Provincial Equality, Special Status and the Compact Theory of Canadian Confederation*

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During the 1980s and 1990s, provincial *amour propre* has emerged as a major obstacle to efforts to accommodate Québécois aspirations within the framework of Confederation. I refer in particular to the apparent conflict between the principle of equality among provinces and the demand for a special constitutional status for Quebec. The object of this article is to find in Canadian history—in the very founding of Canada, in fact—a way of reconciling these ostensibly incompatible ideals in theory at least.

The perspective I mean to apply is that of the compact theory of Confederation. This intention may seem quixotic if not futile. Scholars have distinguished two apparently antagonistic variants of the theory, one envisaging a compact of provinces, the other a compact of nations. This apparent antagonism mirrors the very conflict I wish to reconcile, since the provincial compact sees Canada as a union of equal provinces and the national compact sees it as the work of two founding peoples: the very vision which underlies the demand for special status for Quebec. I will argue, however, that the supposed inconsistency between the two variants is a misconception stemming from historical ignorance.

Anglophone scholars in particular have generally viewed the compact theory as an opportunistic post-Confederation coinage, the work of politicians anxious to apply a patina of legitimacy to their objections to the constitutional settlement of 1867. The charge of opportunism imputes a meretricious character to the theory which accounts for its supposed incongruities and justifies its dismissal. The charge is true up to a point, but not to the extent of invalidating the theory. I will show that

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provincial-rights thought in both Ontario and Quebec was rooted in distinct compact theories of the *Constitutional Act* of 1791, and dates back in each province at least to the 1820s. By the 1860s, ideas of compact already informed both Upper and Lower Canadian conceptions of the place of the provincial community in a wider polity: the British empire. Colonial statesmen imported those ideas into Confederation when, intent on avoiding the weaknesses they perceived in American federalism, they chose instead to model their own federal union on the imperial constitution. In doing so, they established a logical basis for the compact theory of Confederation in both its national and its provincial variant. This enfolding of both older compact theories in the settlement of 1867 affords, I will argue, a theoretical basis for harmonizing the principles of provincial equality and special status.

Whether the exercise has any practical use is another matter. Had the information given here been available and accepted 20 years ago, it might have deterred the federal government from attempting unilateral patriation of the constitution, or dissuaded the Supreme Court from authorizing patriation without the consent of all the provinces. Today, its chief value may consist simply in correcting the historical record. Historical memory is so important a constituent of civic identity that there is no hope for Canadian unity in the long run without some degree of correspondence between English- and French-Canadian understandings of their common past. So large a bone of contention as the compact theory must be considered in any bid to reconcile the differing "national" views of Canadian history.

The argument begins with a sketch of the history of the compact theory of Confederation in public discourse, followed by an outline of the two compact theories of the *Constitutional Act* and the reasons for their continuity across the caesura of Confederation. The reasons for the rejection of the compact theory by English Canadians since the 1920s are discussed. Finally, the theory’s bearing on the clash between the principle of provincial equality and the demand for special status is considered.

**The Compact Theory of Confederation: Inception and Rejection**

The early expressions of the compact theory of Confederation in both of its supposedly irreconcilable variants were documented by the historian Ramsay Cook in 1969 in a study for the Royal Commission on Bilingualism and Biculturalism. The provincial variant, first articulated in 1868, underpinned resistance to the expansive jurisdictional claims of the federal government under Prime Minister John A. Macdonald. It comprised an expansive conception of provincial autonomy and an expansive role for the individual provinces—including a veto—in the amendment of the Canadian constitution. With the Liberals’ rise to
Abstract. Historically, Canadian Confederation was both a compact of equal provinces and a compact of founding peoples, which established the province of Quebec in order to conserve French-Canadian culture in its historic homeland. This observation suggests a solution to the apparent conflict between the principle of provincial equality and the demand for special status for Quebec. The appearance of conflict arises from the habit of equating constitutional status with legislative power. If one distinguishes between status and power, it becomes possible to preserve the constitutional equality of the provinces while according special powers to the government of Quebec in furtherance of its unique historic purpose.

Resume. À l'origine, la confédération canadienne constituait à la fois un pacte entre provinces égales et un pacte entre deux peuples fondateurs. Elle instituait la province de Québec afin d'assurer la préservation de la culture canadienne-française dans son berceau historique. Cette constatation nous amène à concevoir un début de solution au conflit apparent entre le principe de l'égalité des provinces et la quête d'un statut distinct pour le Québec au sein de la fédération. L'apparence de conflit provient de l'habituelle absence de distinction entre le statut constitutionnel et le pouvoir législatif d'une entité étatique. Si l'on distingue le statut constitutionnel du pouvoir législatif, il devient alors possible de préserver l'égalité constitutionnelle des provinces tout en accordant des pouvoirs spéciaux au gouvernement du Québec qui soient en conformité avec son objectif historique particulier, à savoir la préservation de sa culture francophone.

power at Ottawa in 1896, it achieved an ascendancy which remained more or less unchallenged until the 1920s.¹

The national compact theory, according to Cook, arose in reaction to the anti-French sentiment which burgeoned among English Canadians in the late 1880s. Until then, Québécois constitutionalism, as epitomized by the jurist T. J. J. Loranger, had been preoccupied with Quebec's rights as a province; it had been content, therefore, with the provincial compact theory. Now, moved by the plight of francophone minorities outside Quebec, the nationalist Liberal politician Henri Bourassa articulated a theory which could justify demands for federal intervention to quash provincial measures detrimental to those minorities, such as the Manitoba Public Schools Act of 1890. Unfortunately for the minorities in question, such calls for federal intervention in provincial affairs contradicted the conception of provincial autonomy inherent in the provincial compact theory. While the latter was ascendant, such appeals were futile.²

In 1931, however, Norman Rogers, a political scientist and Liberal politician, criticized the provincial compact theory so effectively in a paper to the Canadian Political Science Association that its credibility vanished overnight. Thereafter, almost its only advocates were French Canadians anxious to preserve Quebec's autonomy.³ To Québécois

¹ Ramsay Cook, Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921 (Ottawa: Queen's Printer, 1969).
² Ibid., 29-32, 51-69.
³ N. McL. Rogers, "The Compact Theory of Confederation," Papers and Proceedings of the Annual Meeting of the Canadian Political Science Association 3 (1931), 205-30, and see the works cited in Paul Gérin-Lajoie, Constitutional
constitutionalists, however, the chief importance of Confederation lay in the creation of an autonomous jurisdiction with a francophone majority in fulfilment of a compact between the two founding peoples. The constitutional status of the other provinces was a secondary consequence of this primary object. This outlook found expression in the Tremblay Report of 1956, which upheld the provincial compact theory but insisted that Quebec was not a province like the others.4 At the governmental level Quebec’s true counterpart was the government of Canada, transmuted by this reading of the Confederation compact into the representative of English Canada. Should Quebec require some constitutional right or accommodation which could not plausibly pertain to a province, it could still be claimed by virtue of the province’s special status.

Anglophone rejection of the provincial compact theory after 1930 widened the rift between English Canada and the Québécois. Centralists like Rogers might accept the idea of a compact of peoples as an explanation of the federal elements in the British North America Act of 1867 (BNA Act) and the status of French as an official language in certain federal institutions.5 They were unwilling, however, to embrace the expansive conception of provincial autonomy which was central to the Québécois vision of Quebec’s place in Confederation. The traditional Québécois concept of the Confederation compact received definitive official exposition in the Tremblay Report and was reiterated in 1967 in the final edition of Richard Arès’s work on the subject.6 That same year, however, the constitutional lawyer Pierre Carignan observed that “the majority of French-speakers ... unable to convince their fellow-countrymen that the constitution is a compact,” had lost faith in it themselves and no longer felt bound by it. One separatist writer, for instance, declared that the Confederation compact (if there was one) had been so comprehensively broken by Ottawa and the other nine provinces as to be null and void.7 At the time, a version of the national compact theory was popular among English-Canadian intel-

lectuals, but this did little or nothing to abate Québécois disillusionment. An effect of Ottawa’s commitment to bilingualism and bi-culturalism in the 1960s, this version of the theory exalted the federal government’s role as protector of cultural minorities but made few concessions to Québécois anticanentralism.8

As Robert Vipond has noted, resistance to the Trudeau government’s attempt in 1980 to amend the constitution unilaterally did not rest on the provincial compact theory but on something called the federal principle.9 This was first stated in 1931 by Louis St. Laurent, then president of the Canadian Bar Association. In response to Norman Rogers’s attack on the provincial compact theory, St. Laurent abandoned it as a basis for the provincial claim to a right of veto with respect to proposed constitutional amendments. Instead, he relied on the constitutional equality of the federal and provincial legislative jurisdictions as recognized by the Judicial Committee of the Privy Council in Hodge v. The Queen (1882). He also limited the provincial veto to amendments directly affecting provincial powers. In 1950, the constitutional lawyer Paul Gérin-Lajoie elaborated St. Laurent’s position. Gérin-Lajoie bolstered St. Laurent’s legal argument by citing a few, mainly recent, cases wherein Ottawa had gained unanimous provincial concurrence to a proposed amendment, or given up a proposed change for lack of such concurrence.10 In 1981, Gérin-Lajoie’s legal and constitutional arguments formed the main basis of opposition to Prime Minister Pierre Trudeau’s patriation initiative.

The French-Canadian Compact Theory

As a matter of practical politics, Confederation originated in an agreement between George-Étienne Cartier and George Brown to pursue the federalization of United Canada.11 Each was leader of the largest party

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10 Louis St. Laurent, “Presidential Address,” Canadian Bar Review 9 (1931), 529-34; and Gérin-Lajoie, Constitutional Amendment in Canada, 153-84.

in the legislature from his section of the united province: Cartier of the Lower Canadian *Bleus*, Brown of the Upper Canadian Reform party. Each, moreover, represented a political tradition which was rooted in what one might call a compact theory of the *Constitutional Act* of 1791.

It is well known that French-speaking Quebeckers based their self-conception as Canadians on the notion of a compact between themselves and the English conqueror, a compact successively expressed in the capitulations of Quebec and Montreal, the *Quebec Act* of 1774, the *Constitutional Act* (which divided the old province of Quebec into Upper and Lower Canada) and, finally, the BNA Act. One expression of that idea highlights the continuity of the Lower Canadian compact theory across the caesura of Confederation. It occurs in a petition of protest against the so-called Union Bill, introduced into the British Parliament in 1822. The bill had originated in the wish of the English-speaking commercial community of Lower Canada to destroy the political power of the French-Canadian majority in the provincial House of Assembly. It would have reunited Upper and Lower Canada on terms highly detrimental to the *Canadiens*. The petition objected to any attempt to abolish the Lower Canadian legislature without the consent of Lower Canadians as expressed by their representatives in the legislature. To Lower Canadians, the *Constitutional Act*, which had created that legislature, was "a solemn pact, by which the Supreme Authority of the Empire gave them a legal and permanent guarantee of the preservation of their liberties, their property, and their dearest rights." Its unilateral abrogation by the British Parliament would leave them at the mercy of "a colonial legislature illegally constituted, and alien to the interests, sentiments and happiness of the great majority of Your Majesty’s subjects in this colony."

There are several signs of continuity between this compact theory of the *Constitutional Act* and the Québécois compact theory of Confederation. The petition calls the Act a solemn pact, the very term that the Allaire Report of 1991 was to apply to the BNA Act. It invokes the compact in opposition to proposed imperial legislation which would alter the terms of French Canadians’ political existence without their consent, as was to happen in 1982. It denies the legitimacy—indeed,
the very legality—of a political order so constituted. The petition also
provides a context in which to read the arguments of T. J. J. Loranger,
the first Québécois exponent of the compact theory of Confederation.
As noted above, Ramsay Cook classifies Loranger as an exponent of
the provincial as opposed to the national compact theory. However,
while Loranger made no claims pertaining to francophone minorities
outside Quebec, his language makes it clear that he visualized the pro-
vincial compact in national terms.

Loranger published his treatise in response to the so-called
McCarthy Act of 1883. This Act relied on the Privy Council judgment
in *Russell v. The Queen* (1882), a loosely worded text which could be
read as recognizing the right of the Canadian Parliament to enact what-
ever legislation it wished on the mere assumption that its enactment
conduced to the “Peace, Order and good Government of Canada.”16
Loranger saw the situation as a threat to Quebec’s autonomy compara-
bile in magnitude to the Union Bill of 1822 and the *Act of Union* 18
years later. Like those earlier measures, it posed the deadly danger of
legislative union.

Against this peril, Loranger boldly brandished the talisman of the
national compact, a compact which now embraced all the provinces of
the Confederation:

Why should the province of Quebec . . . have, on an inauspicious day, with
utter want of thought, abandoned its rights the most sacred, guaranteed by
treaties and preserved by secular contests, and sacrificed its language, its insti-
tutions and its laws, to enter into an insane union, which, contracted under
these conditions, would have been the cause of its national and political anni-
hilation? And why should the other provinces, any more than Quebec, have
consented to lose their national existence and consummate this political sui-
cide?17

This passage explicitly equates Quebec’s interest in maintaining its
own autonomy with the other provinces’ interest in doing likewise;
indeed, like much of Loranger’s “First Letter,” it was first drafted in
1881, when Loranger, as counsel for Quebec, intervened in the
Supreme Court in the case of *Mercer v. Attorney General of Ontario*,
an important early test of the provinces’ constitutional status.18 It is,

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Scope of Provincial Autonomy: Oliver Mowat, the Quebec Resolutions and the
17 T. J. J. Loranger, *Letters upon the Interpretation of the Federal Constitution
Known as the British North America Act, 1867. First Letter* (Quebec: “Morning
Chronicle” Office, 1884), iii-vii, 40-41.
18 Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabi-
net and Legislature, 1791-1899* (Toronto: University of Toronto Press, 1986),
252-54.
then, a defence of the provincial compact theory, as Cook says. But it clearly sees Quebec's powers and status under the BNA Act as an outgrowth of rights conferred on French Canadians by treaty, and steadily upheld by them against great political odds. In short, it sees the provincial compact as an expression of the national compact.

The Upper Canadian Compact Theory

As with the Lower Canadian theory, the oldest evidence of the Upper Canadian compact theory dates from the early 1820s. A book published in 1882 declared that "Upper Canada derives her constitution from acts of the British Parliament, which are of the nature of a legislative charter, and may be considered as amounting to a solemn compact between the parent kingdom and the province, establishing the form of provincial government." This statement occurs in some anonymous "Sketches" of the colony by Barnabas Bidwell, an important figure in Upper Canadian reform politics during the 1820s. 19

In 1823, debating the Union Bill in the legislature, another reformer, William Baldwin, called the Constitutional Act "the indefeasible Constitution of this Province" and denied that the British Parliament was constitutionally entitled to alter it without the consent of the people of the colony, duly given. 20 Baldwin is not reported as using the words "treaty" or "compact," but his words clearly imply that notion, and anything he left unsaid then was filled in five years later at a public meeting in support of responsible government for Upper Canada. With Baldwin in the chair, his son Robert moved a resolution which declared, in part,

We hold it as a principle never to be abandoned that our Constitutional Act as passed by the Parliament of Great Britain and as accepted and acted upon by us, is in fact a treaty between the Mother Country and us, her children of this Colony, pointing out and regulating the mode in which we shall exercise those rights which, independent of that act, belong to us as British subjects, and which, therefore, neither the Parliament of the Mother Country, nor any power upon earth could legally or constitutionally withhold from us; and that thus that act, being in fact a treaty, can only be abrogated or altered by the consent of both parties to it, that is to say, the Mother Country and the Colony. 21

20 Kingston Chronicle, March 7 and 14, 1823.
21 Arthur G. Doughty and Norah Storey, eds., Documents Relating to the Constitutional History of Canada, 1819-1828 (Ottawa: J. O. Patenaude, 1935), 479. The word "fact" is missing in one place in this transcription but appears in the original document.
Unlike the Lower Canadian compact theory, which rested on recognized precepts of the law of nations regarding relations between a conquered people and its conqueror, this Upper Canadian theory originated in venerable common law ideas which envisaged self-government as an inalienable right of British subjects. This origin is explicit in the Baldwins’ resolution of 1828, and almost equally so in the anonymous “Letter on Responsible Government,” published a year later, which also refers to the Constitutional Act as a treaty. On the basis of the proposition that “Self government being the first principle of every free Constitution, nothing short of absolute necessity can be a sufficient excuse for a violation of it,” the Letter describes the constitution of the British empire as a federal system of coordinate sovereignties, with a division of legislative power between the British Parliament and the various colonial legislatures remarkably similar to that which Ontario Reformers were to perceive in the BNA Act half a century later.

Both William Baldwin and Barnabas Bidwell have been tentatively identified as authors of the Letter. Either attribution is plausible, since each man had grown up in a colony where the politics of the day had generated a theory of the imperial constitution based on coordinate sovereignty—Bidwell in the Massachusetts of the 1770s, Baldwin in the Ireland of the 1780s and 1790s. In all likelihood, the compact theory of the Constitutional Act and its federalist underpinnings were the common property of the small group of Upper Canadian constitutionalists who worked out the theoretical case for colonial responsible government.

Robert Baldwin continued to base his demand for responsible government on this federal conception of the imperial constitution even in the 1840s. This underlying federalism is important because it illustrates the continuity between the Upper Canadian compact theory and the compact theory of Confederation. In a sense, the ideology of responsible government was the medium by which the one was trans-

22 K. D. McRae, “An Upper Canada Letter on Responsible Government,” Canadian Historical Review 31 (1950), 293-94 (emphasis in original). By “coordinate sovereignty,” I mean that sovereignty, and hence legislative authority, within the British empire was held to be divided between the British Parliament and the colonial legislatures, rather than concentrated in the former. Accordingly, the British Parliament could legislate for a colony without its consent only on matters vital to the integrity and security of the empire, usually trade, navigation and defence.


25 Globe (Toronto), September 25, 1844; and see Romney, “Nature and Scope of Provincial Autonomy,” 10-11.
formed into the other. The transformation occurred in two stages: first, the old compact theory was subsumed in the ideology of responsible government; then that ideology became the basis for the interprovincial compact theory.

The first stage resulted from a tactical shift in Reform rhetoric. Reform theorists soon learned to play down the appeal to inalienable common law right in favour of the new British constitutionalism of responsible government, with its reliance on the notion of binding constitutional conventions which transcended law. This shift afforded two big benefits. Exalting convention above law offered a way round the great theoretical obstacle to colonial responsible government: that is, the imperial doctrine which identified the British Parliament as the sole seat of sovereignty in the empire.26 It thereby made the demand for responsible government more comprehensible and acceptable both to British officials and to the British immigrants who began swarming into the colony in the 1820s.

The advent of responsible government in 1848 made the vocabulary of inalienable right, and of compact between mother country and colony, redundant; but the federal conception of the imperial constitution survived by becoming enfolded in the theory of colonial responsible government. So it was, in 1864, that George Brown’s Globe could cite the modern imperial constitution as a model of stable federalism in contrast to the instability of the American system:

Many illustrations of the advantage of local self-government in rendering the central power more secure occur to us. The most familiar is that presented by the British colonies. So long as they were governed from Downing-street they were always discontented, and complaints were constant, sometimes ending in rebellion, and always injurious to the authority of the parent State. When local self-government was granted all this ceased, and the colonies are now more loyal to the mother country than the mother country is loyal to the colonies.27

The Globe explicitly proposed to model the British North American federation on the relationship of coordinate sovereignty which existed between Britain and her self-governing colonies in the 1860s, and


27 Globe, September 17, 1864. In the past, I have doubted Robert Vipond’s contention that Brown remained true in 1864 to his party’s traditional insistence on autonomy for Upper Canada (Vipond, Liberty and Community, 20-21; and Romney, “Nature and Scope of Provincial Autonomy,” 8). This, and similar declarations in the Globe, constitute strong evidence in Vipond’s favour.
which Reformers had seen as the essence of the imperial constitution 40 years earlier. A month later, the Quebec Conference did just that.

Accordingly, in the 1880s, just as Loranger tied the cause of provincial rights to earlier struggles against legislative union, so Ontario Reformers tied it to earlier struggles for provincial autonomy, basing their understanding of Canadian federalism on a federalist conception of the imperial constitution. In 1882, at the height of the row over the disallowance of the Ontario Rivers and Streams Act by the federal government of John A. Macdonald, a leading Reformer triumphantly quoted a statement made by Macdonald in 1865 while explaining the Quebec resolutions: "The General Government assumes towards the local governments precisely the same position as the Imperial Government holds with respect to each of the colonies now."28 To Reformers, the imperial analogy meant not subordination to the centre but a true federalism in the British imperial mode, signifying local self-rule and a central authority limited even in the use of its legal powers by the same conventional constraints that governed Britain's relations with her self-governing colonies. The idea of Confederation as a provincial compact was inherent in a federal constitution based on the imperial model.

Confederation, then, entailed the functional assimilation of the Upper Canadian provincial compact theory and the French-Canadian national theory. The BNA Act did this by restoring the political integrity of Upper and Lower Canada within the new order of colonial responsible government as sovereign polities within a wider federation. One leading object of the exercise was to satisfy the desire of most people in each province for provincial autonomy in the domain of culture. Upper Canadians' resentment of Lower Canadian interference in their school system, and French Canadians' fear that their own cultural domain might one day become vulnerable to Upper Canadian interference, were leading causes of the federalization agreement of June 1864.

The Challenge to the Compact Theory

When Upper Canadians referred to the Constitutional Act as a treaty, they were resorting to metaphor and knew it. According to Barnabas Bidwell in 1822, the provincial constitution may be considered as amounting to a solemn compact; in the Baldwins' resolution of 1828, it

28 Parliamentary Debates on the Subject of the Confederation of the British North American Provinces (Ottawa: King's Printer, 1865), 42; and Globe, January 21, 1882, 5; compare the quotation in n. 30 below. Mowat maintained that it was well understood at Quebec that the federal veto should be subject to the same constitutional constraints as the imperial (Globe, March 9, 1888). On Reform ideology and other relevant points, see Paul Romney, Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation (Toronto: University of Toronto Press, forthcoming).
is in fact (that is, in effect) a treaty. Likewise, in the *Letter on Responsible Government*, the author describes the unpublished treatise he purports to be discussing as *treatying* the *Constitutional Act* as a treaty.²⁹ All three references signify that, despite being a statute of the British Parliament, it must be considered as a treaty by virtue of a right to self-government inherent in communities of British subjects.

Historically speaking, the compact theory of Confederation was more real than its Upper Canadian precursor, since Confederation had resulted from a Canadian initiative and its terms had been worked out in formal negotiations by the authorized representatives of colonies possessing the right of self-government in their domestic affairs.³⁰ In the Canadian legislature, participants in those negotiations described the Quebec Resolutions as a treaty; in 1867, the ministers who carried the BNA Act through the British Parliament so described the provisions of the Act. In the late nineteenth century, even John A. Macdonald’s friend John Wellington Gwynne, a judge of the Supreme Court and a diehard centralist, accepted without question that Confederation had been created by treaty.³¹

In the 1930s, however, a new generation of centralists set out to undermine the historical credibility of this idea of Confederation. They harped on the founding colonies’ legal incapacity, as subordinate units of the British empire, to conclude treaties, and on the legal absurdity inherent in calling a British statute (the *British North America Act*) a compact. Confederation could not have been a compact for these reasons, but the signs of consent proper to a treaty-making process were missing too. Only the Canadian legislature had ratified the Quebec Resolutions, and the BNA Act rested on the London Resolutions of 1866, which no legislature had endorsed. All those contemporary references to the Quebec Resolutions and the BNA Act as treaties were merely a rhetorical ploy, meant to deter Canadian legislators from trying to amend the resolutions and British MPs from trying to amend the draft legislation. In reality, Confederation had been imposed by the power—legal and political—of the imperial sovereign.³²

³⁰ “The provinces party to the bargain were at the time of the compact independent nations in the sense that they enjoyed self-government subject to the Imperial veto upon their legislation, to the Imperial appointment of their Governor-General, and to the Queen’s command of the Forces” (Globe, March 9, 1888, quoted in Cook, *Provincial Autonomy*, 43).
Considering its pretence to historical authority, what this argument left out of the story is remarkable. Ignoring the revolution wrought in the imperial constitution by the advent of responsible government in the mid-nineteenth century, it construed the decision to base the federal constitution on the imperial model simply as evidence of an intention to create a dominant central power. This misconstruction was compounded by a second error. Noticing that the Quebec Conference had refused to assign the residuary legislative power to the local governments in the American fashion, centralist scholars jumped to the conclusion that the Conference had assigned it to the general government instead, although in reality it had adopted two lists of powers, one "general" and one "local," each with its own residuary power.

The centralist argument assumed, then, a degree of colonial subordination to the imperial will which Upper Canadian Reformers had denied even in the 1820s, and which not even their Conservative opponents would have asserted in the 1860s. It also forgot that Confederation had originated in an agreement among Canadians to federalize Upper Canada, within the context of a wider federation if possible but without such extension if necessary. In accordance with that agreement, in 1864 representatives of Upper and Lower Canada had negotiated with those of several other colonies, and the Quebec Resolutions were the product of that joint effort. If one were to specify a moment when the Confederation compact became a reality, however, it would have to be in March 1865, when the Canadian legislature ratified the resolutions as the basis for a new federal Canada. Viewed in this light, the London negotiations of 1866 merely concerned the accession of Nova Scotia and New Brunswick to an existing compact. Since the resulting agreement preserved the essentials of the relationship between the general and local governments, as arranged at Quebec, it did not need endorsement by the Canadian legislature. Nor did the Maritime legislatures need to ratify it, since those provinces were represented by plenipotentiaries, formally empowered by their respective legislatures to commit the province to any agreement.

33 Donald Creighton, the pre-eminent historian of his generation, simply assumed without documentation that the Fathers of Confederation had taken the old colonial system as their model (Dominion of the North: A History of Canada [rev. ed.; Toronto: Macmillan, 1957], 306-07). The Globe editorial quoted above defeats this supposition.


All these flaws in the centralist argument raise an obvious question: if it was so feeble, why did it prevail for more than 60 years? The explanation can be nothing less than collective amnesia: the forgetting by a whole society of its historical underpinnings, or at least some crucial part of them. To trace that process in its full scope is beyond the reach of this article, but a brief outline would have to stress Canada’s rapid development from the 1890s on and an intellectual paradigm shift associated with it, leading, in the course of 30 years, to the virtual disappearance of the world view that had nourished the provincial compact theory in English Canada.

That world view had belonged first of all to the farmers who formed the electoral infantry of Upper Canadian Reform politics. Their support carried the Reform cause with increasing difficulty into the 1890s, but the turn of the century witnessed its decline under the weight of sustained immigration, industrialization, the settlement of the West and the associated crisis in Ontario’s rural economy. The consequent loss of political power was aggravated by a loss of moral authority. The Reform movement had always depended for ideological and organizational leadership on an urban professional intelligentsia. Successive generations of Upper Canadian intellectuals had embraced the movement as a means of advancing some of the great liberal ideals of the nineteenth century: self-government, the rule of law, opposition to monopoly and the separation of church and state. By the 1890s, however, these ideals had either been achieved or had lost their lustre. To liberal intellectuals of the new century, the questions of imperialism, nationalism and Canadian independence outweighed the old Reform shibboleth of provincial autonomy. The collectivist turn taken by liberalism in response to the rise of corporate capitalism reinforced their indifference to the old values. To the new liberalism a government was a government, and the key question was which government—federal or provincial—could cope better with the problems of urban society and the power of large corporations. Most liberals opted for Ottawa.36

The provincial compact theory was also undermined by the rise in the late nineteenth century of so-called “black-letter” jurisprudence, which frowned on the use of historical evidence in interpreting statutes. On political platforms, Ontario Reformers might defend provincial rights by appealing to history, but in the law courts they had to rely on

their skill in relating those rights to the principles of British common law constitutionalism: in particular, Robert Vipond has suggested, the ideal of the individual's autonomy vis-à-vis the state. Together with the demise of the Reform world view, this black-letter jurisprudence severed the principle of provincial rights from its roots in English-Canadian history and reified it as a set of propositions of positive law. Then, in the 1920s, a new, nationalist generation of liberals blended a new American instrumentalism, the so-called legal realism, with a new, centralist Canadian history in order to denounce the dominant provincial-rights constitutionalism both as a travesty of the founders' intentions and as inadequate to the needs of modern Canada.

Bereft of the historical context which gave it meaning, the provincial compact theory lost its old authority. A discrepancy appeared between theory and constitutional practice which was the more telling because supporters of the theory could not account for it. According to Howard Ferguson, premier of Ontario, whose famous defence of the theory in 1930 occasioned Rogers's attack on it, the BNA Act had been amended several times and the provinces consulted only once. The result of these precedents was to undermine the right of the provinces to be consulted on such occasions.

Most of the inconsistencies that perplexed Ferguson and pleased his opponents arose from the fact that Confederation had entailed the founding of a central government sharing coordinate sovereignty with the provinces and, arguably, enjoying the rank of first among equals. This central government, representing all Canadians, possessed its own sphere of autonomy, the exercise of which could, and did, result in adjustments of the terms of Confederation without the consensus, or even consultation, of the provincial governments. The first instance was Ottawa's negotiation of new financial terms with Nova Scotia in 1868, the case which evoked the first statement of the compact theory.


Arguably these negotiations, like the processes involved in the admission of the Red River Colony and other British provinces into the dominion between 1870 and 1949, fell within the ambit of federal autonomy. Inevitably, however, objectors to these arrangements tried to discredit them by condemning them as breaches of the founding compact. Later, critics of the compact theory would interpret the failure of those objections as a dismissal of the theory itself. 41

Another problem was the constitution of the federal government. The Parliament of Canada could not amend this by itself, but it was far from clear that Ottawa could not unilaterally procure its amendment by the British Parliament, at least in certain respects, though this federal autonomy might not extend to matters such as the composition of the Senate, which pertained to the wider federal structure. On the basis of this assumption, Ottawa secured several amendments to the BNA Act without consulting the provinces; and these, too, were later cited to discredit the theory.

At the root of all this confusion was the silence of the BNA Act itself on the procedure to be followed in amending it. The resulting uncertainty left room for extravagant claims, particularly at climaxes of federal-provincial friction. In 1888, at the height of the provincial rights controversy, the Globe went so far as to deny that the federal government, as a creature of the founding compact, had any right to take part in its amendment. 42 In 1914, by contrast, after 20 years or so of relative tranquillity, Senator Sir George Ross, sometime Liberal premier of Ontario, wrote that the BNA Act could not, technically speaking, be amended in any respect without provincial consent; but the provinces could not reasonably complain if Ottawa acted without them, as long as the proposed amendment did not prejudice any provincial rights or privileges. 43 Ross’s formula was perhaps closest to the spirit and logic of the provincial compact, but apparently it did not appeal to Ferguson when, writing at a time of renewed federal-provincial tension, he claimed a general right of veto for each individual province without reservation. St. Laurent’s formula of 1931, though he divorced it from the compact theory, was more like Ross’s.

In weighing the historical validity of the provincial compact theory we should remember that, though Canadians had quarrelled over the implications of the Confederation compact almost from the start, the resulting uncertainty had not stopped the theory from becoming an axiom of Canadian constitutionalism. Indeed, there was no reason why

41 For this and the next paragraph, see, for example, Rogers, “Compact Theory of Confederation,” 221-25.
42 Cook, Provincial Autonomy, 43.
that uncertainty should have done so, for nothing happened by way of constitutional amendment between 1867 and 1930 which contradicted the theory as Ross presented it. What confounded Ferguson in 1930 was not any inherent inconsistency in the theory, but the loss of the knowledge that would have made sense of it.

**Provincial Equality, Special Status and the Compact Theory**

English Canadians’ forgetting of the historical rationale for the provincial compact theory increased their estrangement from francophone Quebec at that crucial moment, registered by the *Statute of Westminster*, when Canada assumed full command of her national destiny. Ultimately, in 1981, it enabled a majority of the Supreme Court of Canada to manufacture a formula for amending the BNA Act which flouted both the provincial and the national compact theory by dispensing with the consent of the government of Quebec. In this article, historical evidence has been adduced to show that both versions of the theory (though not every claim based on them) were valid. What is their relevance to the present constitutional impasse?

As noted at the outset, one obstacle to a resolution of the Canadian unity crisis is the perceived conflict between many Quebeckers’ desire for special status for their province and the constitutional principle of provincial equality. This apparent conflict impedes any remedy which would assign Quebec special powers in addition to those belonging to all the provinces under the constitution. How can the provinces be equal if one of them possesses powers which are constitutionally denied to the others?

The problem lies in a confusion of the concepts of *powers* and *status*. Quebec nationalists have long wanted their province to have special *powers*, the better to execute its historic purpose of nurturing French-Canadian distinctiveness, but the formal equality of the provinces under the constitution has led them to express this desire as a demand for special *status*. The same confusion has led opponents of special status to reject that demand as inconsistent with the principle of provincial equality. In fact, though, the two concepts can be distinguished not merely in theory but also in the very logic of the Canadian constitution.

The idea of a distinction between powers and status goes back to the very inception of Confederation in 1864. As Robert Vipond observes, George Brown’s *Globe* made such a distinction in order to allay the alarm felt by some Canadians at the prospect of a federation which threatened, in their view, to vest formal sovereignty in the general government rather than in the local ones. It was easy, declared the *Globe*, to conceive of a government which was formally sovereign but exercised very little legislative power, having delegated much of it to some
other authority. In any case, the powers devolved upon the local governments would neither be delegated by the general government nor held at its pleasure, since the local jurisdiction would be constituted by imperial legislation.44

In actual fact, the arrangement concluded at Quebec, inscribed in the BNA Act, and ultimately enforced by the campaign for provincial rights, was one which shared sovereignty between the federal and provincial governments rather than concentrating it at the centre; but the idea of a distinction between powers and status still applies. Instead of the Globe’s initial vision of a benign discrepancy between the allocation of sovereignty and the distribution of power, the BNA Act constituted two orders of government, essentially equal in status but possessing entirely different—indeed, mutually exclusive—sets of powers.

How does all this bear on the apparent conflict between the ideas of provincial equality and special status? It suggests that governments can be constitutionally equal without possessing identical powers. This is where the dual nature of the federal compact comes in. As a compact of provinces, it established provincial governments that were equal to each other in constitutional status. As a compact of founding peoples, however, it assigned to the government of Quebec a special function—the conservation of French-Canadian culture in its historic homeland—which might logically justify a grant of special powers to execute it. No such grant was made, or even contemplated, in the 1860s, because French-Canadian supporters of Confederation accepted the powers assigned to all the provinces as adequate to sustain the Quebec government’s special function. What matters is that nothing in the Confederation settlement, considered as a compact of provinces, need impede such an adjustment today, if that is thought necessary to the better functioning of the compact of founding peoples.

If equality between provinces is not to find expression in identity of legislative powers, in what might it practically consist? To draw up a blueprint for constitutional renewal would go far beyond the scope of any article by a single author, but one obvious practical expression of provincial equality would consist in each province’s continued participation on equal terms in the diverse processes of executive federalism. Another would be an equal voice in constitutional amendment. If the compact of peoples is understood to entail a constitutional veto for Quebec, such equality would necessarily entail a veto for each province. That was always the ultimate import of the provincial compact theory (subject to the limits defined by Sir George Ross), and logically the illegitimacy of the constitutional settlement of 1982 stems as much from its breach of the provincial as of the national compact. The nine provinces that assented to the passage of the Constitution Act, 1982

44 Vipond, Liberty and Community, 30-32.
relinquished the claim to a veto which six of them had asserted prior to the Supreme Court’s decision in the Patriation Reference. They did so, however, on the assumption that the same regime would apply to Quebec, and can hardly be held to that commitment under present circumstances.

Conclusion

This article has proposed a way of theoretically reconciling the concept of special status for Quebec with that of provincial equality. It ignores the practical difficulties of designing an asymmetrical federalism which might sustain Canadian unity in the long run. Confined as it is to the question of the status and powers of provincial governments, it disregards other aspects of the clash between the equal-provinces and two-nations concepts of Canada, such as representation in the Senate. Does it offer any practical contribution at all to resolving the constitutional impasse? Or is it, even assuming the historical validity of the argument, merely an exercise in barren academicism? After all, given goodwill between French Quebeckers and their fellow Canadians, the theoretical obstacles to special status should not be insuperable, any more than the theoretical obstacles to colonial responsible government were 150 years ago. By the same token, lacking such goodwill, enough practical obstacles can be raised to render any theoretical resolution of the problem of special status an exercise in futility.

There remains, however, the importance of historical memory as a constituent of civic identity. However little individual Canadians may know of their country’s history, their perception of constitutional questions is influenced by historical assumptions concerning the country’s founding; but the assumptions of most French Canadians are radically different from those of most English Canadians. Incompatible understandings of Canadian history reinforce, if they do not underlie, the present dissension between French Quebeckers and other Canadians. The theoretical argument presented here rests on the discovery of a lost middle ground between Canadian nationalist and Quebec nationalist versions of Canadian history, a discovery which links Canada’s founding to distinct French-Canadian and English-Canadian compact theories of the Constitutional Act of 1791. In the last analysis, its value may lie chiefly in that.
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