (women, aboriginals, ethnic minorities) during the patriation of the Canadian Constitution as a key moment in the shift toward popular sovereignty. Russell tends to emphasize political explanations rather than economic explanations. With some exceptions (e.g. his discussion of the rise of “Charter Canadians”), Russell’s approach could safely be called old-institutional.

***Comparison with Other Readings and Contribution to the Literature***

*Constitutional Odyssey* is a key text for many Canadian constitutional scholars, and because its focus is primarily descriptive (with the exception of the introduction, conclusion, and some brief interludes throughout), it seems to be relatively uncontroversial. Russell agrees with the general consensus (perhaps he was responsible for creating it?) that the death of Meech Lake and Charlottetown signals the death of elitist executive federalism as a means to mega-constitutional change in Canada. He is less hopeful than Mendelsohn about addressing major constitutional issues with innovative consultation mechanisms.

***Relevant Exam Questions***

This book is relevant for any questions dealing with the democratic deficit and the rise of “Charter Canadians” in Canada. It is also relevant for questions about the Charter’s impact on Canadian democracy and Canadian Parliament. It will also be useful for questions about federalism, particularly those related to the various strategies pursued by Quebec’s leaders throughout Canada’s constitutional history.

***Detailed Notes:***

*Chapter One: The Question of Our Time*

4 A profound difference between Canadian constitutionalism in the Victorian era and constitutionalism today: profoundly different views on constitutional legitimacy

Not as interested in the causes of the change so much as the fact that the change has

taken place, and the results have been revolutionary

5-6 Whatever the merits of elite federalism, it won’t work today, because (1) the creed of

popular sovereignty has replaced traditional elitist theories and (2) political leaders have lost the respect of the people

*Chapter Two: The Sovereignty of the People*

7 Popular sovereignty: a “theory of political obligation which holds that political

authority is legitimate and ought to be accepted only if it is derived from the people”

9 The idea is that the constitution is a comprehensive statement of the basic principles of

the people, and amendment of that constitution can be made by a process which reaches a level of consensus similar to that which produced the original

10-11 The opposing tradition: Burkean constitutionalism; an organic constitution; if the

fathers of Confederation had a philosophical patron saint it was Edmund Burke; the question is whether Canadians are capable of re-establishing their country along Lockean lines

*Chapter Three: Confederation*

12-13 (1) First Constitution in Canada: Royal Proclamation of October 1763; creates the

Canadian jurisdiction and explicitly endorses assimilation

13-14 (2) Second Constitution in Canada: Quebec Act of 1774; grants religious freedoms to

French Canadians and use of civil law; motivated by imperial strategy of containing the revolution in the American colonies; still, it established the recognition of a regime of cultural co-existence. Still no representative institutions

(3) Third Constitution in Canada: Constitutional Act of 1791; divides Quebec into

Upper Canada and Lower Canada each with elected assemblies; but executive power remains vested in British governor advised by chosen executive council; tensions ultimately led to 1837 rebellions

14-15 (4) Fourth Constitution in Canada: Act of Union in 1840, creating United Province of

Canada with single legislature (old provinces are now Canada East and Canada West); long-term objective is assimilation; in 1848 responsible government is granted by an instruction given to governors by the imperial government (Russell’s definition of responsible government: “the executive power of the government legally is vested in the Crown or the Crown’s representative, the governor general or lieutentant-governor. The political rule or constitutional convention, however, is that the Crown does not act on its own initiative but on the advice (direction) of ministers who have the support of a majority in the elected house.”)

16-17 (5) Fifth Constitution; BNA Act of 1867; many forces coalesced to create it: economic

included economic incentives related to western expansion, removal of customs barriers, economic withdrawal of British empire; military threat of the Americans; the more proximate cause was frustration with the union system of government (thus primarily political rather than economic)

18-19 Confederation was not strictly a compact between two nations, since, legally speaking,

neither nation had sovereignty, which rested with the imperial government; but it was a political agreement first between English and French in the Canadas and then with the Maritimers

26 Several provisions were manifestations of cultural dualism: English rights in Quebec,

French rights in the federal legislature and the courts; denominational schools in Ontario and Quebec for minorities; Quebec allowed to continue with civil law; New Brunswick also received a special subsidy beyond those provided for other provinces

*Chapter Four: Provincial Rights*

35 As it turned out, it was not Nova Scotia or Quebec that spearheaded the provincial

rights movement: it was Ontario, where support for confederation was highest; the reason for this is the pattern of partisan politics: Tories were in power in Ottawa, and Ontario Reformers and Quebec Liberals, seeking to organize a competing party, took up the provincial cause

36-37 It’s not that the national government was weak during the early years; Macdonald was a

strong nation-builder; but he contributed little to a Canadian sense of political community: relied on elites and economic motives

38 Reservation power: lieutenant-governor can refuse to sign a bill and reserve it for

consideration by federal cabinet; if nothing happens within a year, the bill dies.

Disallowance: veto power: federal government can render provincial laws void (both

powers mirrored the relationship between Canada and the imperial government)

48 As Robert Vipond has shown, provinces attacking federal intervention appealed to the

same principles of self-government as the earlier politicians had done to object to imperial involvement in colonial affairs: the provincial rhetoric edged closer to popular sovereignty

*Chapter Five: An Autonomous Community*

62 Discussions of constitutional amendment were largely left to lawyer-politicians and

were hardly prominent; it was only the question of how to grapple with the dislocations caused by the great depression that moved national elites to think about constitutional restructuring: thus the Rowell-Sirois Commission was created in 1937

One of the legacies of these changes is that the Canadian left became the leading

advocate of strong national government – the CCF and the NDP viewed Canada as a national community and unimpeded by local majorities

64 All of the changes in the 1930s were one by one or “microconstitutional”, and the effect

of all of them was centralizing, but most decisions were still made through a process recognizing the significance of the provinces (contrast with USA New Deal)

70 For the balance of power in Canada, the exercise of fiscal clout by the federal

government was more important than any constitutional amendment during this era

*Chapter Six: Mega Constitutional Politics, Round One: Fulton-Favreau to Victoria*

72-74 Fulton-Favreau was the first agreement; changes in the division of powers and language

stuff had to be unanimous; most other amendments subject to the 7/50 rule; ultimately criticism of the formula in Quiet Revolution Quebec meant Jean Lesage had to back out

82 One gesture toward a more inclusive process was the MacGuigan-Molgat Committee in

1970 which undertook public hearings across the country, but the executive negotiations took the lion’s share of the attention: “the people did not yet claim their sovereignty”

87-89 The Victoria Charter emerged in 1971 and all of its items would appear again in the

debates even though it was quickly relegated to the historical dustbin; most important were democratic rights and language rights; fundamental freedoms; then a section on the supreme court; another amending formula; but the deal-breaker was jurisdiction over social policy;

*Chapter Seven: Round Two: New Constitutionalism*

98-99 René Lévesque came to power in November of 1976, promising to proceed to

separation only after winning approval for independence in a referendum; this created urgency among English Canadians about the need for constitutional change

99-100 In 1977, Pepin-Robarts is created, supposed to tour the country; but Trudeau was

preparing his own proposals (still tension between popular/parliamentary sovereignty)

106 Russell’s conclusion: incredibly naïve: underestimated the difficulty to agreement when

a people disagrees about fundamental issues about the political community

*Chapter Eight: Round Three: Patriation*

107-8 Two major changes: Trudeau is re-elected and Levesque loses the referendum; balance

of power in the negotiations shifts

110-11 Kirby memorandum is leaked suggesting that unilateral action is possible; Trudeau

presents the people’s package – attempting to appeal to the people over the heads of provincial politicians

113-14 A crucial instrument in building legitimacy for the package was a parliamentary

committee in 1980 and 1981 which considered and accepted changes; the committee held 267 hours of televised hearings; created a new public expectation about popular participation in constitution-making

119 Supreme Court decision requires a “substantial degree” of provincial consent, meetings

begin in November 1981, patriated in April of 1982

*Chapter Nine: Round Four: Meech Lake*

133 The beginning of the new round took place at a ski resort north of Montreal; Gil

Rémillard presented Quebec’s five conditions for accepting the 1982 constitution: (1) recognition of Quebec as a distinct society (2) strengthened role in the field of immigration (3) role in selection of Quebec judges on the Supreme Court (4) opt out of federal spending programs in areas of provincial jurisdiction without fiscal penalty (5) veto on constitutional amendments related to Quebec’s interests

134 This seemed reasonable enough, but in the spring of 1986 the major players didn’t

realize how much the conditions of constitutional politics in Canada were changing, and how the Charter Canadians – women’s groups, aboriginal peoples, ethnic minorities – were serious about their involvement

136 After many hours of negotiation in April 1987 at Meech Lake, agreement had been

reached, primarily by provincializing the relevant segments of Quebec’s demands (with the obvious exception of the distinct society clause)

142 Opposition to Meech came primarily from outside Quebec; failed to resonate with

aboriginals, those outside of French or English communities, and bitterly attacked by interest groups who saw their perilous victory in the Charter at state (esp. women’s groups who played a key role in killing Meech in English Canada); even so, it is possible that Meech would have been adopted in the absence of the Quebec signs issue flare-up in 1988

147 For a majority of English Canadians, Charter rights had displaced provincial rights as

the fundamental constitutional rights; Trudeau won the hearts and minds of English-speaking Canadians

153 Meech Lake represented a loss of faith (outside Quebec) in elected legislatures; for

Quebecers, the crucial question was what *kind* of people (sovereign? Canadian?) the National Assembly should represent

*Chapter Ten: Round Five: The Canada Round 1*

157-58 Unlike Meech, public discussion (and lots of it) preceded negotiation; Quebec carried

out formal consultations in 1990 and 1991 in the Allaire committee and the Bélanger-Campeau commission; in Allaire’s understanding there’s little emphasis on historical culture; it has more to do with the need for coherent and low-level units to compete in the “global village”

163-64 Mulroney took two uncoordinated steps in response to Quebec’s consultations: the

Spicer citizen’s forum and a parliamentary committee chared by Beaudoin and Edwards; ultimately the citizens’ forum engaged 400,000 people, though aboriginal and Quebec participation was relatively low; English-Canadian nationalism (focused on Ottawa) and Quebec nationalism were both shown to be alive and well

166-67 The Beaudoin-Edwards Committee recognized the public dissatisfaction with closed-

door executive federalism, but they rejected a constituent assembly too – recommended another parliamentary committee

*Chapter Eleven: The Canada Round II: The Sovereign People Say No*

190-1 On October 26 1992 the Canadian people acted as Canada’s ultimate constitutional

authority for the first time in history

The whole process was shaped like an hourglass, beginning with consultations,

narrowing into the more traditional modes of executive federalism, and then widening out into a referendum; an even more serious flaw was the division of public consultation into two watertight compartments, Quebec and the ROC.

226-27 What alienated voters in the ROC most was the guarantee of 15% of House seats to

Quebec; on October 26 1992 75% of Canadian voters turned out to vote, and the overall results were 54% no and 45% yes – Newfoundland, New Brunswick, PEI, and Ontario (barely) all voted yes.

*Conclusion*

228 The collapse of Charlottetown marks the end of constitutional “innocence” in Canada; it

is now clear that we should not attempt to reach a consensus on major constitutional change unless it is clear that we must do so

229 There is no reason to believe that another effort at constitutional change would be

successful even with a vastly improved process

231 Hopefully what will happen is that constitutional changes will be taken on in smaller

packages and one at a time, like New Brunswick did, successfully, with its bilingualism provisions in 1993 (without a referendum)

234-35 Regardless of how things proceed from this point, it is now clear that Canadians have established their constitutional sovereignty; major constitutional changes will henceforth be put to the people in a referendum; but the question of whether Canadians have constituted themselves *as* a people remains open – they have not made a formal social contract; still, it may turn out that they are after all the people of Edmund Burke and not John Locke, and their social contract is essentially organic: this may be good enough (“some of us might settle for that”)