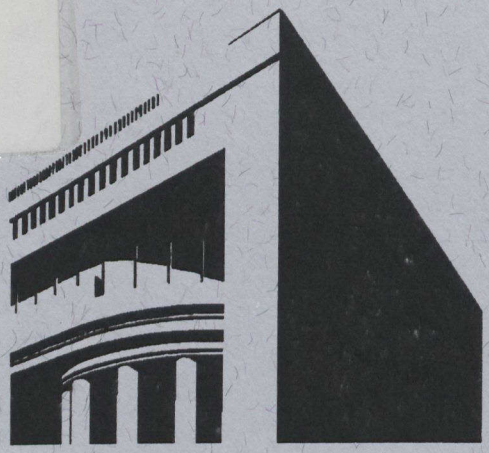

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Canadian Constitutionalism and the Confederation Debates: A View from America

John Rohr
Virginia Polytechnic Institute, Blacksburg

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CANADIAN CONSTITUTIONALISM AND THE CONFEDERATION DEBATES: A VIEW FROM AMERICA

John A. Rohr

Center for Public Administration and Policy

Virginia Polytechnic Institute

ABSTRACT

Following Hannah Arendt's insights on the normative character of founding periods, this article examines the Confederation Debates of 1865 for whatever light they might shed upon contemporary constitutional quarrels in Canada. The article has three main sections. The first analyzes the differences between the constitutional arguments of 1865 and those one hears today. The second emphasizes the similarities between the same sets of arguments and the third examines the role played by the image of the United States in the Confederation Debates. Salient themes include the central role of public administration in Canadian constitutionalism, the distribution of powers in Canadian federalism, and the understanding of popular consent as of 1865. Particular emphasis is placed upon the crucial and somewhat puzzling role played by the supporters of Confederation from Quebec and upon the similarities between the opponents of Confederation and the American Anti-Federalists of 1787-88.

CANADIAN CONSTITUTIONALISM AND THE CONFEDERATION DEBATES: A VIEW FROM AMERICA

Tantae molis erat
Romanam condere gentem.
Aeneid: I, 33

John A. Rohr

Center for Public Administration and Policy

Virginia Polytechnic Institute

The purpose of this article is to examine the Confederation Debates of 1865 in the hope of illuminating some dark corners of the exhausting constitutional quarrels that have dominated Canadian politics for the past two decades. By the "Confederation Debates of 1865," I mean the debates of the 8th Provincial Parliament of Canada which were held during February and March of 1865 in the City of Quebec. These debates focused on a set of resolutions adopted by delegates from Canada (Upper and Lower,) Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland at a Conference also held in Quebec City during the previous October. These resolutions led eventually to the British North America (BNA) Act of 1867.

The reader might wonder why I turn--of all places--to the Confederation Debates for enlightenment on a contemporary Canadian crisis. The plot thickens when I reveal that I am not a Canadian but an American and that after reading all one thousand thirty-two pages of the debates, I harbor a profound suspicion that I belong to a very exclusive club of North American academic eccentrics. To satisfy the reader's curiosity, I should mention that my two most recent books have analyzed contemporary problems in terms of certain themes I discovered in the founding periods of the United States for one book and of the Fifth French Republic for the other.[1] Following the lead of Hannah Arendt, I believe that for many western nations founding periods are normative and that those who study such periods often discover events, arguments and principles that illuminate a nation's subsequent development.[2]

To apply this idea to Canada presents a problem I did not encounter in studying the United States or the Fifth Republic. Despite the importance of the Declaration of Independence in American history, it is the drafting of the Constitution of the United States in 1787 and the subsequent debates over its ratification that define the founding of the present American Republic. Although the origins of France itself trail off into some dim and distant past, there can be no doubt that the Fifth Republic was founded in 1958. In studying the founding of the present regimes in France and the United States, I knew at

once where to turn. With Canada, it was not as simple. The Proclamation Act, the Quebec Act, and the Act of Union present worthy challenges to Confederation as the founding period of Canada and, even if these challengers are ultimately exposed as impostors, the Confederation Period itself harbors enough important events--most notably, the crucial meeting in Quebec City in October, 1864--to make the Confederation Debates something less than the sole contender for serious study of Canada's founding.[3] Despite these methodological problems, I shall focus exclusively on the Confederation Debates of 1865.[4] I do so because no other event from the Confederation Period has records as complete as these and, more importantly, because these records reveal a sustained level of serious--and at times profound--public argument which, I believe, is sans pareil in Canadian constitutional history.

This article has three substantive sections. The first touches briefly upon the most salient differences between the constitutional arguments of 1865 and those one hears today. The second examines more fully the similarities between then and now in three specific areas: the distribution of powers in Canadian federalism, the need for popular consent to constitutional change, and the central role of public administration.[5] Section three considers how the Confederation fathers looked upon the United States. The paper concludes with some brief unsolicited advice for my neighbors to the north which I hope they will see as prudent counsel rather than meddlesome preaching.

Then and Now: the Differences

In view of the enormously important constitutional questions raised by the aboriginal peoples in Canada today, it is startling to discover that they are hardly ever mentioned throughout the long debates of 1865. Although the text of the resolutions before Parliament referred explicitly to "Indians and Lands reserved for Indians," the fathers of Confederation never got around to discussing seriously either this provision or the Indians themselves. The very few references to them are either indirect as when H.L. Langevin

reads from a text on the Northwest Territory which mentions in passing some commercial dealings between white settlers and Indians or merely implied as when A. Mackenzie speaks of "that vast western country where there is hardly a white man living today."[6] When one considers the profound constitutional implications of the recent recommendations of the Royal Commission on Aboriginal Peoples, the problematic status of these peoples residing in Quebec if that province should become a separate nation, or the pivotal role played by Elijah Harper and his aboriginal followers in bringing about the tragic defeat of the Meech Lake Accords, the total irrelevance of the aboriginal peoples to the Confederation Debates is remarkable indeed. [7]

Also missing in action during the Confederation Debates was the Supreme Court of Canada, one of the most important actors in the contemporary crisis.[8] Indeed, pending litigation challenging the constitutionality of Quebec's right to secede from the Confederation threatens to thrust the Supreme Court to the front and center of the most explosive issue of all. The resolutions debated in 1865 conferred upon the "General [i.e., the federal] Parliament" the authority to establish "a General Court of Appeal for the Federated Provinces"--a power Parliament did not exercise until 1875.[9] This leisurely approach seems to reflect the priorities of the early governments under Confederation and, aside from the status of the civil law in Quebec, the indifference of the Confederation fathers themselves to judicial questions in general. This indifference presents a marked contrast to their counterparts in 1787 America and 1958 France who devoted considerable energy to such questions as the jurisdictional problems of American federalism and the relationship of the innovative Conseil Constitutionnel to the well established jurisdictions of the Conseil d'Etat and the Cour de Cassation.[10] Aside from a few brief and superficial references to a "Supreme Federal Court" or to judicial review as practiced in the United States, the Canadian parliamentarians of 1865 showed little interest in judicial power in general and hardly any at all in the proposed "General Court." [11] This is probably best explained by the extremely high value they placed upon "responsible government" and the

painful struggle to bring it about. They preferred to save their energies for debates on the relative merits of federal and legislative unions in achieving truly responsible government, a topic on which they proved themselves indefatigable.

The absence of serious discussion about aboriginal peoples and the Supreme Court in 1865 provides examples of differences between "then and now" based on factors that were not important "then," but are important "now." Let us reverse field and consider two questions that were of great significance in 1865 but are no longer so today: monarchy and religion.

One of the most curious aspects of contemporary Canadian culture is the almost obsessive concern (outside Quebec) with national identity. It is curious because all the hand-wringing over what it means to be Canadian goes on while studies and polls consistently reveal a solid consensus both within Canada and elsewhere that it is a fine place to live, perhaps the best in the entire world. The Confederation fathers had no such problem. The overwhelming majority of them frequently went out of their way to celebrate their pride in being loyal subjects of the Queen, gratefully basking in the shared glory of the British Empire. A few examples will capture the spirit of their commitment to monarchy and empire. Richard Cartwright affirmed his delight in being "the subject of an hereditary monarch, who dare not enter the hut of the poorest peasant without leave had and obtained."[12] Not to be outdone, Antoine Harwood pitied the poor Americans whose executive "is no more than the fortunate chief of a party" and therefore "he can never be regarded as the father of his people." For the happy Canadians, however, "as the sovereign is permanent (`the King is dead, God save the King,') we have at all times in him a father, whose interests and whose inclination it is to extend his protection over the cottage of the poor and over the palace of the rich, and to dispense equal justice to both." The editor of the debates notes that this statement was followed with "Cheers."[13] Voicing more sober sentiments, George-Etienne Cartier credited the British monarchy with delivering Canadians from the "absence of some respectable executive element," which

bedeviled the United States whose system of government "could not present an executive head who would command respect." Under the Confederation to which Cartier looked forward, the Queen's ministers "might be abused and assailed," but such abuse would never reach the Sovereign and, consequently, Canadian institutions would enjoy a prestige unknown in the United States.[14] In contrast to Cartier's sophisticated political science, John Rose flatly asserted the difference between Canadians and Americans to be quite simply that the "genius and instincts of our people are monarchical and conservative--theirs levelling and democratic."[15]

Religion presents an interesting contrast between then and now when one ponders the profoundly secular character of contemporary Quebec society--both separatist and federalist--against the background of the 1860s. In making the comparison, one cannot help asking, "Whatever happened to the Catholic Church?" The short answer can probably be traced back over several decades of unwise alliances on the part of the Catholic clergy with political leaders who were less than models of progressive thinking. Whatever the reason, the contrast is stark.

Religion was a major factor in the Confederation Debates. Today one speaks of the need for some sort of protection for the language, law, and culture of Quebecers, but in 1865 precious little was said about "culture." Religion, language, and law were always mentioned in the same breath and together formed the great threefold object of concern for the French surnamed delegates from Lower Canada regardless of whether they supported confederation or opposed it.[16] These delegates were primarily concerned about a provision in the Quebec resolutions giving the federal government control over "marriage and divorce." Catholic Confederationists like H.L. Langevin assured their coreligionists that there was no need for concern, but for Félix Geoffrion, an opponent of confederation, this clause presented a question of conscience. Reminding the Legislative Assembly that Sir Etienne Pascal Taché, a staunch confederationist, had stated before the Legislative Council (the upper house of the unified Province of Canada) just a few months earlier

during a debate on divorce that such an action is "antichristian and antinational" and that "death alone can dissolve marriage," Geoffrion wondered how it could be that, if a Catholic legislator is "in conscience bound" to vote against divorce, that same legislator can "vote for a resolution purporting to vest in the Federal Legislature the power of legislating on the subject."[17]

No less troubling was the possibility that federal control over marriage would empower the central government to require civil ceremonies for Catholics planning to marry and that failure to conform would render their offspring illegitimate in the eyes of the law.[18] This argument was pressed with sufficient vigor as to result in the final version of the BNA Act including a new provision, not found in the Quebec resolutions, which reserved to the provinces the sole power over the "solemnization of marriage."

Today, the hot-button issue for the minority in Quebec focuses on the language rights of anglophones, but, in 1865, the religious rights of the Protestant minority took center stage. To be sure, then as now, the school issue was salient; but, at a more fundamental level, the divisive question of religious freedom itself arose, with Protestants accusing Catholics of being intolerant zealots bent upon destroying all religions but their own and Catholics responding in kind that their accusers were narrow-minded mendacious bigots. It was not a pretty scene. Christian charity was the big loser.[19]

The Catholic cause was acutely embarrassed by the untimely appearance just the previous year of Pope Pius IX's Syllabus of Errors.[20] His Holiness took a dim view of the dominant liberal sentiments of the day, much to the delight of those willing to see threats to Protestant freedom in Catholic Quebec.[21] The efforts of Catholics to recall the liberal, tolerant attitudes of the Quebec bishops were met with the counterargument that the papal Syllabus signaled a dramatic new departure for Catholicism throughout the world and that henceforth "honorable gentlemen of the Roman Catholic persuasion" would have to say "either that they have no confidence in what the head of their Church says, or that they have confidence in it, and will act accordingly."[22] Refusing to be pinioned on the

horns of this dilemma, the Catholic spokesmen continued to point to the good sense of their bishops and Quebec's history of religious tolerance.

What are we to make of these bygone debates on monarchy and religion? Are they mere museum pieces to flatter the wisdom of our more enlightened times, reminding us of what marvelous progress we have made in our democratic and secular ways? I do not think so. I believe participants in today's constitutional debates can learn from these old debates as well as about them.

Federalists might ask themselves if the diminished role of the monarchy, once a source of such intense pride for Canadians, has contributed to the chronic Canadian puzzlement over their national identity. Does it help to explain why a serious but whimsical author hit upon "The Unbearable Lightness of Being Canadian" as a perceptive subtitle for his thoughtful book?[23] Can this "unbearable lightness" be traced to a failure to find a suitably democratic commitment to fill the void created by the virtually total irrelevance of the monarchy today? More importantly, does it offer separatists an easy target for appeals to Quebecers looking for a deeper sense of national identity?

Have Quebec separatists made a bad bargain in exchanging yesterday's religion for today's culture as the travelling companion of language and law along the road to separation? Religion, in the sociological sense of the term, is always part of culture, but a culture that loses its religion may lose its soul as well. It is, of course, too late in the day for Quebec separatists or anyone else in the western world to rekindle the religious passions of the last century. Yesterday's vibrant, militant religious fervor has split off in many directions. Today it can be found at the heights of fashionable ecumenical dialogue, in the depths of cranky fundamentalism or in free fall toward the religious indifference of the poet's "decent, godless people." Quebec separatists might be well advised to find a place in their ranks for that most attractive aspect of contemporary Christianity, namely its tendency to soften the hard edges of ethnic politics.[24]

Then and Now: The Similarities

Canadian Federalism and the Distribution of Powers

In the months preceding the Quebec Referendum of October, 1995, considerable attention was lavished upon the precise wording of the text that would be submitted to the people. At first, the debate focused on the speculative question of what it would be and, once this was known, what it should have been.[25] Federalists argued that their opponents had deliberately muddied the waters, misleading Quebecers into thinking that they could live in a sovereign Quebec that somehow remained part of Canada. The federalist strategy was to reduce the question to a stark dichotomy: either you are in or you are out--a formulation separatists wisely ignored. Both sides invoked such powerful symbols as Canadian passports and currency to support their respective positions. Post-election analysis revealed that substantial numbers of "yes" voters thought that a sovereign Quebec would in some way or other remain part of Canada, despite the scoldings they received from stern federalists for being so illogical.

Although no end to the crisis is in sight, I cannot help thinking that when the end comes, it will appear--much to the chagrin of ideologues of all stripes--in some hopelessly illogical compromise, whose sole merit will be that it works. If so, the Confederation Debates on Canadian federalism offer an illuminating precedent. Perhaps Justice Holmes had it right when he said that a page of history is worth a volume of logic.

Americans who study Canadian constitutional history feel right at home when they get around to examining the regulation of commerce because both countries impose an interprovincial or interstate limitation on the regulatory powers of their respective federal governments. Thus, in principle, neither Ottawa nor Washington may regulate commercial affairs that are strictly intraprovincial or intrastate. Despite this similarity in principle, Washington's writ, in fact, runs much further and deeper into the economic life of the United States that Ottawa's does in Canada. Noting this difference, a widely-used textbook on Canadian constitutional law states that "ironically, the express restrictions in

the American constitution have proved to be far less of a barrier to the development of national economic policies than have the judicially created restrictions in Canada."[26] This is "ironic" because the Constitution of the United States explicitly limits its federal government's regulatory power to "commerce among the states," whereas article 91 of the BNA Act of 1867 imposes no such limitation. Among the explicitly enumerated powers entrusted to "the exclusive Legislative Authority of the Parliament of Canada," one finds quite simply "the Regulation of Trade and Commerce." The "judicially created restrictions" mentioned in the text quoted above refer primarily to a series of late nineteenth and early twentieth century decisions by the Judicial Committee of the Privy Council (JCPC), the British institution, which, despite the creation of the Supreme Court of Canada in 1875, de facto exercised the ultimate judicial authority in Canadian affairs until 1949.

In the late 1920s and early 1930s, Canadian constitutional scholars who favored a more active role for their federal government subjected the JCPC decisions limiting Ottawa's power over commerce to a withering attack. The gist of their argument was neatly captured in a pithy and oft-quoted sentence from the pen of W.P.M. Kennedy, dean of the Honour School of Law at the University of Toronto: "Seldom have statesmen more deliberately striven to write their purposes into law, and seldom have these more signally failed before the judicial technique of statutory interpretation."[27]

Kennedy's complaint finds considerable support in the unadorned text of the BNA Act which the JCPC had construed quite narrowly. Article 91 confers upon Parliament a sweeping power "to make Laws for the Peace, Order and good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Then, for good measure, it specifies a long list of explicit federal powers that are added "for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section"--that is, of the peace, order, and good government or "POGG" clause, as it came to be known. Among these enumerated powers one finds "the Regulation of Trade and Commerce."

Jurisprudentialists of a federalist persuasion held that POGG was the sole grant of power to the federal government and the specific enumerations were merely concrete examples of the broader, more comprehensive power. The practical point of their position was that the federal government enjoyed plenary power to regulate trade and commerce.

The JCPC had interpreted the text differently, finding in the exclusive grant to the provinces in article 92 of a power to "make laws in relation to ...Property and civil Rights in the Province" an impressive limitation on the federal government's power over trade and commerce. Much of the jurisprudence of the late nineteenth and early twentieth centuries centered on JCPC's effort to find the right balance between these texts, with most of the decisions favoring the provinces.[28] This line of reasoning culminated in a series of opinions authored by Lord Haldane which restricted POGG to an "exceptional" power to be used only in an "emergency" or in the face of "sudden danger to the social order" or in "special circumstances such as a great war."[29]

Canadian nationalists, like Dean Kennedy, seem to be on target when they find JCPC's interpretation of the BNA Act crabbed and strained. Although the Quebec Resolutions, the text debated in 1865, differed somewhat from the BNA Act of 1867, it was close enough to provide evidence suggesting that a good number of the delegates favored expansive powers for the federal government.[30] The 29th Resolution, anticipating what would eventually emerge as the POGG clause in the BNA Act, provided: "The General Parliament shall have power to make Laws for the peace, welfare, and good government of the Federated Provinces (saving the Sovereignty of England) and especially laws respecting the following subjects." It then went on to enumerate a long list of specific powers, most of which reappeared in the BNA Act. Among them was "[t]he Regulation of Trade and Commerce."

During the Confederation Debates, support for a broad interpretation of federal power came first and foremost from John A. Macdonald. Warming to one of his favorite

topics, how to avoid the fatal flaws in the Constitution of the United States, Macdonald celebrated the superior wisdom of the Quebec Resolutions as follows:

> They [the Americans] commenced, in fact, at the wrong end. 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. Here we have adopted a different system. We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature.[31]

Variations on this theme can be found throughout the debates. Following Macdonald's lead, Isaac Bowman contrasts the Quebec Resolutions favorably with the Constitution of the United States, and then goes on to assert: "In the scheme submitted to us, I am happy to observe, that the principal and supreme power is placed in the hands of the General Government, and that the powers deputed to local governments are of a limited character."[32]

David Jones sees in the American doctrine of states' rights "the cause of the bloodshed and civil war" that has ravaged that sorry land for "the last four years." He then points out that "[o]ur case is exactly the reverse," in that instead of having the provinces delegate powers to the proposed central government, "it [the central government] gives to these provinces just as much or as little as it chooses." He then quotes in full the centralizing language of Quebec Resolution 45:

> In regard to all subjects over which jurisdiction belongs to both the General and Local Legislatures, the laws of the General Parliament shall control and supersede

those made by the Local Legislature, and the latter shall be void so far as they are repugnant to, or inconsistent with, the former.[33]

Richard Cartwright is pleased to report that "every reasonable precaution seems to have been taken against leaving behind us any reversionary legacies of sovereign state rights to stir up strife and discord among our children."[34] Finally, John Scoble advises his colleagues that a "careful analysis of the scheme convinces me that the powers conferred on the General or Central Government secures it all the attributes of sovereignty, and the veto power which its executive will possess and to which all local legislation will be subject, will prevent a conflict of laws and jurisdictions in all matters of importance, so that I believe in its working it will be found, if not in form yet in fact and practically, a legislative union.[35]

Scoble's reference to a "legislative union" is particularly significant because throughout the debates many delegates from Upper Canada who supported the Quebec Resolutions added that their only disappointment lay in the federal character of the proposed union. They would have preferred a legislative union--that is, an even more centralized regime than the one they were approving. Nevertheless, they would support the Quebec Resolutions because they bid fair to bring about a unified structure close enough to the legislative union they really desired.[36] Such statements, combined with those cited above go a long way toward supporting Dean Kennedy's remark that "[s]eldom have statesmen more deliberately striven to write their purposes into law" and that these purposes included an extremely vigorous federal government.

Upon closer examination, however, the federalist case is not as strong as it might at first appear. The friends of Confederation from Lower Canada seemed at times to be reading a text quite different from the strongly centralized document revealed in the passages we have just quoted. Take, for example, the following comments from four of the most prominent members of the Quebec delegation supporting Confederation:

Etienne Pascal Taché--"...for all questions of a general nature would be reserved for the General Government, and those of a local character to the local governments, who would have the power to manage their domestic affairs as they deemed best."[37]

George Cartier--"Questions of commerce, of international communication, and all matters of general interest, would be discussed and determined in the General Legislature."[38]

H.L. Langevin--"All local interests will be submitted and left to the decision of the local legislatures."[39]

Joseph Cauchon--"But if no mention was made of divorce in the Constitution, if it was not assigned to the Federal Parliament, it would of necessity belong to the local parliaments as it belongs to our Legislature now, although there is not one word respecting it in the Union Act."[40]

What these remarks have in common is an exceedingly broad interpretation of provincial power under the Quebec Resolutions and one that finds little support in the text. Their argument seems to rely inordinately upon clause 18 of Resolution 43 which gives the provincial legislatures power to make laws respecting "generally all matters of a private or local nature, not assigned to the General Parliament." This passage is no match for the sweeping power of the General Parliament "to make laws for the peace, welfare, and good government of the Federated Provinces."[41] As noted above, this sweeping power was supplemented with the power to legislate "especially" in a long list of substantive areas which concludes with the power to legislate "generally respecting all matters of a general character, not specially and exclusively reserved for Local Governments and Legislatures." The distinction drawn by the Quebec delegates between general and local matters was too neat and simple. They seemed to assume that the distinction between the two spheres was almost self-evident. Such an assumption is at odds with the language of the Quebec Resolutions. As we saw above, Resolution 45 anticipated that there would be jurisdictional

conflicts between general and local legislation and that they should be resolved in favor of the federal government.[42]

The highly centralized character of the proposed confederation did not escape its opponents from Quebec. Unlike Taché, Cartier, et al., anti-confederationists, like the Dorions (A.A. and J.B.E.), Joseph Perrault, and L.A. Olivier, agreed entirely with John A. Macdonald's strongly federalist interpretation of the proposed constitution and for that very reason voted against it. Consider the following:

J.B.E. Dorion--"I am opposed to this scheme of Confederation, because we are offered local parliaments which will be simply nonentities, with a mere semblance of power on questions of minor importance."[43]

Joseph Perrault--"...[L]ocal governments...will be nothing more than municipal councils, vested with small and absurd powers, unworthy of a free people, which allow us at most the control of our roads, our schools, and our lands."[44]

A.A. Dorion--"I find that the powers assigned to the General Parliament enable it to legislate on all subjects whatsoever. It is an error to imagine that these powers are defined and limited, by the 29th clause of the resolutions. Were it desirous of legislating on subjects placed under the jurisdiction of the local legislatures, there is not a word in these resolutions which can be construed to prevent it, and if the local legislatures complain, Parliament may turn away and refuse to hear their complaints, because all the sovereignty is vested in the General Government, and there is no authority to define its functions and attributes and those of the local governments."[45]

If we look only at the franco-français debate on the Resolutions, it seems clear that the opponents of confederation read the text more accurately but the Quebec supporters read it more wisely.[46] It is inconceivable that men as sophisticated as Taché, Cartier, and Langevin did not understand the meaning of the text before them. They understood it only too well, but imposed a strained interpretation upon it that would sufficiently obfuscate its

clear meaning as to make it politically possible for Quebec to enter the Confederation. Further, their point of view prevailed when, some years later, the JCPC found in the tiny acorn of provincial power over property and civil rights the origins of what eventually became the mighty oak of decentralization that overshadowed POGG and the rest of Macdonald's carefully laid plans. Events proved that there was too little political support, not just in Quebec but in all of Canada for Macdonald's grand vision ever to become a reality. The Quebec Confederationists were poor exegetes but great statesmen. They knew that at times confusion is the friend of compromise. Perhaps there is a lesson in all this for the contemporary and possibly salutary confusion over the meaning of sovereignty.

Consent of the Governed

Peter H. Russell begins his widely-read Constitutional Odyssey by recalling what he describes as "[p]erhaps the most haunting lines in Canadian history." He refers to a letter written in 1858 by three prominent fathers of Confederation, George-Etienne Cartier, Alexander Galt, and John Ross, to Sir Edward Bulwer-Lytton, the British colonial secretary at that time. The "haunting lines" were as follows:

> It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus remedying any defect.[47]

Russell then contrasts this statement with a comment by Newfoundland premier Clyde Wells in 1990: "The Constitution belongs to the people of Canada--the ultimate source of sovereignty in the nation." Russell assures his reader that "[b]etween the two passages quoted lies much more than the gulf of years."[48] Indeed, the "constitutional odyssey" on which he embarks is the fascinating story of how Canadians made their way from the first statement to the second.

Although the Confederation Debates provide many passages echoing the sentiments of the authors of the letter to Bulwer-Lytton, they also provide, however illogically, many passages anticipating Clyde Wells's statement as well.

Despite the nearly universal support among the delegates for the monarchy and the no less universal rejection of both republicanism and democracy, the issue of whether the Quebec Resolutions should somehow be ratified by the people of Canada revealed a curious commitment to the notion that the legitimacy of a major constitutional change requires some sort of popular consent.

Naturally, the opponents of the Quebec Resolutions pressed this argument ceaselessly. They hoped that some sort of referendum, or even a new election, focused exclusively on confederation, would open the proposed text to a careful public scrutiny which its most controversial measures could not withstand. They knew, for instance, that the confederation document was exceedingly vulnerable on the grounds that it called for a legislative council--later to be renamed the Senate--whose members were to be appointed for life by the Crown and whose number could not be increased. This measure was a concession to the Maritime Provinces and enjoyed little support in Canada where, as of 1865, the members of the upper house of Parliament, the "legislative council," were elected.

The opponents of confederation knew that if they could rivet the attention of the people on the appointive senate and other unpopular measures, the supporters of the constitution might have to accept some amendments to the proposed Quebec Resolutions. This, they surmised, would set off a chain reaction in the Maritime Provinces which would demand further changes and thereby unravel the whole scheme. Thus the question of the need for recourse to the people was of considerable strategic importance throughout the debates. It was a point on which the friends of confederation could not yield an inch. The interesting point for our purposes is to review the arguments both sides made in support of their respective positions.

The argument of the anti-confederationists was straightforward. Consider the following:

James O'Halloran--"I remarked at the outset, that I must deny to this House the right to impose on this country this or any other Constitution, without first obtaining the consent of the people. Who sent you here to frame a Constitution? You were sent here to administer the Constitution as you find it."[49]

J.B.E. Dorion--"I am opposed to the scheme of Confederation, because I deny that this House has the power to change the political constitution of the country, as it is now proposed to do, without appealing to the people and obtaining their views on a matter of such importance."[50]

Matthew Cameron--"Sir, I cannot conceive it to be possible that any body of men sent here by the people under the constitution will make changes in that Constitution which were not contemplated by those who sent them here, without submitting those changes first to the people." [51]

One could hardly ask for clearer statements affirming the principle that constitutions derive their just powers from the consent of the governed. Similar statements abound throughout the debates.[52]

The friends of Confederation were clearly embarrassed by this call for a recourse to the people. Their determination to reject it was thoroughly justified strategically, as the almost disastrous results of an election in New Brunswick, held as the Canadian Confederation debates were in progress, amply demonstrated.[53] The problem for the confederationists was that their objections were merely strategic. They struggled in vain to find a principled response to the demand that the people of the two Canadas approve the proposed massive constitutional revision. The best they could do was to make tradition do the work of principle by arguing that recourse to the people was not the British way of doing things. Typical of this approach was the following comment from John Ross, one of the authors of Peter Russell's "haunting lines":

> I will add that this mode of appealing to the people is not British but American, as under the British system the representatives of the people in Parliament are presumed to be competent to decide all the public questions submitted to them.[54]

The problem with this argument was that it was easily defeated by recalling that there were ample precedents for Canadians and other colonists adapting British practices to local circumstances. Recourse to the people, like Confederation itself, would be such an adaptation.[55]

Throughout the debates, the confederationists were reluctant to challenge directly the call for recourse to the people, preferring instead to dismiss it on procedural grounds. For example, when James Currie, an articulate anti-confederationist, introduced a resolution that the Legislative Council should not make a decision on the Quebec Resolutions "without further manifestation of the public will than has yet been declared," he met a host of procedural objections[56] Alexander Campbell queried him on just how this "further manifestation of the public will" would come about. Transforming Currie's resolution into a man of straw, he dismissed as absurd the notion--a notion never proposed by Currie-- that "the nearly four millions of people who comprise the provinces to be affected by the union should meet together en masse."[57]

He also rejected the possibility of a special election on confederation because such an election would require that Parliament first be dissolved, an impossible precondition since a majority of the members in both houses supported the government's commitment to confederation and, therefore, there was no basis for dissolution. "Receiving the support of more than two-thirds of the representatives of the people as the present Government does," Campbell asked, "how is it possible that Parliament could be dissolved to suit the views of a small minority?"[58]

Timing was another procedural roadblock the confederationists placed in the path of recourse to the people. On the very first day of the debates, 3 February 1865, confederationist Fergusson Blair said that submitting the plan to the electors at that time

"would involve a delay which could not be compensated for by any benefit proposed to be derived from such a course." He allowed, however, that "the subject would present a different aspect" in the event that at a later date there should be "numerous petitions in favor of an appeal to the people."[59]

As the debates drew to a close, however, the confederationists changed their position on timing. On Saturday, 11 March 1865, the Legislative Assembly finally voted to approve the Quebec Resolutions. When the same body reconvened the following Monday, John Cameron, a supporter of the text, surprised his colleagues by offering a resolution requesting the Governor General to "be pleased to direct that a constitutional appeal shall be made to the people" before the text is dispatched to London for "the consideration of the Imperial Parliament,"[60] Thomas Parker, who, like Cameron, had voted for the Resolutions on the previous Saturday, opposed the Monday morning resolution to submit the text to the people before it went to London. Timing was his principal concern. "If the resolutions were to be referred to the people at all," he said, "it should have been before they received the sanction of the House." He asked rhetorically, "Are we to turn round today and reverse what we did on Saturday last?" He would have favored recourse to the people earlier, "but not now, after their [the Resolutions'] deliberate sanction by the House; to do so would stultify the Legislature."[61] Thus Parker opposed recourse to the people at the end of the debates because it was too late, whereas his follow confederationist, Fergusson Blair opposed it at their beginning because it was too early.

The confederationists' reluctance to answer directly the argument for consulting the people was underscored in their determination to expand the variety of procedural considerations they relied upon to sidestep the intrinsic merits of the issue. These additional procedural matters included (1) efforts to have resolutions calling for consultation ruled out of order; (2) complaints about the expense such consultations would involve; (3) and, most importantly, a constantly recurring theme that there was no need to consult the people in a formal referendum or an election because they had already been

consulted in countless informal ways that made their overwhelming support for confederation abundantly clear.[62]

We have already seen the staunch loyalty of the vast majority of the participants in the Confederation Debates to the British monarchy and we shall examine below their widespread contempt for republicanism and democracy, especially in their American incarnations. Despite these commitments, both sides in the Confederation Debates revealed a surprising acceptance of the liberal principle demanding popular consent for major constitutional change. Political strategy governs the manner in which this acceptance becomes manifest. The anti-confederationists shout it from the roof tops, while their opponents grumble discretely about the practical problems of implementing in deed the doctrine they will not condemn in principle.

The Centrality of Public Administration

Americans following recent constitutional vagaries in Canada were surprised to learn that less than a month after the 1995 Quebec referendum, Prime Minister Chrétien delivered himself of the opinion that "[t]he real problems in Canada are economic growth and the creation of jobs and good solid administration."[63] That the Prime Minister of Canada would mention "good solid administration" as one of the nation's three "real" problems in the immediate aftermath of a referendum that nearly destroyed his country must surely have struck interested Americans as extraordinary and perhaps even as bizarre. Public administration is not prestigious activity in the United States. It is inconceivable that an American president in the midst of a great constitutional crisis would turn to administration --good and solid or otherwise--as the path to political salvation. Not so in Canada. Chrétien's remark was part of a national chorus that evoked the muse of administration to inspire politicians to achieve the high statesmanship needed to bind up the nation's wounds. Constitutional debates over the very survival of the regime moved effortlessly into detailed discussions of such classic administrative themes as environmental

management, immigration policy, public finance, civil service pensions, education, manpower and training, unemployment benefits, control of natural resources, and, of course, that hardy perennial of Canadian Federalism, equalization of payments.[64]

Federalists were not alone in enlisting administration to support their cause. Quebec separatists, most notably Premier Lucien Bouchard, frequently tempered the high rhetoric of sovereignty with the mundane details of of education, employment, health care, civil service reform, and financial management that would make it all possible and worthwhile.[65]

The striking variation in the value Canadians and Americans assign to public administration marks an important difference in the political culture of the two countries. Some have traced it back to the American Revolution, arguing that refugee Loyalists brought to their new country an affection for government that was quite literally alien to their erstwhile rebellious neighbors to the south.[66] This affection, so the argument goes, was reinforced by the warm welcome they found in what remained of British North America. Whatever the explanation, the phenomenon itself is clear enough today among both federalists and separatists. It was also true in 1865 when both friends and foes of the Quebec Resolutions enlisted detailed questions of administration as weapons in defending their respective positions.

The Confederation Debates reveal a host of administrative questions that absorbed the attention of the delegates. The topics ranged from broad generalizations on the hopes for improved administration from the stable institutions confederation was expected to provide, to more focused attention to public works, and, finally, to very specific discussions on canals and schools.[67] Woven into the fabric of these arguments was a curious debate over the provision in Resolution 64 that the "General Parliament" would make "an annual grant in aid" to each province "equal to eighty cents per head of the population, as established by the census of 1861." Subsequent resolutions provided special benefits for New Brunswick, Newfoundland and Prince Edward Island. These

provisions triggered debates foreshadowing later controversies over the equalization payments that would play so important a role in the administration of Canadian federalism.[68]

Among the many administrative questions debated in 1865, however, none can match the importance of the Intercolonial Railway. In rehearsing the debates over this immensely controversial innovation, I have no intention of weighing the merits of the issue. I examine the railroad question, which was to dominate the early development of Canadian administration, only to give a very specific example of the salience of administration in the debates. I do this to establish the link between "then and now," thereby suggesting that when contemporary Canadians link mundane questions of administration to the high statesmanship of saving a great nation, they echo sentiments harking back to the beginnings of confederation.

Quebec Resolution 68 proposed an "Intercolonial Railway" to extend "from Rivière du Loup, through New Brunswick, to Truro in Nova Scotia." Its importance in the debates for friend and foe alike of the resolutions is textually demonstrable. Speaking before the Legislative Council, William Macmaster, an opponent of confederation, denounced the proposed railroad as "a very questionable part of the project" and then elevated its importance by adding "indeed to my mind it is the most objectionable of the whole."[69] Echoing these sentiments, anticonfederationist Matthew Cameron saw the railroad as nothing less than the "leading feature" of the proposed constitutional change and one of the main reasons why it should be rejected.[70]

Not to be outdone, the friends of confederation were no less outspoken in supporting the railroad than their adversaries were in condemning it. For Antoine Harwood, "the building of the Intercolonial Railway" was "the most important consideration of all for everyone, and one which would of itself be sufficient to make us desire the union of the provinces."[71]

Raising his sights beyond the railway proposed in the text before him, Colonel Arthur Rankin proclaimed it but the first step toward "that still more important and magnificent project, the Atlantic and Pacific Railway." Seeing the embryo of this grander project in the proposed Intercolonial Railway, Rankin assured his colleagues that "it would be impossible to overestimate the advantages which any country must derive from being possessed of a line of communication destined to become the highway from Europe to Asia."[72]

With such strong statements both in its favor and against it, the Intercolonial Railway became, of course, the subject of considerable controversy. At the very outset of the debates in the Legislative Assembly, Luther Holton, a prominent anticonfederationist, went to the heart of the matter when he registered his surprise at finding in a constitutional text a proposal to build a railway. He ridiculed this provision as "a novelty that, perhaps might not be found in the constitution of any country." [73] To this John A. Macdonald replied: "The railroad was not, as stated by Mr. Holton, a portion of the Constitution, but was one of the conditions on which the Lower Provinces agreed to enter into the constitutional agreement with us."[74]

Macdonald's distinction between "a portion of the Constitution" and a "condition" for accepting the constitution was no shallow legalism. It produced an immediate and most unwelcome reaction in New Brunswick where the friends of confederation were facing an imminent election that focused on the Quebec Resolutions. For Samuel Tilley, the leading New Brunswick confederationist, the Intercolonial Railway was absolutely essential. It was, as Donald Creighton puts it, "Tilley's biggest political asset."[75] Albert J. Smith, Tilley's principal opponent, seized on Macdonald's unfortunate comment that the railway was not a "portion of the Constitution" to argue that the commitments in the Quebec Resolutions most favorable to New Brunswick, above all the Intercolonial Railway, meant nothing at all. Frantically, Macdonald sent a telegram to Tilley assuring him that the provision for the Railway--regardless of its status as part of the constitution--would appear

in the text of the imperial act which was the ultimate goal of the Quebec Resolutions. His remarks helped to reassure the "terrified Unionists" in New Brunswick, but mistrust and hard feelings remained.[76]

The prominent place given to the railway provision in the proposed constitution brought a technical dimension to the Confederation Debates conspicuously absent from the comparable debates in the United States in 1787 or in France in 1958. The railroad clause prompted extremely lengthy and detailed discussions of what we might call today financial management. The wearisome detail in the two excerpts that follow capture nicely the technical flavor of much of the debate over the railroad:

Hon. Mr. RYAN--[speaking in favor of the resolutions on 20 February] . . .I want to shew by this [a lengthy discussion he had just finished on the economics of transporting a barrel of flour,] that the carrying of flour over the Intercolonial Railway will not be so difficult of accomplishment as people who have not gone into the calculation closely may be disposed to imagine. (Hear, hear.) I have here, too, a statement of the imports of flour into New Brunswick, Nova Scotia, and Newfoundland. It is as follows:

Imports of Flour	Barrels
New Brunswick	243,000
Nova Scotia	328,000
Newfoundland	226,00
[Total]	797,000

Mr. A. MACKENZIE-- [speaking against the resolutions on 23 February]. . .Major Robinson estimates the cost of the road at about £7,000 pounds per mile, or about £2,800,000 altogether. I do not think, judging from the statement he gives of the grades in the road, the bridges to be built, and the material to be found along the line, that it is a fair inference that the cost would equal the amount he sets down.

> The character of the ground over which the road will pass is very similar to the railways of Canada. It is represented to be very much of the nature of the country through which the Great Western runs westward of Hamilton over a great portion of the line. The best portion of the line is equal to the worst portions of the Great Western. Even at the cost of £7,000 per mile the expense of constructing the entire road would be a little over fifteen millions of dollars.[77]

Statements of this nature abound throughout the Confederation Debates.[78] As noted above, there is nothing like them in the French or American debates. Luther Holton was right. To insert a clause about a specifically named railroad into a constitution was an innovation, but it underscores a blending of administration and constitutionalism in a distinctively Canadian way.[79]

Before concluding our study of the railroad as an example of administration in the Confederation Debates, we should note the theme of technology driving constitutional reform. Speaking in favor of the resolutions, John Ross invoked Lord Durham's famous (or infamous) Report of 1839 in which he argued that a railroad "between Halifax and Quebec would, in fact, produce relations between these provinces that would render a general union absolutely necessary."[80] This same passage is cited by Anselme Paquet, an opponent of confederation, as a reason for rejecting the Quebec Resolutions.[81] The curious fact that the same author is cited verbatim, first for confederation and then against it, is explained by the diametrically opposed memories of Lord Durham in the two Canadas as of 1865. Generally loved and admired in Ontario, in Quebec he was, quite simply, despised. [82] What is interesting for our purposes, however is that both friends and foes of Lord Durham agree with his prediction that an Intercolonial Railway would be a particularly apt means for achieving political unity. Logically enough, Ross and Paquet cite Lord Durham's argument, each to his own end of bringing about confederation (for Ross) or of stopping it (for Paquet.) For the latter the railroad should be opposed because it would lead to political union as the mal-aimé Durham had correctly surmised. For the former, the

railroad should be supported for precisely the same reason. For our study of the administrative-constitutional link, however, the important point is that Lord Durham had the wit to foresee technological innovation as a sure path to constitutional reform and that men on both sides of the 1865 debate recognized that he was right.

The Confederation fathers of 1865 had no need of promptings from Lord Durham to see the connection between the Intercolonial Railway and confederation. Thus, anticonfederationist James Currie, noting that "some leading men in Halifax had said `the Railway first, and Confederation next,'" argues that the simplest way to defeat confederation would be to reject the railway proposal. He was satisfied that "if the Intercolonial Railway project were taken out of the scheme [i.e., the proposed constitution,] we would not hear much about it afterwards."[83] Although Currie, like Lord Durham, saw a close connection between the railway and confederation, he did not fear the railway as simply a means to confederation. His argument was that the confederationists in the Maritime provinces cared only about the railway but would cynically embrace confederation as a necessary evil. This position was expanded by A.A. Dorion who attributed to Samuel Tilley, the prominent New Brunswick confederationist, the sentiment "no railway, no confederation." Indeed, A.A. Dorion went on to denounce the entire confederation plan as nothing but an elaborate scheme to rescue the financially troubled Grand Trunk Railroad.[84]

Confederationist H.L. Langevin candidly acknowledges that his cause would be doomed without the Intercolonial Railway, "for it is almost impossible that so great an enterprise [as the Intercolonial Railway] should succeed unless it is in the hands of a great central power."[85] Thus Langevin joins his opponents Currie and Dorion in acknowledging, albeit for very different reasons, the close link between the proposed railroad and confederation itself. In the passage just cited, however, Langevin seems to reverse Lord Durham's timetable because he envisions confederation ("a great central power") preceding the railroad. Langevin's priorities differ sharply from those of his

fellow confederationist A.M. Smith who, rather surprisingly, concedes that "[a]s a commercial undertaking, the Intercolonial Railway presents no attraction." He then adds, however, that "for the establishing of those intimate social and commercial relations indispensable to political unity between ourselves and the sister provinces, the railway is a necessity."[86]

Although there are many variations on the theme, the theme itself is clear and unambiguous.[87] Regardless, of how they might differ on the merits of the Quebec Resolutions , the men of 1865 were at one in seeing a close connection between confederation and the great public enterprise of the Intercolonial Railway. That is, they found in railroads, the "high tech" of their day, a path to meaningful compromise that created a great nation. Today there is no dearth of technological innovation; it is the hallmark of our time. Perhaps some bright statesmen in Quebec City or Ottawa will seize upon it to restore that nation.

The Image of the United States in the Confederation Debates

The United States has played a muted role throughout the present constitutional crisis of its neighbor to the north. The official position of the American government has been to encourage Canadians of all stripes to patch up their differences, while it maintains a low profile to avoid aggravating a situation that is already volatile enough. Some attention has been given to the likely impact of an independent Quebec upon the North American Free Trade Agreement, but this question tends to be readily subsumed under the larger question of the economic viability of Quebec as a nation in its own right. Howard Galganov, an outspoken defender of anglophone rights in Quebec, had little to show for his ill-advised trip to Wall Street to discourage American investment in his province because of its language policies. Traditional trade disputes between Canada and the United States continue apace, but this is simply business as usual with little relevance to Quebec's claims of sovereignty.

This subdued role contrasts sharply with the dark shadow cast by the United States upon the Confederation Debates of 1865 which took place during the closing months of the American Civil War. One of the major arguments for confederation was the need to prepare for a possible attack from the United States once the war was over. Canadian statesmen of all persuasions knew that the government of the United States was greatly displeased with the sympathetic position of the British Empire toward the southern states throughout the war. Several minor but exceedingly unpleasant border skirmishes had not escaped the attention of thoughtful Canadians. The record of the debates reveals a serious concern that the victorious Union armies might soon invade Canada to settle some scores with the British Empire and even to annex certain sections of British North America. The statements that follow capture the spirit of this concern.

After noting the rapid march of recent events in the American Civil War, Thomas Ryan stated:

> Already we hear the great anticipated successes of the North. If the news be true that Charleston has been evacuated, it will be a severe blow to the cause of the South; and if the South be conquered, we know what have been the sentiments toward Canada expressed in the United States for the last three years. They will, perhaps, turn north for further conquests, and try to humble a power which has not in every way met their wishes. We should, at all events, be prepared to meet such a contingency, prepared to repel attack, prepared to defend our homes and the free Constitution under which we live.[88]

John Rose expressed his hopes that peaceful relations could be maintained with the United States, but then warned ominously:

> But at the same time we cannot conceal from ourselves the fact that within the last three or four years we have several times been seriously threatened. It is not in the power of any man to say when the cloud, which so darkly overshadows us, may burst in full fury on our heads, and those who have the direction of the destinies of

this country ought to be prepared to do all that in them lies to place it in a position to meet that event.[89]

Recalling past military glories, William McGiverin assured his listeners that, if the proper precautions were taken, "we are in quite as good a position to hold our own as those who successfully resisted the invader in the war of 1812."[90] Joseph Blanchet echoed these patriotic sentiments with his own pledge that if "we are ever invaded by the United States, I shall ever be ready to take up arms to drive the invaders out of the country."[91] J. Beaubien linked military preparedness specifically to confederation by asserting that the proximity of the British colonies to the United States required that they "unite together in order to form a stronger nation, and one more able to withstand the onslaught of an enemy . . ."[92] For Thomas Ferguson the situation was grim indeed for the Americans "are at this moment a war-making and war-loving people."[93]

These statements all came from men who supported the Quebec Resolutions and used the military threat from the United States to bolster the case for confederation. Those opposed to confederation tended to be somewhat skeptical of the potential dangers of American aggression, but rather than deny them outright, they turned them to their own advantage. Thus, Matthew Cameron argued that if the military threat were as great as the confederationists say it is, the proper course would be to stop wasting precious time debating the merits of confederation and to get on with the far more urgent business of building the proper fortifications at once.[94] J.B.E. Dorion cleverly tied the threat of war to his favorite theme on the need to submit the Quebec Resolutions to the people for their consent. Answering those who recalled the patriotic days of 1812, Dorion argued that "you must not suppose that the people will fight as they fought in 1812." And why not? Because the people cannot be expected to fight to defend "a Confederation like this which is now proposed" to be forced upon them "without consulting them and even against their will."[95]

American influence on the Confederation Debates was not limited to the fear of armed invasion. American ideas and institutions made their mark as well. Although the Confederation fathers outbid one another in condemning American republicanism, the republican Constitution of the United States fared better at their hands, playing, as it were, to mixed reviews, while top-billing was reserved for the framers of the American Constitution. Let us examine more closely how the Confederation fathers regarded these three crucial elements of the American founding: republicanism, the constitutional text, and the authors of that text.

We have already had occasion to note the pervasive commitment to monarchy among the participants in the Confederation Debates. Consequently, their pejorative references to American republicanism come as no surprise, being simply the opposite side of the monarchist coin. Thus Benjamin Seymour can refer to "all the wild republican theories of our neighbor" while Philip Moore rejects the proposed constitution because "the engrafting of this system of government upon the British Constitution has a tendency to at least introduce the republican system."[96] Alexander Vidal, one of the few confederationists who favored referring the proposed text to the people, warned his fellow confederationists that "I am not to be deterred from expressing my views by the taunt of republicanism."[97] J.O. Bureau, an opponent of confederation, professed to detect "republican sentiments" among members of the government who had introduced the Quebec Resolutions, whereas Colonel Frederick Haultain, a staunch confederationist, suspected some of his opponents of being "men with annexation tendencies . . .who are inclined toward republican institutions."[98] Thus, both friends and foes of confederation used republicanism as a club to beat their opponents. At times American republicanism was identified with democracy, as when David Macpherson predicted that failure to approve the confederation plan would put Canada on an inclined plane leading inevitably to its incorporation into the American union. Canadians would find themselves "plunged

into a malstrom (sic) of debt, democracy and demagogism." To which his listeners shouted "Hear, Hear."[99]

The American Constitution itself fared better at the hands of the Confederation fathers than the republican principles which underlay it. For every John Sanborn labelling it as "that horror of our constitution-makers," there was a David Christie ready to celebrate "the wonderful fabric of the American constitution."[100] As noted above, John A. Macdonald took the lead in singling out the decision to leave residual power with the states as the great flaw in the constitution of the United States. Learning from this American mistake, the confederationists proposed to confer on the "General Parliament" the sweeping power "to make Laws for the peace, welfare and good government of the Federated Provinces"--the forerunner of the POGG clause of the BNA Act. Although Macdonald was unrelenting in condemning this fundamental flaw in the American Constitution, he also found in it much to admire. At the very outset of the Confederation Debates, he made it clear that he would not follow "the fashion to enlarge on the defects of the Constitution of the United States," adding that he was "not one of those who look upon it as a failure." On the contrary, he considered it "one of the most skillful works which human intelligence ever created" and "one of the most perfect organizations that ever governed a free people." To recognize "that it has some defects is but to say that it is not the work of Omniscience, but of human intellects." Canadians are "happily situated in having had the opportunity of watching its operation, seeing its working from its infancy till now." Consequently,

> [w]e can now take advantage of the experience of the last seventy-eight years, during which that Constitution has existed, and I am strongly of the belief that we have, in a great measure, avoided in this system which we propose for the adoption of the people of Canada, the defects which time and events have shown to exist in the American Constitution.[101]

This is a rather generous assessment, coming as it did near the end of the fourth year of the dreadful civil war fought to preserve the Constitution of the United States.

Not everyone agreed with Macdonald's analysis that the tragic flaw in the American Constitution lay in its defective federalism which failed to give adequate power to the national government. Leonidas Burwell found no fault with American federalism. Indeed, he thought that "as a principle of free government it has been successful" and he doubted "whether history records a like example, under ordinary circumstances, of such great success and prosperity." For Burwell, the failure to come to terms with slavery was the great American tragedy. Slavery "was the cause of the war. It was opposed to the spirit of the age and had to be eradicated."[102] David Christie echoed Burwell's sentiments. The American Constitution

> has stood many rude tests and but for the existence . . . of an element in direct antagonism to the whole genius of their system--negro slavery--the Constitution would have continued to withstand--yes, and after the extinction of that element, will continue to withstand--all the artillery which their own or foreign despotism can array against it.[103]

For the most part, references to the Constitution of the United States came in general statements on its spirit and institutions with little attention to specific textual provisions. There were some interesting exceptions, however. The partial veto of the American President over acts of Congress struck anti-confederationist Philip Moore as an attractive alternative to Parliament's power of disallowance over provincial legislation.[104] J.B.E. Dorion praised the complex procedure Americans required for constitutional change and contrasted it pointedly with the willingness of the confederationists to adopt the Quebec Resolutions by a simple act of the Canadian Parliament with no recourse to the people.[105] John A. Macdonald cited the proposal in the Quebec Resolutions to subject criminal offenses to federal jurisdiction as a marked improvement over the American constitutional practice of leaving such matters to the states.[106] On the other hand, in a somewhat confused reference to the contracts clause--i.e., the clause in the American Constitution which forbids states from impairing the obligation of contracts--John Sanborn lauded the

Americans for providing greater protection for property against state governments than the Quebec Resolutions offered against provincial governments.[107]

Despite its republican foundations, the Constitution of the United States received, on balance, rather high marks from the monarchist Canadian Parliamentarians of 1865. The rave reviews, however, were saved for the framers of the American Constitution and appeared in such statements as Joseph Cauchon's reference to "the illustrious founders of the Union" and Isaac Bowman's salute to the American founding fathers as "some of the wisest and ablest statesmen." [108] Even when George-Etienne Cartier condemns George Washington's "insidious offer" to Quebecers to join the American Revolution, the context makes clear that the target of his contempt is the offer itself but not the man from whom it issued.[109] The most remarkable encomium, however, came from John Ross who suggested that opponents of confederation might overcome their narrow provincialism if they would take the trouble to "read the debates which preceded the establishment of the American Constitution." He singled out the debates in Virginia, "which at that time, by reason of its wealth and population, bore a similar relation to the other colonies to that which Canada now bears to the Lower Provinces." By reading the great speeches of "the Madisons, the Marshalls, the Randolphs, the Henrys, the Lees and others," opponents of confederation would see that "those great patriots," setting aside the small village feelings and animosities tending to embarrass and to destroy harmony, . . . "acted like great men, true and noble men as they were, and applied themselves to their task with the purpose of bringing it to a successful issue."[110]

In view of the high esteem in which the Confederation fathers held the framers of the American Constitution, it seems fitting that we examine the extent to which they used ideas, strategies and arguments similar to those employed by their American predecessors. Here we meet at once an embarrassment of riches. The founding fathers in both countries: a.) insisted that the time for constitutional reform was "now or never," with the Americans threatening the grim spectre of civil war or foreign invasion and the Canadians the

inevitable slide down the inclined plane leading to annexation to or conquest by the United States;[111]

b.) maintained that the new constitution would provide better public administration;[112]

c.) congratulated their fellow citizens on having the rare opportunity to choose their destiny freely;[113]

d.) answered arguments from their opponents to the effect that enhanced military readiness would provoke attacks from potential enemies;[114]

e.) endured severe attacks from their opponents on alleged procedural irregularities and outright illegalities in their innovations;[115]

f.) and weighed the merits of invoking divine intervention on behalf of their efforts.[116]

Although the topics from which to choose are many and varied, I have selected two that seem particularly well suited to our present inquiry. The first revisits the troubling issue of recourse to the people to approve constitutional changes and the second examines the constructive use of ambition by statesmen.

One of the major strengths of the American Constitution is that it was approved by special conventions held in each of the states from 1787 until 1791. The delegates to these conventions were chosen by those who had the suffrage in accordance with the electoral laws of the several states at that time. Thus, the American Constitution came as close as late eighteenth century mores would permit to implementing the standard laid down in the Declaration of Independence that governments derive their just powers from the consent of the governed.

As we have seen, the Canadian Confederation did not enjoy a similar process of ratification, much to the chagrin of the opponents of confederation.

Despite the historical fact that the American Constitution was ratified by the people, James Madison, writing as Publius in The Federalist Papers, had some serious misgivings on the wisdom of submitting important questions to the people on a frequent basis. Federalist 47-51 addresses the problem of how to preserve the regime of separation of

powers envisioned by the framers of the Constitution. That is, if one of the three great branches of the proposed government should overstep its constitutionally appointed bounds, how could the proper balance be restored? After dismissing as ineffective the naïve reliance on mere "parchment barriers," he turns to the proposal of his friend Thomas Jefferson that whenever "two of the three branches of government shall concur in opinion . . . that a convention is necessary for altering the constitution or correcting breaches of it, a convention shall be called for the purpose." (Madison's emphasis.)[117]

Despite his high regard for Jefferson, Madison rejects the notion of "occasional appeals to the people" to correct constitutional problems. He gives several profoundly conservative reasons for this. First, he fears that "every appeal to the people would carry an implication of some defect in the government." By calling public attention to these defects, the appeals "would in great measure deprive the government of that veneration which time bestows on everything and without which perhaps the wisest and freest governments would not possess the requisite stability." He recognizes that such a strong commitment to the status quo would make no sense "[i]n a nation of philosophers" where "[a] reverence for the laws would be sufficiently inculcated by the voice of enlightened reason." Since, however, "a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato," wise statesmen should be cautious about encouraging measures that might undermine the "veneration" necessary for stable government. Aware that his position makes generous concessions to the need to cultivate popular prejudices in such a way that they favor the established order, Madison concludes this part of his argument by wryly observing that "the most rational government will not find it a superfluous advantage to have the prejudices of the community on its side."[118]

He then takes up a second line of argument no less conservative than the first: "The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society." He acknowledges that his fellow

Americans approved new constitutions in most of the states shortly after the Revolution with few untoward effects, but attributes this success to the extraordinary events at that time. These changes took place under wartime conditions "which repressed the passions most unfriendly to order and concord" and created "an enthusiastic confidence of the people in their patriotic leaders." Since Americans cannot count on perpetuating such extraordinary solidarity, they may wish to observe considerable caution in subjecting constitutional changes to popular approval.

It should be noted that James Madison wrote these words in The Federalist Papers, the very purpose of which was to rally public support for the proposed constitution. Thus, he did not oppose all recourse to the people to endorse constitutional change. His objection was against an excessive use of this procedure.[119] The Canadians of 1865 were no strangers to constitutional change. Perhaps James Madison, despite his impeccable republican credentials as author of the first amendment might have understood rather well the confederationists' reluctance to submit their handiwork to popular appeal as well as their obvious embarrassment in failing to do so. As for the contemporary constitutional crisis, prudence might urge him to modify his doctrine to fit the democratic spirit of our times, but perhaps he would do so cautiously and with considerable misgivings about the possible dangers of frequent referenda in both Quebec and in all of Canada.

Having rejected Jefferson's recourse to the people as the solution to the problem of how to safeguard the principle of separation of powers against abuse, Madison gives his own solution in the famous Federalist 51. Although the primary safeguard against official abuse must always come from the people themselves, "experience has taught mankind the necessity of auxiliary precautions." Chief among these is the lawgiver's need to design the constitution in such a way as to channel the ambition of statesmen along socially constructive lines. This entails "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." This leads Madison to write the best known lines in American political science:

"Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

Although the Canadian Confederation is not grounded in the principle of separation of powers, the broader implications of the creative possibilities of political ambition were not lost on the Confederation fathers. In his opening address to the Legislative Assembly, John A. Macdonald suggested that confederation would enhance the prestige of Canada to such an extent that the representative of Queen Victoria in Canada would always be a man of the highest quality, perhaps even "one of her own family, a Royal Prince." Although Canadians could put no restrictions on Her Majesty's prerogative to appoint whomever she wished, he added that once confederation is in place, "it will be an object worthy of the ambition of the statesmen of England to be charged with presiding over our destinies."[120]

Canadian statesmen would also feel the attraction of ambition once they have a broader political field for their actions. Lord Durham had anticipated this development when he wrote that the union he envisioned in 1839 "would elevate and gratify the hopes of able and aspiring men. They would no longer look with envy and wonder at the great arena of the bordering Federation, but see the means of satisfying every legitimate ambition in the high office of the judicature and executive government of their own union."[121]

Charles Alleyn echoed Lord Durham's sentiments when he predicted that with confederation a "worthy field will be opened for the ambition of our young men and our politicians will have a future before them, and may fairly aspire to the standing and rewards of statesmen. (Cheers.)"[122]

The release of creative energy occasioned by confederation was felt as far away as British Columbia. Although British Columbia was not a party to the Quebec Resolutions, many people in that part of British North America felt--correctly as it turned out--that the proposed confederation would soon include them as well. H.L. Langevin read aloud an editorial from a British Columbia newspaper which included the following consideration among the advantages of confederation:

> Instead of seeing the talent of our statesmen fettered, harassed and restrained within the narrow limits of local politics, we shall find its scope extended to a whole continent, while a more vast and more natural field will be thrown open to the active and enterprising spirit of the North American Provinces. [123]

Participants in the Confederation Debates felt that the seriousness of the topic under consideration was bringing out the best in them. Colonel Arthur Rankin allowed that "it is to me a matter of congratulation to observe, that at last, something has arisen which has given a higher tone to the debates in this House, and to the utterances of our public men." He attributed this improvement "to the fact that we are discussing a question of greater importance than has ever before been brought under our consideration." Finally, he added, the Legislative Assembly has turned its attention "to something worthy of the consideration of gentlemen who aspire to establish for themselves the reputation of statesmen."[124]

In a remarkably eloquent address, Thomas D'Arcy McGee celebrated the capacity of the confederation question to elevate the tone of public life throughout British North America. "The provincial mind, it would seem, under the inspiration of a great question, leaped at a single bound out of the slough of mere mercenary struggle for office, and took post on the high and honorable ground from which alone this great subject can be taken in all its dimensions." He congratulated the "various authors and writers" on confederation because they seem "to be speaking or writing as if in the visible presence of all the colonies." No longer are such public men merely "hole-and-corner celebrities." They now write and speak as though "their words will be scanned and weighed afar off as well as at home." He was pleased to observe that "many men now speak with a dignity and carefulness which formerly did not characterize them, when they were watched only by their own narrow and struggling section, and weighed only according to a stunted local standard." He hoped that the proposed confederation would "supply to all our public men just ground for uniting in nobler and more profitable contests than those which have signalized the past."[125]

Thomas D'Arcy McGee's high-minded sentiments challenge serious statesmen on both sides of today's Quebec separation issue to maintain a level of public argument worthy of their subject. The subject itself merits the best efforts of ambitious men and women, for on one side there is the creative exhilaration of founding a new nation and on the other the patriotic duty of saving an old one.

Conclusion

To conclude this article, I shall revisit John Ross's extraordinary advice to his fellow legislative councillors that they read the Virginia debates on the ratification of the Constitution of the United States. He mentioned specifically, James Madison, John Marshall, Edmund Randolph, Patrick Henry and Richard Henry Lee. Anyone who followed Ross' advice might have been surprised to discover that two of these five men, Henry and Lee, opposed ratification of the Constitution and a third, Edmund Randolph, somewhat characteristically, straddled the issue by refusing to sign it as a delegate to the Constitutional Convention in Philadelphia and then reluctantly supporting it during the crucial debates in Richmond. Henry, Lee, and, to a lesser extent, Randolph were "Anti-Federalists," i.e., they formed part of the broad, articulate and very able opposition to the proposed constitution. Like most backers of losing causes, the Anti-Federalists were not treated kindly by history.[126] This began to change, however, as Americans prepared to celebrate the bicentennial of their constitution in 1987. Thanks to the prodigious scholarly efforts of Herbert J. Storing, the writings and speeches of the Anti-Federalists were compiled in a seven-volume work entitled The Complete Anti-Federalist.[127] Storing made a powerful argument that the Anti-Federalists should be included among the founding fathers of the Republic even though they opposed the constitution which still governs that Republic. His reason was that they contributed substantially to "the dialogue of the American founding." That is, the Constitution of the United States was a product of a great public argument as befits the origins of a free society and the Anti-Federalists formed an

essential, though ultimately unsuccessful, part of that founding argument. Today American constitutional scholars take the Anti-Federalists far more seriously than they did just two decades ago, crediting them with initiating the movement for the Bill of Rights and for pointing out serious flaws in the constitution that are still with us today. Contemporary Americans familiar with the Anti-Federalist literature bring a much richer understanding to their country's constitutional problems than those unfamiliar with it.

I am not prepared to repeat Ross's advice today; but, in the spirit of his comments, I shall take the liberty of urging contemporary Canadians to familiarize themselves not with the Virginia statesmen of 1788, but with their own Canadian statesmen of 1865, including those who opposed confederation--the Canadian version of the American Anti-Federalists. Etienne Taché urged those "honorable members" of the Legislative Council "who objected to any particular measure" to make their objections part of the record "and so secure the advantage of placing their views before the country."[128] The "honorable members" were not bashful about airing their dissenting views nor were the members of the Legislative Assembly. Perceptive contemporary statesmen may find in these anti-confederationist arguments considerable insight into the flaws of Canadian federalism. The same holds for the arguments of many of those Quebecers who supported confederation but did so with a far more guarded interpretation of the extent of federal power over the provinces than a literal reading of the confederation text would suggest. Here they will find Canadian public argument at its best[129].

Robert Vipond surely had it right when he said that the Confederation Debates of 1865 lack the depth of the American debates of 1787-88. Events did not force the Canadians of 1865 to examine "first political principles" as they did for the Americans who had recently emerged from a revolution that had made a definitive "self-conscious break with the past."[130] Consequently, when compared with their American counterparts, the Canadian debates may seem forbidding, burdened as they are with admittedly tedious discussions on how to finance railroads, canals, and other public works. But in this very

tedium, with its meticulous attention to exquisite administrative detail, contemporary Canadians may learn something about themselves and what their history tells them of how they go about solving their problems, even problems of the highest questions of state such as those that Quebec asks today.

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[1] John A. Rohr, To Run A Constitution: The Legitimacy of the Administrative State, (Lawrence, KS: University Press of Kansas, 1986); Founding Republics in France and America: A Study in Constitutional Governance (Lawrence KS: University Press of Kansas, 1995.)

[2] Hannah Arendt, On Revolution (New York: Viking Press, 1963): 214.

[3] Unfortunately, the records of the Quebec Conference of October, 1864 are fragmentary at best. See A.G. Doughty, "Notes on the Quebec Conference, 1864," Canadian Historical Review (March, 1926): 26-47. For informative accounts of what is known about this conference, see Donald Creighton, The Road to Confederation: The Emergence of Canada, 1863-1867, (Toronto: Macmillan, 1964): chapters 5-6; W.L. Morton, The Critical Years: The Union of British North America, 1857-1873, (Toronto: McClelland and Stewart, 1964): 155-162; Robert Rumilly, Histoire de la Province de Québec, 2 vols. (Montréal: Editions Bernard Valiquette, 1941): I, 22-26; P.B. Waite, The Life & Times of Confederation 1864-1867, (Toronto: University of Toronto Press, 1962): chapter 7.

[4] Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 3d Session, 8th Provincial Parliament of Canada, (Quebec: Hunter, Rose & Co., 1865.) Hereafter Debates. In referencing the Debates, I will give the page or pages and, where appropriate, I will also insert parenthetically the numbers 1 or 2 and the letters a, b, and c to indicate the column from which the citation was taken and its position within the column. Thus (2c) means the text cited can be found in the lowest third of the second column; (1a) means the top third of the first column; (1b) the middle third of the first column, etc.

[5] To keep this article within manageable bounds, I had to confine its examination of the similarities between then and now to the three topics mentioned in the text. The choice was not an easy one. Many interesting topics must be saved for another day, the chief among them being the 1865 version of Quebec as a distinct society and the rights of the anglophone minority in Quebec. Readers interested in these topics will find helpful materials in the debates. Although I did not find the expression "distinct society" in ipsissimis verbis in the debates, the idea is certainly there. Usually it is expressed in terms of "peoples" and "races." As might be expected, there is considerable confusion and inconsistency in how these terms are used, just as is the case with today's "distinct society." There can be no doubt, however, that the fathers of Confederation saw Quebec as raising questions far more profound than those raised by the defining characteristics of the other provinces. Clearly, they did not see Quebec as simply a province comme les autres. On the distinct nature of Quebec, see the following passages: 29(1c); 85(16); 363(1a); 365(1a); 423(1b); 463(1b); 588(2c); 569-599; 601(1b); 779(2b)-780(1c); 794(1a); 823(1a); 892; 901(1a); 944-945; 984(2c)-985(1a.) These texts show that the distinctiveness of Quebec was seen as qualitatively different from attributes of the other provinces which made them different in their own way. See Debates, 91(1b);

93(2b)-94; 121(1b); 158(2c)-159; 178(1a); 258(2c)-259; 280(2b); 758(1b); 861(2a.) One of the striking differences between the Constitution of the United States and the Quebec Resolutions is the latter's pronounced tendency to make specific statements providing exceptional treatment for various provinces. For Quebec, see especially Resolutions 20, 33, 35 and 46. For the other provinces, see especially Resolutions 2, 9, 12, 14, 29, 40, and 43. The passages cited reveal that the exceptions for Quebec are of a far more profound nature than those for the other provinces.

The status of the anglophone minority in Quebec tended to be discussed more in terms of religion than of language. The following citations are pertinent: 173 (2b); 236-237 (1); 405 (2)-406; 432 (2); 640 (2b)-644; 672 (1b)-673. For matters other than religion, see 90 (2b); 408 (2c)-409 (1a); 793.

[6] Debates, 381 (2c) and 433 (2c.)

[7] For an account of the Report of the Royal Commission on Aboriginal Peoples, see Maclean's (2 December 1996): 16-19.

[8] See, for example, Attorney General of Manitoba et al. v. Attorney General of Canada, et al., 28 September 1981 ("The Patriation Reference") and Queen v. Ford, 15 December 1988 ("The Quebec Sign Case"). Both are reported in Peter H. Russell, Rainer Knopff, and Ted Morton, eds., Federalism and the Charter: Leading Constitutional Decisions (Ottawa: Carlton University Press, 1993): 706-759 and 557-581.

[9] See James G. Snell and Frederick Vaughan, The Supreme Court of Canada: History of the Institution (Toronto: University of Toronto Press, 1985): 3-12.

[10] Rohr, To Run A Constitution, 83, 163-166, 175-176; Founding Republics, chapter 5.

[11] For examples of brief discussions on judicial power, see Debates, 690(1a)-(2c) and 698(1a.)

[12] Ibid., 823(2a.)

[13] Ibid., 833(2c)-834(1a.)

[14] Ibid., 62(1c.)

[15] Ibid., 396(2b.) The conservative character of nineteenth century Canadian culture has come under close scrutiny recently by scholars who find strong liberal tendencies during this period. For a particularly cogent statement of this position, see Janet Ajzenstat, The Political Thought of Lord Durham, (Kingston: McGill-Queen's University Press, 1988.)

[16] Ibid., 87(1c); 464(1b); 556(1c); 776(1a); 950(1b.)

[17] Ibid., 776.

[18] Ibid, 777(2c.); see also 849(1) and 335(1c-2a.) The issue of marriage and divorce was pervasive throughout the Confederation Debates. See 690-691, 388, 911, 859(c), and 15 (2c.)

[19] See, for example, 640(1c)-644(1c); 672(1b)-673(1c); 843(1); 850(1a-b); 926(1c)-927(1c); 236(1a)-237(2b.) The acrimonious debates on religion were not without their lighter moments as when French confederationists professed dismay at discovering that French Quebecers opposed to confederation who had not seen the inside of a church for years suddenly appeared as pious defenders of the faith they had long since abandoned. See 477(1b); 699(1c.) As the final touches were being applied to this article in January, 1997, the confessional school question arose anew. This time, however, the issue had little to do with pitting Catholics against Protestants. There is apparently a widespread consensus in Quebec that the confessional school arrangements worked out at the time of Confederation are an anachronism and that today the schools should be aligned along linguistic rather than religious traditions. To do this, however, it seems that the Quebec government would be placed in the awkward position of seeking an amendment to the Constitution of 1982 whose legitimacy has never been recognized in that province. See Paul Cauchon, "Québec relance le dossier," Le Devoir, (21 janvier 1997): 1. The immediate background of the proposal to diminish the role of the confessional schools can be traced to a report from La Commission des états généraux sur l'éducation in October, 1996. See "Les Québecois disent non `a l'école laïque," La Presse (11 octobre 1996): 1; Michèle Ouimet, "La hache dans les écoles d'elite," La Presse (11 octobre 1996): B1; Jean-Pierre Proulx, "Les écoles confessionnelles ne sont pas toutes imposées par la Constitution canadienne," Le Devoir (10 octobre 1996): 7.

[20] Jean-Charles Bonenfant, "Les craintes de la minorité anglo-protestante du Québec de 1864 à 1867," Les Cahiers des Dix No. 36 (1971): 59-63.

[21] Debates, 641(1c)-643 and 912.
[22] Ibid., 643(1c.)
[23] Richard Gwynn, Nationalism Without Walls: The Unbearable Lightness of Being Canadian, (Toronto: McClelland and Stewart, 1995).
[24] For a particularly thoughtful discussion of the confessional school problem in the context of Quebec's "vide spirituel," see the interview given by Fernand Dumont for a special 25th anniversary issue of L'Actualité (15 septembre 1996): 86-96.
[25] The English version of the referendum question read as follows: "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?"
[26] Russell, et al., Federalism and the Charter: 38. The statement remains true today despite the recent decision of the Supreme Court of the United States in U.S. v. Lopez 115 S. Ct. 1624 (1995.)
[27] Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council," Manitoba Law Journal, 23 (January, 1996): 509.
[28] The story is told with admirable clarity in Robert P. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution, (Albany: SUNY Press, 1991): chapter 2.
[29] Risk, 500-501, citing Board of Commerce Reference [1922] 1 A.C. 191 at 197-8 and Fort Frances Pulp and Power v. Manitoba Free Press [1923] A.C. 696 at 703 and 704.
[30] The differences between the two texts can be traced to a conference in London where certain changes were introduced into the text approved in the colonies to meet objections from the mother country. See Donald Creighton, The Road to Confederation: chapter 14.
[31] Debates, 33(2b.) For further development of this theme by John A. Macdonald, see pages 40(1c)-42(2c.)
[32] Ibid., 807(2b.)
[33] Ibid., 818(1c.)
[34] Ibid., 823(1b.)
[35] Ibid., 911(2a.)
[36] For examples of statements supporting legislative union, see Ibid., 75(2); 425(1a); 465(1a); 749(2c); 806(2c); 818(2c); 918(1a); 976(2.)
[37] Ibid., 9(2c.)
[38] Ibid., 55(1b.)
[39] Ibid., 373(1a.)
[40] Ibid., 702(2b.)
[41] Resolution 29.
[42] For a discussion of the confederationists' studied efforts to avoid clarifying jurisdictional questions, see Vipond, chapter 2.
[43] Debates, 859(2a.)
[44] Ibid., 623(2b.)
[45] Ibid., 689(2c.) For similar statements, see 690 and 176(1c.-2b.) See note 11 above for Cartier's answer on how to decide jurisdictional questions.
[46] The role played by the Reform Party during the debates is beyond the scope of this paper. See Vipond, chapter 2, for a good discussion of this topic.
[47] Peter H. Russell, Constitutional Odyssey: Can Canadians Become A Sovereign People? 2d (Toronto: Univ. of Toronto Press, 1993): 1.
[48] Ibid., 2
[49] Debates, 797(2b.)
[50] Ibid., 864(1a.)
[51] Ibid, 985 (1b.)
[52] See, for example, 12(2c); 120(1b); 277(2b); 733(2a); 883(1b); 894(2c); 934(1b.)
[53] See Creighton, 246-252.
[54] Debates, 77(2c.) For similar statements, see 471(2)-472(1); 579(2c); and 1004.
[55] Debates, 330(1b.)

[56] Ibid., 269(1b.)
[57] Ibid., 292(2c.)
[58] Ibid., 295(1c-2a.) Currie's proposal was received favorably by some supporters of the Quebec Resolutions. See the remarks of Alexander Vidal and Walter Dickson, Debates, 284-290 and 301-309
[59] Ibid., 11(2c.) For another statement anticipating a later appeal to the people, see Debates, 840(2b.)
[60] Ibid., 962(2c.)
[61] Ibid., 1019(2b.)
[62]Ibid., 327(2b,) 769-770, 990(1b,) 110-115 passim, 432(1c,) 765(2a,) 809(1c,) 888(1,) 891(2c,) 995(2b.)
[63]"PM Eyes Way to Improve Federation," Toronto Star (22 November 1995); reprinted in NEWSCAN of 24 November 1995.
[64] The following citations provide examples of the connection between administrative and constitutional questions after the referendum of Oct. 1995. "Today and Tomorrow: An Agenda for Action," Report of the Confederation 2000 Conferences (Ottawa, 1996); Steven A. Kennett, "The Environtmental Framework Agreement: Reforming Federalism in Post-Referendum Canada," Resources 52 (Fall, 1995); "Environmental Management Framework Agreement," Canadian Council of Ministers of the Environment, (Winnepeg: October, 1995); Robert Matas, "Environment Pact Transfers Powers to Provinces," The Globe and Mail, (20 January 1996); "PM Eyes Ways to Improve Federation," Toronto Star, [reprinted in NEWSCAN of 24 November 1995,] (22 November 1995); Mary Janigan and E. Kaye Fulton, "The Master Plan: A Draft for a New Canada Goes Before the Cabinet," Maclean's (5 February 1996); "New Wisdom in Quebec," The Globe and Mail, [reprinted in NEWSCAN of 22 March 1996] (20 March 1996); E. Kaye Fulton and Mary Janigan, "Previewing the Budget," Maclean's (29 February 1996); David Roberts, "Distinct Society Status would not Necessarily Mean Extra Power for Quebec, Dion Says," The Globe and Mail, [reprinted in NEWSCAN of 12 April 1996] (11 April 1996): Barry Came, "Finding Common Ground in Quebec," Maclean's (1 April 1996); Alain Dubac, "Une Caricature du Québec Contemporain," La Presse, (16 avril 1996); Mario Fontaine, "Johnson Rue dans les Brancards," La Presse (16 avril 1996); Michel Vastel, "Le Canada . . . `a minuit moins une," L'Actualité 21 (1er mai 1996): 14-16; Neville Nakivell, "Referendum Threats Raise Warning," The Financial Post [reprinted in NEWSCAN of 3 May 1996] (2 May 1996); Edison Stewart, "Unity Panel Calls for Urgent Reform of Federation," [reprinted in NEWSCAN of 10 May 1996] (5 May 1996); Barry Came, "A Credible Effort," Maclean's (20 May 1996; "Building a Stronger Canada": Confederation 2000 Business Council on National Issues (3-4 May, 1996): passim; "Provinces Can Control Job Training, Ottawa Says," NEWSCAN (31 May 1996): 2; Barry Came, "A New Tune in Quebec City," Maclean's (17 June 1996): 14-16; Brenda Branswell, "A Hot Time in the Old Town," Maclean's (24 June 1996): 12-14; "National Unity of National Securities" Globe and Mail [reprinted in NEWSCAN] (25 June 1996); Peter C. Newman, "A Revolutionary Twist on Indian Statehood," Maclean's (1 July 1996): 33; Anthony Wilson-Smith, "Mission Accomplished," Maclean's (1 July 1996): 17-19; "Co-operation the Focus of First Ministers' Meeting," Canada Quarterly, 4(3) (July, 1996): 1-2; Howard Schneider, "Floods Let Canada Wave Flag of Federalism," Washington Post (27 July 1996): 23A; Brenda Branswell, "Floodwaters on a Rampage," Maclean's (5 August 1996): 22-25; Mary Nemeth, "On the Offensive," Maclean's (2 September 1996): 11-13; Jim Bronskill, "CSIS Used Public Servants as Informants," Ottawa Citizen (6 September 1996): 1; Jean-Pierre Proulx, "Les Ecoles confessionnelles ne sont pas toutes imposées par la constitution canadienne," Le Devoir (10 October 1996): 7A; Brian Johnson, "Undiplomaatic Service," Maclean's (21 October 1996): 58-60; Brenda Branswell, "Quebec's Distinct Dilemma," Maclean's (26 October 1996): 18-19; Debra Brown, CBC News, reporting on meeting of Human Resources Minister Pierre Pettigrew with his provincial counterparts, (26 November 1996); Anthony Wilson-Smith, "Backstage Ottawa," Maclean's (9 December 1996): 25.
[65]See especially Premier Bouchard's remarks of 6 December 1995 at Laval in what L'Actualité called "un véritable discours du trône." Michel Vestel, "Bouchard l'énigme," L'Actualité 21 (février, 1996): 17-25 at 20. See also "A l'écoute du Québec," L'Actualité 21 (1er mars 1996): 13; Jean Paré, "Le Grand théâtre de Quebec," L'Actualité 21 (1er mai 1996): 8; Jean Chartier, "Plan O: l'opération secrète de Parizeau,"

L'Actualité 21 (1er juin 1996): 11-12; Michel Vastel, "Le Bilan de Fernand Dumont," L'Actualité 21 (15 septembre 1996): 86-96; "Lucien Bouchard and the Weekend Psychodrama," The Globe and Mail (28 November 1996) reprinted in NEWSCAN of 29 November 1996.)

[66] David V.J. Bell, "The Loyalist Tradition in Canada," Journal of Canadian Studies V(2) (May, 1970): 22-33.

[67] For the general statements, see Debates, 30(1c) and 131(2c); on public works, see 366(1a) and 920(1b): on education, see 95(1) and 411 (1b-2b.) The discussion of canals was pervasive throughout the debates. To sample some of the main arguments, see 79(1c); 639(1b-2c); 680(2c.]

[68] Ibid., 69(2.); 93(2b); 377(1c)-379; 158(2c)-159; 178(1a); 258(2c)-259; 280(2b); 758(1b): 861(2a); 945(2b)-947(2b.)

[69] Ibid., 229(2c.)

[70] Ibid., 979(2a.)

[71] Ibid., 832(2c.)

[72] Ibid., 920(2b.)

[73] Ibid., 17(2b.)

[74] Ibid., 18(1c.)

[75] Creighton, 250.

[76] Ibid., 250-251.

[77] Debates, 336(1c) and 430(2c)-431(1a.)

[78] Ibid., 109(1c); 201(2a); 377-379; 386(2b); 415(2c)-416; 467-469; 512(1b-c); 553; 677(2); 681(2); 693(2)-694(1); 702(1b); 703(1a); 751-757; 762(1c); 791; 812-814; 901(1a.)

[79] Administrative questions were by no means neglected by the Americans of 1787 or the Frenchmen of 1958. Quite the contrary, administrative questions were important in the founding debates in both countries. However, the French and the Americans tended to stress the formal powers of the administrative institutions rather than the financial management of specific regulated industries. For a fascinating account of the relationship between government and railroads in the early years of the Confederation, see Pierre Burton, The Last Spike, (Toronto: McClelland and Stewart, 1977.)

[80] Debates, 77(1a.)

[81] Ibid., 790(1b.)

[82] French Canadians have tended to look upon Durham as unmitigated racist with nothing but contempt for the French way of life in British North America. For a recent effort to rehabilitate Durham, see Ajzenstat. For examples of French Canadian resentment of Lord Durham, see 789; 844(1b); 850(2b)-852(2b); for a defense of Lord Durham, see 908(1c)-910(1a.)

[83] Debates, 52(1b.)

[84] Ibid., 251(2a.)

[85] Ibid., 356(2a.)

[86] Ibid., 901(2c.)

[87] For other statements linking railroads to confederation, see 896(1a,) 227(1a,) 132(2a,) 297(1b.)

[88] Debates, 338(1c.)

[89] Ibid., 415(2b.)

[90] Ibid., 466(1a.)

[91] Ibid., 549(2b.)

[92] Ibid., 550(2b.)

[93] Ibid., 960(1a.)

[94] Ibid, 745(2c)-746(1c.)

[95] Ibid., 868(2b)-869(1a.) For additional comments on the fear of war with the United States, see 97(2b); 130-131; 180(1c); 274(2c); 296(1a); 337-338; 343(1a); 415(2b); 465-466; 548(1c); 550(2b); 635(2b)-639(2c); 771(1c); 772(1a); 783(2b); 788(1c); 817(1a); 802(2c); 827(2b); 828(1b); 868(2c); 917(2b); 921(1c); 960(1a); 964(1c-2a); 967(2c); 1023(2b.) For statements debunking this fear, see 186(1b); 429(2a); 745(2c); 1016(2c.)

[96] Ibid., 205(1b) and 228(2c.)

[97] Ibid., 304(1b.)

[98] Ibid., 190(1a) and 636(1a.)
[99] Ibid., 152(1b.) The "inclined plane" metaphor was originally introduced by Etienne Taché at the very beginning of the debate in the Legislative Council and became a standard rhetorical weapon of the confederationists throughout the debates. See Debates, 6(1c); 343(1a); 82(2b); 152(2b); 155(2a); 206(2a); 325(1c); 326(1c); 332; 342(2c); 741(2c); 746(2b); 826(1a.) The metaphor was rejected as inappropriate at 46(1b) and 60(1c.) For examples of anti-republican statements in addition to those provided in the text, see 129(2b); 143(1b); 189(2c); 209(2b); 241(2c)-242(1a); 288(1a.)
[100] Ibid., 122(2b) and 219(2c.)
[101] Ibid., 32(2c.) Macdonald's assessment of the constitution was echoed by Thomas D'Arcy McGee; see Debates, 145(1b.)
[102] Ibid., 446(2a-b.)
[103] Ibid., 212(1c.)
[104] Ibid., 238(2c.)
[105] Ibid., 228(2c)-229(1a.) Dorion does not have the American system for amending the constitution quite right, but his description is close enough to support the point he was making when he introduced it into the debates.
[106] Ibid., 41(1.)
[107] Ibid., 123(1c.) Sanborn correctly refers to "the celebrated Dartmouth College decision in which Webster so distinguished himself." He mistakenly states that the case turned on a clause in the Constitution of the United States which "provides that no law could be passed which would affect the rights of property." The case actually involved the clause in the tenth section of the first article which prohibits the states from passing laws "impairing the Obligation of Contracts."
[108] Ibid., 565(2b) and 804(2b.)
[109] Ibid., 57(2c.)
[110] Ibid., 74(1b.)
[111] For an explanation of the inclined plane metaphor, see note 99. For examples of the use of the "now or never" argument at the time of the founding of the American Republic, see Rohr, Founding Republics, 184-189.
[112] Debates, 30(1c) and 131(2c); for the American position on this point, see Rohr, To Run A Constitution, 1-3.
[113] Debates, 363(1c); Federalist 1.
[114] Debates, 621(2a); John A. Rohr, "Constitutional Foundations of the United States Navy: Text and Context," Naval War College Review 45 (Winter, 1992): 68-83.
[115] Debates, 704(1b,) 705(1b,) 857(1b); Forrest MacDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution, (Lawrence, KS: University Press of Kansas, 1985): 279-284.
[116] Debates, 648(1a); on Benjamin Franklin's call for prayer at the convention, see Max Farrand, ed., The Records of the Federal Convention of 1787, 4 vols. (New Haven: Yale University Press, 1966): I, 450-452.
[117] Federalist, 49.
[118] Ibid.
[119] The constitution itself provides for special conventions at both the state and federal levels as alternative methods of amendment.
[120] Debates, 34(2a.)
[121] Ibid., 790(2a) where Lord Durham's Report was quoted.
[122] Ibid., 672(1a.)
[123] Ibid., 381(1c.)
[124] Ibid., 913(1a.)
[125] Ibid., 128.
[126] Lee and Henry are, of course, revered for their outstanding contribution to the Revolution, but few Americans are aware of their opposition to the constitution.

[127] Herbert J. Storing, ed., The Complete Anti-Federalist, 7 vols. (Chicago: University of Chicago Press, 1981.) See also Jackson Turner Main, The Anti-Federalists: Critics of the Constitution 1781-1788, (New York: Norton, 1961.)

[128] Debates, 83(1c-2a.)

[129] If there is any merit in my suggestion, the first practical step toward implementing it might well be to bring the Confederation debates back into print. At present, it is very difficult to purchase a copy of the complete text either in English or in French.

[130] Vipond, 20