Canadian Confederation and the Influence of American Federalism

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What was the impact of United States federalism on the deliberations of the Fathers of Canadian Confederation? What lessons did the Canadian founders suppose that they had drawn from the US example, and how did they apply them to the constitutional provisions that they drafted at the Quebec Conference in the fall of 1864 and that were adopted, with minor changes, in the Constitution Act, 1867? Why did they not profit from these lessons quite as they had hoped?

Students of the Confederation period agree that the delegates from the British North American colonies attending the Quebec Conference were highly critical of American federalism. However, they do not agree on what the delegates understood by federalism, as is indicated in the first section of this article, in which I review the contending interpretations that Canadian historians and political scientists have developed from their reading of the delegates’ pronouncements. One promising way of systematically determining the delegates’ views is to measure them against James Madison’s analysis of the federalism of the constitution drafted at the Philadelphia Convention in 1787, as set out in the thirty-ninth paper of The Federalist. Madison’s analysis, described briefly in the second section, is an account of the concept itself as well as an examination of its role in US constitutional arrangements. Accordingly, in the sections that follow, it is used to help identify the delegates’ understanding of American federalism, their criticisms of it, and the ways in which they sought to correct its excesses and thereby produce a better constitution for Canada. Of course it is a commonplace of the history of Canadian federalism that the delegates’ intentions were confounded, at least to some extent. In the concluding section of the article, I consider whether they seriously misunderstood American federalism and, if they did, the extent to which that misunderstanding undermined their efforts.

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The Federal Principle

For the colonists living in British North America in the mid-nineteenth century, the rarified concept of federalism was defined by its greatest example to hand. Federalism meant American federalism, and it was a notably unpopular identification. The historian P. B. Waite is emphatic about the aversion to federalism: "'No understanding of Confederation is possible unless it be recognized that its founders, many of its supporters, and as many of its opponents, were all animated by a powerful antipathy to the whole federal principle.'" Since their referent was the American version, how did they understand it? Waite refers to the connection many drew between federalism and the Civil War, a connection often expressed in causal terms. Federalism seemed a suspect principle, an arrangement that encouraged dissension, not unity. As for the principle itself, he suggests that those who grasped it at all saw it less in the distribution of legislative powers between Congress and the state legislatures than in the compromise on representation that had been worked out between the two houses of Congress, that is, population-based representation in the House of Representatives and equal state representation in the Senate. This was the understanding that was brought to the Confederation proposal. For the founders, Waite argues, the federal principle was reflected largely in the different bases for representation in the House of Commons and the Senate. The question of the distribution of legislative powers, while not unimportant, was not the central federal question.

Recently students of Canadian government have shown considerable interest in the federal dimensions of national institutions, and for them Waite's view that the composition of the second chamber was central to the nineteenth-century understanding of federalism is both encouraging and suggestive. The competing view asserts the centrality of the division of powers concept. Thus, Frank Scott, a keen student of the Confederation debates as well as a noted authority on constitutional law, stressed the extent to which the theory of federalism embodied in the Quebec Resolutions differed from the theory of American federalism, and his argument centred on the relationship between the two levels of government. According to Scott, the chief feature and chief flaw of American federalism in the eyes of the Quebec delegates originated in the fact that at the time of the union the American states were independent and sovereign. This meant that sovereign authority flowed from the states to the central government, with the regrettable consequence, prescribed by the feared states' rights

2 Ibid., 34, 113.
3 Ibid., 111, 115.
Abstract. How did the Fathers of Canadian Confederation understand United States federalism? What lessons did they presume to draw from it and how did they apply them to the Confederation project? In this article, James Madison’s comprehensive test of federalism, as set out in the thirty-ninth paper of The Federalist, is used as a tool to examine the Canadians’ views of American federalism, particularly in relation to the questions of state sovereignty and the role of an upper chamber. The article suggests that their preoccupation with the threat of state sovereignty led them to concentrate on division of powers issues and, as a result, to pay little attention to the federal possibilities of a second chamber. And it concludes that, because they were working with a parliamentary model of government, not a republican one, these possibilities were not—and are not now—as promising as some political scientists suggest.

Résumé. Quelle compréhension les Pères de la Confédération canadienne avaient-ils du fédéralisme américain? Quelles leçons comptaient-ils en tirer et comment les ont-ils appliquées à leur propre projet de confédération? Dans cet article, l’interprétation du fédéralisme livrée par James Madison (telle que décrite dans le Fédéraliste no 39) est la référence de base qui permet de retracer l’opinion des Canadiens au sujet du fédéralisme américain, concernant en particulier les questions liées à la souveraineté et au rôle d’une Chambre haute. Il est suggéré que les craintes entourant la souveraineté du Canada ont incité les Pères à concentrer leur attention sur la question de la division des pouvoirs, négligeant du même coup les possibilités offertes par le régime fédéral concernant l’utilisation d’une seconde Chambre. En conclusion, il est maintenu que le modèle parlementaire—plutôt que républicain—de gouvernement a fait en sorte que ces possibilités n’étaient pas—et ne sont toujours pas—aussi prometteuses que certains politologues l’ont suggéré.

doctrine, that what flowed upwards could return with a vengeance, as it did when the Confederate States seceded from the union. Moreover, this initial problem of sovereignty was compounded by constitutional provisions assigning specific powers to the Congress and the remaining or residual powers to the states. The result was a federation without a sufficiently strong, unifying central government, a federation that, temporarily at least, was overwhelmed by its parts. As Scott indicates, the delegates to the Quebec Conference, especially John A. Macdonald, harped constantly on the sovereignty problem and their answer was a central legislature equipped with an extensive array of legislative powers conferred on it by the British Parliament, not delegated to it by colonial legislatures.

In a recent commentary on the views on federalism of leading members of the governing coalition formed in 1864 in the largest of the British North American colonies, the Province of Canada, Robert Vipond, like Scott, focusses on the relationship between central and local governments. He argues that for Macdonald the test of a federal system was the exclusivity of local jurisdiction, and even the highly centralized system that he favoured could be considered federal so long as local legislatures, however limited their concerns, possessed exclusive legislative competence in relation to them, just as the central legislature possessed exclusive competence in relation to its general

concerns. In this sense, according to Vipond, Macdonald followed the theory of federalism that Madison set out and defended in *The Federalist* and that is reflected in the American constitution, the same theory that forms the basis of our modern understanding of federalism. Vipond’s commentary appears in his article on the constitutional doctrine developed by the provincial rights movement in the generation following Confederation, a doctrine, he argues, that centred on the notion of legislative exclusivity. But Madison’s test of federalism extends beyond that to encompass the object of Waite’s concern as well.

**Madison’s Federal Test**

To judge from the Articles of Confederation, the first constitution of the independent American states, a federation was conceived as a voluntary alliance of states based upon a thoroughgoing principle of state equality. Under the Articles, most legislative matters were handled independently by the states themselves. The central governing body, the Congress, in which member states were represented equally by delegates they appointed, addressed a limited number of concerns and relied entirely on the states to carry out its decisions. It could not itself legislate on citizens and therefore could neither levy taxes nor regulate commerce. Any changes in the terms of the Articles required the unanimous consent of the states. Such was the arrangement Gouverneur Morris had in mind when, speaking to fellow delegates at the Philadelphia Convention, he distinguished federal from national governments: “the former being a mere compact resting on the good faith of the parties; the latter having a compleat and compulsive operation.” The successor constitution drafted at Philadelphia did not outline a “mere compact.” Yet one of its ablest defenders, James Madison, was not about to abandon a federal claim on its behalf. In No. 39 of *The Federalist*, in an attempt to show that opponents of the proposed constitution were wrong when they charged that it did not preserve the federal principle, he devised a “federal test” that covered five points: the basis of consent on which the proposed constitution was to stand, the sources of the new central government’s ordinary powers, the operation and extent of those powers and, finally, the constitutional amending power. Assessing the constitution on each point in turn, he produced an interesting and mixed review.

On the first item, consent, federalism triumphed. According to Madison, ratification of the constitution was a federal procedure, not a

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national one, because it required the approval of each of the state constitutional conventions as opposed to the consent of the people as citizens of one nation: “Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.” On the fifth item, constitutional amendment, he argued that the results were “neither wholly national nor wholly federal.” A national procedure required a national majority of voters, a federal one the consent of each state. The procedure recommended seemed to fall somewhere in between using states over citizens and requiring the agreement of more than a majority of them, but not unanimous agreement.

The second test concerned the sources of the central government’s executive and legislative powers, and Madison judged them to be federal and national. In the legislative branch, the House of Representatives was national because it derived its electoral mandate from the people and represented them on a population basis. The Senate, by contrast, was federal because its members were appointed by the state legislatures, each appointing two senators. The executive power, he continued, was based on a “very compound source,” that is, the more complicated mix of federal and national features combined in the presidential selection process. The process began with the states “in their political character” because the number of electors per state was determined by the total of its representatives and senators. Yet that total itself reflected the states “partly as distinct and co-equal societies, partly as unequal members of the same society.” If the electors were unable to produce a candidate with a majority, the election would revert to the national House of Representatives which, for this purpose, would form itself into state delegations, each with one vote. The executive power, Madison concluded, combined “at least as many federal as national features.”

In his account of the third test, the operation of the ordinary powers of government, Madison began by supposing that in federal governments the central authorities could operate only on the member states whereas in national governments they reached the citizens of the nation. In the light of this supposition he found the proposed central government national. However, on the fourth test, the extent of its powers, it could not be considered national because its jurisdiction extended only to enumerated matters while the states retained a “residual and inviolable sovereignty” over the rest. Madison identified the concept of legislative exclusivity that has since become a benchmark of our understanding of divided jurisdiction: “the local municipal authorities form distinct and independent portions of the [legislative] supremacy, no more subject, within their respective spheres, to the

general authority than the general authority is subject to them, within its own sphere." 8

Madison concluded that the proposed constitution was "in strictness, neither a national nor a federal Constitution, but a composition of both." It was a remarkably harmonious composition in which the two elements were interwoven and balanced throughout. Only the tests on ratification and the operation of the central government's powers revealed one or the other to prevail, the federal element in the former, the national in the latter. The other three revealed combinations. The central government itself was a "composition," the fine balance of which reflected the balance in the constitution as a whole.

From the perspective of Canadian federalism, a noteworthy aspect of the complexity of the balance was the wide-ranging use of the federal element in the design of political institutions and in procedures like ratification and amendment, as well as in the matter of jurisdiction. The jurisdictional question was only one of five used to test the presence or absence of federalism. Had it alone tested positive, it would hardly have been enough to permit Madison to present the constitution as federal, at least not at that time. On the other hand, it was equally important that the constitution proposed a strong national government in place of the Congress of the Articles of Confederation; that is, a government empowered, among other things, to raise and collect taxes, to frame laws and enforce them in its own courts, although not to disallow state laws in violation of the constitution or treaties with other nations, as Madison had urged at the Philadelphia Convention. 9 There, too, Alexander Hamilton had argued the desirability of a "compleat sovereignty" such that the passions supporting governments, like the love of power, could be made to work in favour of the central government at the expense of state governments. 10 In the event, the powers agreed upon, while less than complete, proved sufficient to the purpose.

Confederation and the Federal Test

The Quebec delegates, too, thought in terms of a composite. This time the two opposing models were legislative union and federal union, and neither term conveyed quite the same meaning as the US concepts, national and federal. By legislative union, Macdonald meant one government, almost certainly a parliamentary one like Britain's, and termed it "the best, the cheapest, the most vigorous, and the strongest system of government we could adopt." 11 His colleague Alexander Galt,

8 Ibid., 249.
10 Ibid., 142-43.
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minister of finance in the coalition government of the Province of Canada, described it as a "more complete union" that enabled "more direct action and control of the government" over the interests of the citizens, or "unity of action." It never occurred to either of them to revert to such rudimentary considerations as that contained in Madison's third test—the power to legislate on individuals and therefore impose and collect taxes—when discussing the advantages of legislative union. Assuming these powers to prevail, they were concerned to convey a sense of the strength and vigour they supposed such a government to possess. But it was an impracticable model in the circumstances, unless it could be moderated somehow, and this brought them up against the federal alternative and the experience of the United States.

The Fourth Test

Early in the proceedings at the Quebec Conference, Macdonald defined the federal question in terms of an American error. The alleged error was to have permitted sovereign states to delegate specified powers to a national government, reserving the unspecified remainder to themselves. Subsequently the issue emerged as a critical point of difference between partisans of the local legislatures and those who regarded them as an administrative necessity to be tolerated but contained, and they joined issue when Oliver Mowat, another member of the coalition ministry representing Canada at the conference, introduced motions defining the powers of local legislatures. E. B. Chandler of New Brunswick objected that this was the mark of a legislative, not a federal union, and urged instead that their powers be unspecified and include all those not assigned to the central government. In Chandler's opinion, the issue was decisive as to whether the union could be regarded as federal or legislative. In response, Charles Tupper, premier of Nova Scotia, recalled the understanding reached earlier at the Charlottetown Conference that, contrary to the American system, the powers not assigned to the local legislatures be reserved to the central legislature. It was, he said, a "fundamental principle" held by delegates from the Province of Canada, and if it pointed in the direction of legislative union, so much the better. Macdonald, who intervened to say that Chandler was proposing to make the same mistake as the Americans had, added that the effect of what he termed the "decentralization" of the United States was a lack of patriotic feeling. In a contest between the interests of a person's state and those of the union, the state won out. Since the British North American colonies, like the

American states, had very different economic interests and therefore
different tariff requirements, it was essential to avoid institutional
arrangements that enhanced rather than moderated local attachments.¹⁴

Later, when Macdonald defended publicly the Resolutions drafted
at the Conference, it was clear that his views on the issue remained
unchanged. In his speech in the debate on the Resolutions in the
Legislative Assembly of the Province of Canada, he referred to the US
constitution with the understanding air of an admirer who knows what
has gone wrong. It was, he suggested, an adaptation of the British
constitution, and "perhaps the only practicable system that could have
been adopted under the circumstances existing at the time of its
formation."¹⁵ But time and events had revealed grave defects, chief
among them the relationship between the national and state
governments. Macdonald was preoccupied with two aspects of that
relationship, state sovereignty and the residual power: "They declared
by their Constitution that each state was a sovereignty in itself, and that
all the powers incident to a sovereignty belonged to each state, except
those powers which, by the Constitution, were conferred upon the
General Government and Congress."¹⁶ He objected to the assignment of
the residual power to the states because it reflected and gave impetus to
the notion of state sovereignty, and he identified state sovereignty as the
weak link of the constitution and ultimately the source of the Civil War.
Galt, in distinguishing for his constituents the federalism of the Quebec
scheme from American federalism on the ground of the source of
sovereignty, made much the same point. The American states, he
declared, entered the union as sovereign states, and delegated express
powers to the national government, reserving the remainder to
themselves. The result was the states' rights doctrine so fatal to the
stability of a federal union, and it was essential to avoid it.¹⁷ But how to
avoid it?

Macdonald, Galt and Tupper, legislative unionists at heart, were
fond of emphasizing and elaborating the decision to assign the "great
subjects of legislation" to the general legislature. The Americans,
however, had done that too, and clearly it was not enough. Hence the
emphasis on rectifying the problems of state sovereignty and residual
power. On the residual power, Macdonald touted the provision that
reserved to the new parliament "all matters of a general character, not
specially and exclusively reserved for the Local Governments and
Legislatures."¹⁸ At one stroke, he declared, the authors of the Quebec

¹⁴ Ibid., 124.
¹⁵ Waite, Confederation Debates, 44.
¹⁶ Ibid.
¹⁷ Speech on the Proposed Union, 4.
¹⁸ Parliamentary Debates on the Subject of the Confederation of the British North
American Provinces (Quebec: Parliamentary Printers, 1865), 33.
scheme had rectified the American error and true cause of the Republic’s misfortunes. He did not point out that they had also included a reserve power clause for the provinces that covered, of course, unspecified matters of a “private or local nature.” He seems not to have been troubled by the possibility that there might be disagreement on what was general and what was local. On the contrary, he predicted that the sheer weight of power on the national government’s side was sufficient to preclude it. On the sovereignty problem, as Galt explained, a solution was at hand in the form of the British colonial system, because the British Parliament, not the colonial legislatures of the provinces joining the union, would establish the powers of the general and local governments in a statute embodying the terms of the Quebec scheme.

Two other features of the scheme borrowed from colonial practice signalled the subordinate status of provincial governments. One was the mechanism of reservation and disallowance placed at the disposal of the general government in relation to bills passed by the local legislatures. It was a colonial institution replicating the same powers as were held by the British government in relation to the bills of colonial legislatures. Disallowance, or the veto, as it was often called, was unpopular in some constituencies, especially French-speaking ones. Thus the politic Macdonald declined to mention it at all, while his close colleague from Montreal East, George Etienne Cartier, only alluded to it when seeking to placate the fears of the British minority in Canada East that the French-speaking majority in the local assembly would injure it through laws adversely affecting the rights of property. He referred vaguely to a “remedy,” but did not elaborate. Galt, whose constituency was this very minority, did not hesitate to elaborate. Even when a lieutenant-governor had assented to provincial legislation, he pointed out, it was still subject to disallowance by the general government for a period of one year. There was no need to rely wholly on the lieutenant-governor’s discretionary power to reserve provincial bills for consideration. And yet there was every reason to do just that because appointment to the Office of Lieutenant-Governor was in the hands of the general government.

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19 Browne, Documents, 161. Section 43 assigns 18 subjects to the local legislatures, the last of which reads: “And generally all matters of a private or local nature, not assigned to the General Parliament.”
20 Speech on the Proposed Union, 8.
21 Parliamentary Debates on the Subject of Confederation, 136.
22 Ibid., 61.
23 Speech on the Proposed Union, 16.
In his own discussion of this point, Macdonald explained that subordinate legislatures required subordinate executives: "As this is to be one united province, with the local governments and legislatures subordinate to the General Government and Legislature, it is obvious that the chief executive officer in each of the provinces must be subordinate as well."24 He described the relationship between these local executives and the general government as colonial, modelled after the relationship between colonial governors and the British government. Galt observed that one effect of the model was to put an end to direct relations between the provinces and the British government, and that this was intentional. Since the provinces were confined to local matters, he argued, they had no need to deal with Britain and any attempt to do so would only arouse "very great mischief." Moreover, the lieutenant-governors would serve as the general government's most important "links of connection" with the provincial governments, the conduits through which it could resolve difficulties arising between itself and them. Galt recognized the conflict between the obligation of these officials to act on the advice of their provincial ministers, and their obligation to the government that appointed them, and he sided with the latter: "all action beginning with the people and proceeding through the Local Legislature, would, therefore, before it became law, come under the revision of the Lieutenant Governor, who would be responsible for his actions and be obliged to make his report to the superior authority."25

From the point of view of the Quebec delegates, therefore, the US example first and foremost illustrated the problems associated with the fourth test of federalism, the extent of powers available to the central government. And the British colonial system provided solutions that Madison would have regarded as strong injections of the national element. What aspect of the federal element, then, did the delegates retain in this matter? Was it exclusivity of jurisdiction in relation to those matters assigned to the local legislatures, as Vipond suggests? Since Macdonald, in particular, was less attached to the federal principle than others, it is important for Vipond to show that Macdonald ultimately accepted the exclusivity doctrine. Certainly the future prime minister of the new federation supposed there to be a clear distinction between general and local matters and therefore that local legislatures had a role to play. Each province, he said, would have the "power and means of developing its own resources and aiding its own progress after its own fashion and in its own way." But not entirely in its own way. The general government's arsenal of intrusive powers included more than the formidable combination of reservation and disallowance. For example,

24 *Parliamentary Debates on the Subject of Confederation*, 42.
it might declare any local work, although situated wholly within a province, to be for the general advantage, and bring it within its jurisdiction. As for the criminal law, Macdonald could not resist pointing out that under the terms of the Quebec scheme it was assigned to the general parliament, whereas the American constitution unwisely permitted each state its own criminal code: "I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic." 26

There was also a provision enabling the general parliament to legislate uniformity in the laws on property and civil rights and in procedure in the courts, but only in the common law provinces that agreed to it. Except in Canada East where the Code Civil prevaled, Macdonald explained, the laws of the provinces, diverse in superficial ways, were based on the same principles. Accordingly, the first general administration would pursue the project of assimilation. Uniformity in the criminal law provided the standard which, he hoped, the civil law of the common law provinces might one day meet. 27 And yet there is another side to this provision. As initially drafted, it was simply a uniformity of laws provision. In its final form, as Section 94 of the Constitution Act, 1867, it essentially established a procedure for transferring jurisdiction over property and civil rights from the provinces of Ontario, New Brunswick and Nova Scotia to the federal parliament. 28 But the procedure required their consent and in that way, as Samuel LaSelva argues, it could be understood to have signalled the sovereignty of the provinces in relation to their jurisdiction. Section 94 was the closest the 1867 Act came to anything resembling an amending formula and it affirmed the provinces’ jurisdictional control. 29 The federal government, through such devices as the disallowance power, could interfere unilaterally in provincial law-making, but it could not alter the distribution of legislative powers itself. To this extent the Confederation agreement formally satisfied the requirements of a federal principle now understood to mean security of jurisdiction at the local level.

26 Parliamentary Debates on the Subject of Confederation, 41.
27 Ibid.
28 Browne, Documents, 159. Section 33 of the Quebec Resolutions opens with the words: "Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland and Prince Edward Island," and adds a clause on the requirement of the agreement of the provincial legislatures. Section 94 of the Constitution Act, 1867 contains a major substantive addition enabling Parliament, in the event of the passage of uniformity legislation, "to make Laws in relation to any Matter comprised in any such Act."
To understand the political significance of security of local jurisdiction it is necessary to turn to those of the delegates for whom it was important. For the leaders of the French-speaking community in the eastern section of the Province of Canada, it was the non-negotiable condition in return for which they were prepared to concede the principle of representation by population in the lower house of the new parliament, a principle that would institutionalize their minority position within the new nation. Sir Etienne-Pascal Taché, premier of the coalition government in the Province of Canada, who opened the debate on the scheme in the Legislative Council, emphasized in both languages his view that it was “tantamount to a separation of the provinces” and that “Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired.”

Taché’s real object was to persuade the worried English-speaking minority in Canada East that it had no reason to fear the French-speaking majority that would dominate the assembly in the new province, and he had a good deal to say about goodwill, forbearance and trust as well as the federal structure of the scheme. While Taché looked inward, Cartier looked to the promise of national politics. But he too relied on a federal structure that would separate local from national matters and establish different levels of government to deal with them. His object was to persuade French-speaking members that they need not fear the prospect of forming a minority in the national legislature because that body was not charged with matters related to the rights and privileges of nationalities. The provincial legislatures were. The national agenda, by contrast, was constituted by the “large questions of general interest in which the differences of race or religion had no place,” for example, by commercial questions.

Cartier was hopeful that the federal structure would banish tiresome questions of nationality to the local level, thus freeing men of both nationalities to deliberate constructively at the national level on questions of commercial policy. This they could do if, as he supposed, commerce transcended nationality.

George Brown, leader of the Reform party in Canada West and member of the coalition ministry, took a position rather like Cartier’s in the end. A defender of strong central government, nonetheless he was interested in the role of local governments in the scheme he supported because, among other things, it promised to release his beleaguered Canada West from the ordeal of its existing union with Canada East. The people of Canada West (subsequently Ontario), he exulted, would be free to spend money for local purposes, dispense local patronage and

30 Waite, *Confederation Debates*, 22.
31 Parliamentary Debates, 55-61.
pursue land and settlement policies in their own community without having to seek the agreement of other communities, particularly Canada East. While Taché spoke about the freedom to guard cherished institutions, Brown was anticipating impatiently his province's freedom to pursue its commercial and political life. However, Brown was also interested in the substance of a national politics, and like Cartier he supposed that it could be purified if purged of local considerations. "If we look back on our doings of the last fifteen years," he said, "I think it will be acknowledged that the greatest jobs perpetrated were of a local character—that our fiercest contests were about local matters that stirred up sectional jealousies and indignation to its deepest depth." Members who were compelled to champion their own section in disputes over local matters, he argued, invariably found themselves unpopular elsewhere. However, if they could participate in a national politics unencumbered by local considerations, they could appeal to voters everywhere. They could aspire to national popularity and reputation without having to sacrifice local loyalties. It is hard not to conclude that Brown's vision of a rational politics at the national level—rational because it excluded the affectionate attachments that always interfere with consideration of issues on the merits—was the politics of Canada West itself, writ large.

The Second Test

The Quebec delegates liked to talk about the great projects that the new central government would pursue and they were determined to equip it with the powers such projects would require. This meant adjusting the relationship between national and local governments in ways that favoured the former to a greater extent than they thought the American relationship did. They were anxious to avoid the threat of upstart local governments, but having guarded against that, they were prepared for political and administrative reasons to secure jurisdiction on purely local matters to local authorities. As Madison's federal criteria demonstrated, however, there were other areas in which to consider the mix of national and federal elements, such as the design of central government institutions, a matter covered in his second test.

The Canadian and Maritime delegates favoured the British parliamentary model for the central government, a decidedly national choice in Madison's terms. The Canadians, anxious to escape the federal-like conventions that had come to hobble governments in the Province of Canada, were determined to follow the model as closely as possible. Still, the Senate posed something of a problem for them. At the Quebec Conference, the composition of the Senate, often referred to there as the Legislative Council or upper house, was the first specific

32 Ibid., 94. 33 Ibid., 96.
question delegates addressed. Macdonald moved the initial motion and it included two vital proposals on representation, namely that the provinces be formed into three sections and that each section be represented equally. The two Canadas of the Province of Canada, which were to become the provinces of Ontario and Quebec in the event of union, would each constitute a section, the four Maritime provinces represented at the conference making up the third.

The sketchy records of the debate that followed on this and related motions and amendments indicate that Maritime delegates were prepared to accept equal regional as opposed to equal provincial representation, but not in the way Macdonald proposed. For instance, they successfully resisted the idea of the third section including four provinces, instead paring it to the three Maritime provinces, with Newfoundland assigned four additional representatives. The numbers finally arrived at were 24 members per section, the third section consisting of 10 each for Nova Scotia and New Brunswick, and 4 for Prince Edward Island. Later, however, when it became clear to Island delegates that George Brown’s population-based formula for the lower house would yield them a meagre five seats, they became increasingly unhappy. Edward Whelan announced that he had thought four members in the upper house unfair, although he had given way on it at the time. The idea of five members in the lower house was altogether unsatisfactory. His Island colleagues agreed and chose to press for additional members in the lower house. Only A. A. Macdonald, an Island delegate, made a case for equal provincial representation in the upper house, citing the US Senate as an example. He argued that the small provinces ought to be well represented in a body that was to guard their rights and privileges and that, as the constitutional equals of the large provinces, they were entitled to equal representation.

The lack of interest in this line of reasoning was one indication that in general delegates were inclined to view the upper house more as a parliamentary institution like the British House of Lords than a federal one like the American Senate. Another was the decision that its members be appointed by the central government, and hold office for life. It was taken unanimously and, unlike the decision on the numbers, took little time to reach, possibly because the issue of election versus nomination had been discussed extensively at the meetings in Charlottetown that took place prior to the conference in Quebec. /\n
34 Browne, Documents, 64-65.
35 Ibid., 110.
36 Ibid., 138.
37 Browne, Documents, 44-49. In his letter to Edward Cardwell, the British colonial secretary, Lieutenant-Governor Gordon of New Brunswick reported that the composition and the method of selection of members of the federal upper house was one of two subjects “debated at some length in more elaborately prepared speeches” at the Charlottetown meetings (ibid., 45).
same was true of the decision to impose a high real property qualification on candidates. In his opening speech to the conference, John A. Macdonald had indicated that he knew that some delegates favoured election over appointment and that his own mind was open on the subject. At the same time, he preferred appointment because he thought it best to "return to the original principle and in the words of Governor Simcoe endeavour to make ours 'an image and transcript of the British Constitution'." He also recommended a high property qualification for members of an upper house that was partly intended to protect property. "The rights of the minority must be protected," he reminded delegates, "and the rich are always fewer in number than the poor." The closest he came to articulating a federal purpose in that speech was a reference to the need for an equality of representation in the upper house as against population in the lower one in order to avoid "local jealousies" and generally keep things "conciliatory." For Macdonald, the House of Lords was the governing model that delegates would adapt to their purposes.

In the debate on the Quebec Resolutions, the Canadian delegates never attempted to develop much in the way of a federal rationale for the upper house. They talked generally about the protection of sectional interests, but declined to explain how an institution, the members of which were chosen for life by the Crown on the recommendation of the central government, could possibly serve that function. Instead they concentrated on defending what they obviously perceived to be the weak point of the upper house in the eyes of a Canadian public accustomed to electing legislative councillors since 1856, namely, the return to nomination. Macdonald defended the nominative principle as a return to the right practice of parliamentary government, or a near return, the heredity aspect of the House of Lords being unsuited to Canadian society. Thus his main concern was to explain why the marginally federal feature of fixed and equal sectional representation would not produce an independent-minded upper house in continual deadlock with the lower house. Equal sectional representation was simply the price of representation by population in the lower house, and not a high one as it turned out. Many of the scheme's opponents suspected as much, especially those for whom the American Senate invariably served as the standard of a proper second chamber in a federal union.

In the Legislative Assembly of the Province of Canada, Christopher Dunkin, independent member from Brome County in Canada East and perhaps the shrewdest critic of the scheme, regarded the upper house as

38 Ibid., 68.
39 Ibid., 98.
40 Parliamentary Debates, 36-38.
the "merest sham" of a federal institution. The American Senate, he pointed out, possessed important executive as well as legislative powers, and its members were chosen by the state legislatures themselves. It was a powerful political institution, a real "federal check." By contrast, the Canadian version—"a very near approach to the worst system which could be devised in legislation"—was essentially a legislative review body with the inappropriately vast and negative power of veto. It was not an integral part of the central government. Nor did it represent any public opinion, least of all local opinion. And yet, Dunkin argued, the Quebec scheme as a whole did contemplate a federation. As a result, local governments, not content to pursue their interests at the local level alone, would demand a voice at the national level. Unable to find effective expression in the upper house, they would turn to the cabinet. But the cabinet was a parliamentary institution shaped by conventions that caused it to act as a unit in the interests of the nation as a whole, not as a coalition of individuals visibly championing local interests. It was an inappropriate vehicle for the expression of local interests.41

Maritime anti-Confederates, disappointed with Maritime weight in the central government generally and in the upper house in particular, continually appealed to the American example. In New Brunswick, A. J. Smith, whose government had been defeated by Leonard Tilley's pro-union party in a second election on the Confederation issue, argued that the upper house did not provide the provinces with an effective check on the central government and that this was a more serious problem here, where the lower house could bring down an administration, than in the United States, where the House of Representatives could not. "Give us, at least," he wrote, "the guard which they have in the United States, although we ought to have more, because, here, the popular branch is all-powerful."42 In Nova Scotia, Joseph Howe repeatedly warned readers of his Botheration Letters that Canadians would dominate the central government unless the small Maritime provinces held out for the American solution of equal representation in the upper house. He also explained to them that the American Senate, because it shared in the powers of the executive branch, was a far more weighty body than the typically parliamentary chamber of "sober second thought," and he concluded: "The Senate is therefore, in the American system, the body in which largely resides not merely the dignity but the real substantial power of the Government; and thus to the smaller States is secured a fair share of influence over the administration, that we, by no provision which the Quebec scheme includes, can ever hope to obtain."43 Maritime anti-Confederates,

41 Ibid., 494-500.
42 *Morning Freeman*, Saint John, June 30, 1866.
43 *Morning Chronicle*, Halifax, January 11, 1865.
worried about the fate of their provinces in the proposed union, were much more concerned about the central government and the absence of federal features in it than they were about division of powers questions.

**The First and Fifth Tests**

As noted earlier, Madison had included ratification and amendment in his assessment of the Philadelphia Convention's work, finding the first federal and the latter a mix of federal and national elements. On both tests, the Confederation agreement resists much comparison because of the colonial circumstances of its birth and the role of the British Parliament in legislating the agreement and subsequent amendments to it. As far as ratification and amendment procedures were concerned, the real question in both instances was the consent required domestically before the British Parliament could be requested to act.

In the case of ratification, the Quebec delegates decided that a favourable vote on the Quebec Resolutions in the colonial legislatures was sufficient. No amendments to the Resolutions were permitted. Opponents often pressed for a more popular procedure, especially if they were from communities hostile to union, and occasionally cited American practice, as did the Rouge member of the Legislative Assembly of the Province of Canada, J. B. E. Dorion, who suggested that American amendment procedures offered a more appropriate course.44

In Nova Scotia, where the consent issue was debated hotly, anti-Confederates urged the parliamentary route of a general election.45 They had good reason to press for an election. When the Nova Scotian delegates returned from the Quebec Conference, it soon became apparent to them that there was serious opposition to the Resolutions in the province. As a result, Tupper's government never did risk a vote in the legislature. What he did manage to get, in April 1866, was a motion authorizing the lieutenant-governor to appoint delegates to attend the London Conference and there, with the Imperial government and delegates from the other British North American colonies, arrange a new scheme of union ensuring "just provision for the rights and interests of Nova Scotia."46 It was as close as the province came to giving formal sanction to Confederation.

In New Brunswick, two elections were fought on the issue against a backdrop of strong British pressure in favour of the Quebec scheme and in the end Tilley's government secured a motion from the legislature with wording similar to that of Nova Scotia's. Only the legislature of the

44 *Parliamentary Debates*, 858.
Province of Canada voted in support of the scheme. In Prince Edward Island the legislature voted it down, and the Island waited six years before joining the union. Newfoundland, not prepared to deal seriously with the idea, waited many more years.

On the amendment question, the American example was even less relevant, mostly because the Quebec scheme did not include a comprehensive amending formula. Amendment does not appear to have been discussed at the Quebec Conference, nor was it much pursued subsequently by opponents and advocates of the scheme. A notable exception among opponents appeared in a published Letter to Lord Carnarvon, under the heading “Federal Safeguards,” in which Joseph Howe, William Annand and Hugh McDonald described the omission of a formula as a “radical defect.” They pointed approvingly to the American constitution and commented that although it was democratic in origin and character, it was “wisely protected from the hazard of rash innovation” by the explicit and strict requirements of its amending formula. The three Nova Scotians, convinced that the “Canadians” were using the British government to impose upon the Maritime provinces a constitution, the terms of which their legislatures had not approved, saw in the American system a way of ensuring that there be widespread consent to constitutional change. In the event, Canadians did not acquire a comprehensive amending formula for many years, and until they did, they relied on developing precedents to govern domestic consent procedures. Of these, one of the earliest and most enduring was the requirement of the favourable vote of legislatures, as opposed to that of special conventions or referenda. More controversial was the appearance of the unanimity rule for changes affecting provincial governments. Be that as it may, it was the developing logic of Canadian federalism, and not the example of American federalism, that mattered.

Conclusion

The American framers understood federalism as a governmental arrangement in its own right, and the constitution outlined by the Articles of Confederation was the example to hand. The Quebec delegates, on the other hand, knew federalism in terms of the constitution that replaced the Articles, that is, the constitution that Madison analyzed as a combination of national and federal elements. They were preoccupied with two features of it, state sovereignty and the
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residual power, and they were convinced that by reversing US practice in relation to them, they could avoid the disintegrative pressures to which federal arrangements appeared vulnerable. In assigning the general residual power to the central government and in adhering to the colonial practice according to which the British Parliament, not the provinces, delegated power, they were lessening the weight of the federal element in Madison’s fourth test, legislative jurisdiction. In choosing to follow as closely as possible the British parliamentary model, they came near to eliminating the federal element altogether from the subject of Madison’s second test, the institutions of the central government. One result was a new combination of federal and national elements or, in Galt’s terms, the principle of union and the federal principle, and it was quite different from the one Madison had described. Not only did it feature fewer federal elements, it concentrated them at the local level.

In the Quebec delegates’ account of the guide they used on jurisdictional matters, that is, the distinction between general and local matters, the connection between the federal and the local is quite clear. Galt explained that the Quebec scheme weakened the federal principle by giving effect to it at the local level only, and as much as possible removing it from the national government. This, he argued, marked a great improvement over the constitution of the Province of Canada, which suffered from an internal contradiction. On the one hand, it gave the two sections of the province equal representation in both houses of the legislature. On the other, members from both sections were expected to deal “as one” with all matters, general and local, much as a parliament of a legislative union. In the end, the federal element proved overwhelming, paralyzing government. The Quebec scheme, Galt continued, remedied this by modifying the federal element of the new national government so that it no longer interfered with unity of action. The half-hearted federal mechanism of sectional representation in the upper house, diluted further by the selection principle of central government nomination, was no match for the population-based representation in the lower house. Thus the scheme partook of the federal character only in relation to local matters, that is, matters of “private right and sectional interest,” while preserving the union on matters common to all.50 It relegated federalism to the parts.

As the history of Canadian federalism has demonstrated, Galt’s confidence in the unfettered unity principle animating the central government was to prove misplaced, but not because of unexpected federal strength in the Senate. The trouble was in the parts themselves, in the provincial governments which soon showed signs of resisting Galt’s idea that they were no more than glorified municipal

50 Speech on the Proposed Union, 4.
governments. If the Confederation agreement has failed at times to preserve the union principle on matters common to all, it is because powerful provincial governments have managed to lay claim to them, either by expanding the "local" to include arguably national matters or by demanding and acquiring a role in the determination of national policy. How have they done this? What has enabled them to confound the intentions of the founders? Students of Canadian politics have long considered the problem and offered various and compelling explanations, among them the strength and persistence of the autonomist tradition in Quebec, the internal dynamic of the political and bureaucratic institutions that comprise and sustain modern provincial administrations, and the role of the Judicial Committee of the Privy Council in developing constitutional doctrines favourable to provincial claims.

Recently political scientists have looked hard at Galt's unity principle in the central government and concluded, in effect, that he was wrong. They argue that the decision to deny serious institutional expression to local concerns within the central government has served to weaken rather than strengthen it. They point to the various institutional ways in which the Washington government gives effective representation to local interests, and argue that these have contributed to the importance and authority of the Congress and the executive branch and at the same time deprived state governments of a monopoly on the task of local representation. "Effective territorial representation," writes Roger Gibbins, "has been combined with, and indeed has helped to produce, a strong and relatively centralized national government." He suggests several ways in which Canadians might follow the US example, including the election of senators who, armed with a popular mandate, could compete with provincial premiers in the role of provincial spokesmen.

Gibbins' suggestion was an alternative open to the Quebec delegates. There was some support for an elected upper house, principally from two of the reform-minded members of the Canadian delegation, William McDougall and Oliver Mowat. And, as indicated earlier, the issue was discussed at length at the meetings in Charlottetown. If Gibbins' reasoning is applicable, then the delegates helped defeat their own purposes by favouring a parliamentary over a federal model for the upper house, a decision arising in part out of a mistaken analysis of the American constitution. They ought to have paid less attention to problems like state sovereignty and the residual power and more to the composition of the central government.

51 Roger Gibbins, Regionalism: Territorial Politics in Canada and the United States (Toronto: Butterworths, 1982), 77.
52 Waite, Confederation Debates, 82.
Or ought they? It can be argued that they were quite right to be anxious about the proper relation of general to local legislative powers because they were working with the parliamentary model of government, not a republican one, and because they had decided to adopt it in the organization of the provincial governments as well as in the national government. The historian W. L. Morton considered the latter decision to be of the greatest importance because it established the ground of provincial sovereignty. It paved the way "for the continuation and development in the provinces of all the powers and pretensions of responsible and parliamentary government." In the event, the "powers and pretensions" of what the Nova Scotia delegate Jonathan McCully called "miniature responsible Governments," have proven formidable. Indeed, the provincial governments may have been sufficiently powerful from the start to have resisted the countervailing claims of an elected upper house, had the delegates opted for one. As Morton pointed out, the long-established Maritime governments lost some powers but, retaining their character, otherwise carried on as before, while the governments of the central provinces emerged stronger and "more self-governing" than their predecessors in the old provinces of Upper and Lower Canada prior to 1840.

More secure than ever before, it is quite possible that provincial governments today are immune to the alleged nationalizing effects of an elected Senate. Accordingly, those who are looking for ways of strengthening the federal government may well have to turn to the same questions on the distribution of legislative powers that the founders considered so important.

53 W. L. Morton, The Critical Years: The Union of British North America, 1857-1873 (Toronto: McClelland and Stewart, 1964), 210. As Morton points out, the alternative was the municipal government model, with the office of governor replaced by that of a superintendent, possibly an elected superintendent.

54 Ibid., 210-11, 199.
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