ALTERNATIVE PASTS: LEGAL LIBERALISM AND THE DEMISE OF THE DISALLOWANCE POWER

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Constitutional debate in Canada has come increasingly to center on different "visions" of the country and the "alternative futures"[1] that these visions represent. It is often said that we are caught between an older view of political authority that vested sovereignty in Parliament and looked to Britain as the model, and a new one that seems to vest sovereignty in people, not governments, and consciously imitates the United States;[2] between "our historic participatory model"[3] that stresses the values of community and decentralized democratic participation, and an atomistic liberalism that stresses the protection of individual rights; between a definition of the scope of the country which seizes on the importance of regional identity, and a competing alternative which emphasizes the possibilities and rights of national citizenship.[4] In short we live suspended uneasily between the spirit of the *Charter of Rights* and the Meech Lake Accord.

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[1]I have adopted the term that Charles Taylor uses to guide his discussion of the implications of the *Charter* for identity and community. See Charles Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in Alan Cairns and Cynthia Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) at 183-229. The study was commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada, vol. 33.

[2]This view was given political expression in the debate leading up to the promulgation of the *Constitution Act, 1982* by then Premier Sterling Lyon of Manitoba, who couched his objections to a judicially enforced *Charter* in a lengthy defence of the parliamentary system. He concluded that Canadians were being asked "to discard the constitutional philosophy of 1867, and embrace the constitutional philosophy of 1776." See Sterling Lyon, "Notes for the Entrenchment of a *Charter of Rights*" First Ministers' Conference on the Constitution, (9 September 1980), at 9. The Manitoba position drew heavily on a paper written by Professor G. P. Browne of Carleton University. Something of the same characterization guides Alan Cairns' judgment that "the constitutional exercise" that culminated in the adoption of the *Charter* "strengthened the democratic component in Canadian constitutionalism and moved partially in the direction of vesting sovereignty in the people." See Alan Cairns, "The Canadian Constitutional Experiment" (1984) 9 Dalhousie L.J. at 87-114. See also Alan Cairns, "Ottawa, the Provinces, and Meech Lake" in Roger Gibbins, ed., *Meech Lake and Canada: Perspectives From the West* (Edmonton: Academic Printing and Publishing, 1988) at 105-119; and "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Can. Pub. Pol. at 121-145.

[3]Taylor, "Alternative Futures," at 225.

[4]The most succinct description of these competing visions, usually called "pan-Canadian" and "provincialist," is Richard Simeon, "Constitutional Development and Reform" in Michael S. Whittington and Glen Williams, eds., *Canadian Politics in the 1980's* (1st ed.; Toronto: Methuen, 1981) at 243-259. See also Keith Banting and Richard Simeon, "Federalism, Democracy and the Constitution," in Banting and Simeon, eds., *And No One Cheered* (Toronto: Methuen, 1983) at 2-26; Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism," 14 Can. Pub. Pol. at 7-24; and Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. at 47-99. For the relation between this pan-Canadianism and the *Charter of Rights*, see Peter H. Russell, "The Political Purposes of the Canadian *Charter of Rights and Freedoms*" (1983) 61 Can. Bar Rev. at 30 and Rainer Knopf and F.L. Morton, "Nation-Building and the Canadian *Charter of Rights and Freeedoms*" in Cairns and Williams, eds., *Constitutionalism, Citizenship and Society in Canada* at 133-175.

But the debate about these "alternative futures," as Charles Taylor calls them, is highly problematic because it is often ahistorical. By this I do not mean that the debate ignores history. On the contrary, the current discussion is usually set against the backdrop of the larger Canadian constitutional tradition, and its disputants typically couch their analysis in terms that are meant to show how our current situation either builds on the past or departs from it. The problem, rather, is with the tendency to read the past through the lens ground by the present debate. And the problem - most clearly evident in Charles Taylor's contribution to the McDonald Commission research series - is that in reconstructing the past, much of the complexity, subtlety and ambiguity of the Canadian constitutional tradition has been lost.

The stark dichotomies favoured in the current debate seem particularly inadequate as tools for understanding the debate that took place in the 1880s, largely though not exclusively in Ontario, over use of the federal veto power of disallowance. The attack on John A. Macdonald's use of disallowance has long been considered one of the central episodes in the struggle for provincial rights. It is rightly viewed as a turning point in the development of Canadian federalism. But beyond its importance as an episode of constitutional history, the debate over disallowance offers what is arguably the most illuminating context for examination of the larger ideological or theoretical assumptions that animated late-nineteenth-century legal and constitutional discourse in Canada - a perspective I will call "legal liberalism." This conception of legal liberalism does not square as easily with the terms of the current constitutional debate as Taylor and others suggest. To that extent its recovery may serve as a corrective to the present debate by revealing an "alternative past" from which to view these "alternative futures" afresh.

I

Disallowance is a veto power, modelled after the imperial power of the same name, which allows the federal government to strike down or nullify acts of a provincial legislature within one year of passage.[5] It is impossible to discern with absolute clarity the "original intentions" of the Fathers of Confederation with regard to disallowance. "The Fathers" were not a monolithic group. For that reason alone, generalizations about their intentions are dangerous and probably misleading. It is clear, however, that at least some of the leading Confederationists supported the veto power for the same reason that James Madison supported a national veto over state legislation in the U.S. Simply put, they believed that disallowance would be a useful tool in protecting individuals and minorities from unjust, tyrannical or discriminatory provincial legislation.

The argument that disallowance could be used to protect minorities against tyrannical provincial majorities was made with special vigour by the likes of John

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[5] *Constitution Act, 1867*, sections 56, 90.

Rose - representatives from the English-speaking, Protestant community in Quebec. Rose spoke openly of his constituents' apprehension that a legislature dominated by those of another "race and religion" might attempt to manipulate the electoral laws so as to reduce the influence of the English Protestant minority in Quebec. Rose entertained no such apprehension, however. "If the Local Legislature exercised power in any such unjust manner, it would be competent for the General Government to veto its action - even although the power be one which is declared to be absolutely vested in the Local Government."[6]

This view was not confined to Anglo-Quebeckers. Alexander Mackenzie, one of the leading Upper Canadian Reformers and Canada's second prime minister, thought inclusion of disallowance "necessary in order that the General Government may have control over the proceedings of the local legislatures to a certain extent."[7] George Brown suggested that the power of disallowance would provide aggrieved individuals or groups with an "appeal" against "injustice" that had been perpetrated by a local legislature.[8] And John A. Macdonald seems to have understood that disallowance would act as the linchpin between centralism and the protection of individuals and minorities. "Under the Confederation scheme," he is reported to have said at Quebec in 1864, "we shall... be able to protect the minority by having a powerful central government."[9] Of course it is easy to make too much of this evidence, for the fact remains that most of the settlement's supporters in the Canadian assembly apparently had no clear idea as to how the veto power would be exercised. Still, it is not insignificant that the leaders of the Great Coalition seem to have agreed that the disallowance power would or could be used as an instrument to protect individual and minority rights.

It is ironic, therefore, that when the federal government came to exercise the power of disallowance in the first years after 1867, it was guided neither by the bare and unqualified words of the *British North America Act* nor by the suggestion that the veto should be used to protect provincial abridgement of individual or minority rights. And it is doubly ironic that the person primarily responsible for limiting the scope of the veto power and directing it away from rights questions was John A. Macdonald.

As Minister of Justice in his own first cabinet, Macdonald took it upon himself to circulate a report among the provincial governments that explained under what circumstances his government would feel compelled to veto provincial laws. Macdonald's report was repetitive and sometimes unclear, but the fundamental point - that the practice of disallowance would be more limited than the almost

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[6]Canada, Legislative Assembly, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec: Hunter, Rose and Company, 1865) at 407. (Hereafter cited as *Confederation Debates*.)

[7]*Confederation Debates* at 433.

[8]*Ibid.* at 108.

[9]G. P. Browne, ed., *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 95.

unqualified words of the *B.N.A.* allowed - was unambiguous. Basically, Macdonald indicated that the federal government would consider it appropriate to exercise the veto only in the following cases: 1) if provincial acts were "altogether illegal or unconstitutional"; 2) if they were "illegal or unconstitutional in part"; 3) "in cases of concurrent jurisdiction, as clashing with the legislation of the general parliament"; or 4) in cases "affecting the interests of the Dominion generally."[10] Nor was disallowance to be used in every case falling under these headings. It was "of importance," Macdonald said, that provincial legislation "should be interfered with as little as possible," and he therefore promised that disallowance would be exercised "with great caution" and "only in cases where the law and the general interests of the Dominion imperatively demand it."[11]

Why did Macdonald emphasize the disallowance limitations and what precisely did these categories entail? One answer to the question is surely that Macdonald was simply adapting imperial rules for domestic use. By the time of Confederation the use of the imperial power of disallowance was quite strictly limited. It was generally recognized by the time this report was written and circulated in 1868 that the imperial authorities would not interfere with Canadian legislation unless it manifestly affected imperial interests. That limitation had allowed the Canadians to legislate quite freely on internal Canadian matters. Since the federal power of disallowance was explicitly modelled after the imperial power of the same name, it made some sense to restrict the federal power of disallowance in essentially the same way.

Yet Macdonald's reference to the imperative of "the law and the general interests of the Dominion" suggests another answer to that question that has little to do with the now familiar imperial analogue. For what Macdonald seems to have realized is that the *B.N.A. Act* gave the provincial governments a legal claim to legislate "exclusively" on those matters enumerated under Section 92, as it gave the federal government the "exclusive" right to legislate on matters listed in Section 91.[12] And he seems to have concluded from this that the legal right to disallow provincial legislation simply could not be exercised in an unqualified way without undermining the provincial legislatures' legal right to legislate exclusively on those matters listed under Section 92. His report of 1868 was thus an attempt to formulate rules for the exercise of disallowance that would balance the veto power as a tool of national consolidation with the provinces' legal claim to exclusive power; it was an attempt to reconcile a tension or conflict in the terms of the *B.N.A. Act* itself and to vindicate his claim that the Confederation settlement was indeed "a happy medium" between two extremes.[13]

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[10]Macdonald's report, dated 8 June 1868, is reproduced in W. E. Hodgins (comp.), *Correspondence, Reports of the Ministers of Justice, and Orders in Council upon the Subject of Dominion and Provincial Legislation, 1867-1895* (Ottawa: 1896) at 61-62. (Hereafter cited as *Dominion and Provincial Legislation.*)

[11]*Ibid.*

[12]*Constitution Act, 1867*, Section 91 (Preamble); Section 92 (Preamble).

[13]*Confederation Debates* at 32.

Macdonald seems to have believed that a workable balance could be achieved if disallowance were used exclusively as a jurisdictional veto. Within the confines of Section 92, the provincial legislatures enjoyed the exclusive right to legislate, and Macdonald strongly implied that on such matters clearly within provincial jurisdiction the federal government had no business interfering. There were two corollaries and one exception to this basic rule. First, Macdonald clearly understood that the provincial legislatures might attempt to legislate on matters not covered by the list of subjects in Section 92. In this case they would be guilty of overstepping the boundaries of their jurisdiction or, worse yet, encroaching on the subjects reserved to the federal government. In such cases they would be legislating "illegally" or "unconstitutionally," and Macdonald was quick to say that if this occurred the federal government had every right, consistent with the idea of provincial autonomy itself, to veto provincial legislation that was in this sense *ultra vires*. Second, Macdonald seems to have realized that even if the provincial legislature were acting within its jurisdiction, its action might collide with a legitimate federal law. Macdonald was almost certainly thinking here of the areas of agriculture and immigration which Section 95 of the *B.N.A. Act* itself designated as matters of "concurrent" jurisdiction. On these subjects the federal and provincial governments would share legislative responsibility, and Macdonald seems to have realized that their policies could well be inconsistent. Thus the veto power here would simply serve the purpose performed by the supremacy clause of Article 6 of the U.S. Constitution. In the case of conflict between federal and provincial legislation on the subject of immigration or agriculture, federal legislation could be made to prevail.

These specified areas of concurrent jurisdiction did not exhaust the possibility of policy collision, however. Macdonald seems to have realized that provincial acts might still impinge on national policy without actually exceeding provincial jurisdiction. Macdonald's language was vague on this point, but one can understand his fears. He perhaps foresaw the possibility, already anticipated by the official categories of concurrent jurisdiction, that federal and provincial jurisdiction would to some extent overlap. And he perhaps concluded that in such cases federal policy had to be protected from provincial acts that were perfectly "legal," that is within provincial jurisidiction, but which nevertheless conflicted with federal policy. He perhaps realized as well that legitimate provincial legislation might occasionally have to yield to what Parliament considered to be some greater national purpose even if that purpose could not easily be fit under any of the enumerated headings of Section 91. In any case, he seems to have thought it necessary to provide the federal government with a third line of defence against provincial legislation, the disallowance of provincial legislation which "affects the interest of the whole Dominion."

The obvious difficulty with this third category was its vagueness; for, after all, in what did the "interests of the Dominion generally" consist? If the national interest were used routinely as a pretext for disallowing provincial legislation which was perfectly legitimate save for its incompatibility with the national interest, the power of disallowance would destroy the very balance that Macdonald claimed to

want to maintain. This is one of the reasons that the power of disallowance became especially controversial in the 1880s.

Yet at the time Macdonald circulated his report, in 1868, these fears were little mentioned. The rules laid down by Macdonald in the year after Confederation received broad bi-partisan support, and the report served as the standard for use of disallowance for some twenty years because Conservatives and Liberals alike accepted what they understood to be Macdonald's basic premise: that the federal government could of right disallow provincial acts, but only for jurisdictional reasons. What precisely was included in the term jurisdiction was of course open to question; what was excluded by it was not. For if Macdonald's working assumption was that the provincial governments must generally be allowed to act freely within their jurisdiction, it followed that disallowance could not be used routinely to protect individual or minority rights as long as the provincial governments stayed within provincial jurisdiction. Nor, by the same reasoning, could the federal cabinet act to strike down provincial legislation that it found imprudent, unwise, unappealing or downright obnoxious as long as the legislation fell within the provincial sphere. From Macdonald's perspective, it was crucial that the federal government have the capacity to act quickly to prevent the provincial governments from thwarting the task of building the nation. Macdonald was nothing if not a centralist, and disallowance seemed useful, indeed crucial, in protecting the federal government's expansive authority from the depredations of the provinces. If the cost of wielding the veto power in this way was to allow the provincial governments to act freely within the limited ambit granted to them by the Constitution, it was a price Macdonald was quite willing to pay. That was Macdonald's way of reconciling centralization with the federal principle.[14]

At the very least, this interpretation of the guidelines is consistent with the way in which Macdonald in fact exercised the power of disallowance in the first government. As Minister of Justice from 1867 to 1872, Macdonald recommended disallowance of five acts, all of them on jurisdictional grounds. Thus when the Ontario and Quebec legislatures attempted to confer on themselves parliamentary privileges and immunities Macdonald argued that provincial legislatures lacked the "competence" under sections 92-95 of the *B.N.A. Act* to enact such legislation.[15] A portion of the supply bill passed by the Ontario legislature in 1869 was disallowed because, in Macdonald's words, it was not "within the com-

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[14]My interpretation of Macdonald's guidelines for the use of disallowance differs from the conventional interpretation championed by Eugene Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors Since 1867" (1938) 4 The Canadian Journal of Economics and Political Science at 47-39; and J. R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954), c. 2. Both want to argue that when Macdonald referred to "illegal" and "unconstitutional" acts in the report of 1868 he did so in order to distinguish them. They suggest that by "illegal" Macdonald was referring to acts that were ultra vires or beyond the jurisdiction of the provinces, whereas by "unconstitutional" he meant to bring within the pale of disallowance acts that were unsound, unreasonable or violations of property rights. My interpretation accords with that of Gérard La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Queen's Printer, 1955) at 37.

[15]Hodgins, *Dominion and Provincial Legislation* at 83.

petence" of the provincial legislature to pay judges' salaries; this was a federal responsiblity.[16] An act of the Nova Scotia legislature empowering the Halifax city police court to sentence juvenile offenders was held to be *ultra vires* on the grounds that it was a matter of the criminal law, on which the federal government had exclusive power to legislate.[17] And another act of the Nova Scotia legislature, this one regulating pilotage, was also disallowed for encroaching on federal jurisdiction.[18]

Macdonald's inaction is arguably even more revealing than his action in this regard. On several occasions in those first years he received petitions from citizens who claimed some grievance against a provincial legislature, and who appealed to Ottawa in the hopes that the federal government would disallow the offending act. The most notable of these petitions centred on the will of a certain Goodhue, the terms of which had been changed by an act of the Ontario legislature after the man's death. The original will favoured the man's grandchildren, the revised will his children. The executor of the estate, presumably acting on behalf of the grandchildren, asked the federal government to disallow the act on the grounds that it was "unconstitutional, in depriving persons of rights and property without their consent, and without any compensation whatever."[19] Macdonald's reply was succinct and blunt: "Petitions have been received for the disallowance of this Act, but as it is within the competence of the provincial legislature, the undersigned recommends that it be left to its operation."[20]

Macdonald adopted the same tack in deflecting the demand that the federal government disallow New Brunswick's *Common Schools Act of 1871*. The act, it was feared, would effectively dismantle the de facto denominational school system that had existed for some time in the province.[21] When other attempts to block passage of the bill failed, Macdonald was asked to veto the law on the grounds - in Timothy Anglin's words - that it "outraged, insulted and deprived [Catholics in New Brunswick] of their just rights and privileges."[22] Macdonald responded by explaining that while he had considerable sympathy for Anglin's cause, there was really very little he could do. While he was "very much at one" with Anglin in his support for minority educational rights, Macdonald reiterated

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[16]*Ibid.* at 83, 93.

[17]*Ibid.* at 472.

[18]*Ibid.* at 476.

[19]*Ibid.* at 97.

[20]*Ibid.* at 100-101. I have taken the small liberty of transposing the words used in the report of one bill (c. 48, regarding the Grand Junction Railroad Co.) to the Goodhue case. This is unexceptionable because the Goodhue bill was allowed to stand, in the Minister's words, "for the same reason as that given with respect to chapter 48."

[21]For background to the New Brunswick schools question, see Peter M. Toner, "New Brunswick Schools and the Rise of Provincial Rights" in Bruce W. Hodgins, Don Wright and W. H. Heick, eds., *Federalism in Canada and Australia: The Early Years* (Waterloo: Wilfrid Laurier University Press, 1978) at 125-136. See also A. I. Silver, *The French-Canadian Idea of Confederation* (Toronto: University of Toronto Press, 1982), c. 5.

[22]Canada, Parliament, *House of Commons Debates*, at 198-199 (29 April 1872).

that the only question to be decided "was whether according to 'the *British North America Act*, 1867,' the Legislature of New Brunswick had exceeded its powers."[23] The federal government, Macdonald continued, could only be concerned with the legality of a provincial law, not with its wisdom or fairness. If it were otherwise, parliamentarians would "set up their own judgment against the solemn decision of a Province in a matter entirely within the control of that Province"; and that would make them guilty of a "violent wrench of the Constitution."[24] Disallowance, in short, was meant and used in the first years after Confederation to reach jurisdictional questions only.[25]

Nor was this understanding of the use of disallowance peculiar to Macdonald or Conservative administrations. The question of provincial rights in Canada is often treated as a partisan dispute in which Liberals defended provincial autonomy as uncompromisingly as Conservatives supported central domination. Yet there was little dispute about the principles that should guide the exercise of disallowance, at least through the 1870s. The Liberal government of Alexander Mackenzie, which held office from 1873-1878, accepted disallowance as a legitimate constitutional instrument for striking down provincial legislation that exceeded its jurisdiction. Indeed, the Mackenzie government used the power rather more freely than Macdonald had. It disallowed eighteen provincial laws in its five-year tenure, as opposed to just five over a comparable period by the first Macdonald administration.[26] With Macdonald, the Liberal ministers responsible expressly restricted their use of the power to cases in which a jurisdictional violation could be found.[27]

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[23]*Ibid.* at 199.

[24]*Ibid.* at 201.

[25]I have developed this interpretation of the New Brunswick schoools question in greater detail in "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada" (June 1985) 18:2 Canadian Journal of Political Science at 267-294.

[26]I have tabulated these results from the tables in Hodgins, *Dominion and Provincial Legislation*.

[27]In this regard the four men who served as Ministers of Justice in the Mackenzie cabinet - A. A. Dorion, Fournier, Blake and Laflamme - were as firm as Macdonald had been in refusing to disallow laws which had been impugned solely on non-jurisdictional grounds. Two cases, both of which came before Edward Blake, stand out. In the first, a complicated Quebec law involving the claim by a provincial office holder that the government had deprived him of property by abolishing his office, Blake replied that even if the Quebec law had violated his property rights, such a violation "in matters purely local, would not, by itself furnish grounds for disallowance." (Hodgins, *Dominion and Provincial Legislation* at 274). In the other, an Ontario statute which legalized the union of several Presbyterian churches against the wishes of some of the parishioners, Blake said simply that he need not "express an opinion upon the allegations of the petition as to the injustices alleged to be affected by the Act." "That," he said, "was a matter for the local legislature." (*Ibid.* at 133) On one or two occasions Blake did allow considerations of this kind to creep into his reports, but only if the act were objectionable, and hence disallowable, on jurisdictional grounds as well. The apparent injustice of an act did not provide sufficient grounds for disallowance, and no provincial act was disallowed solely for such reasons during the Mackenzie years. (See La Forest, *Disallowance and Reservation* at 41-43.)

II

During the first decade of Confederation there was no serious partisan disagreement about the general rules governing the exercise of disallowance. The opposition, whether Liberal or Conservative, sometimes quibbled with the government's use of the power in particular cases, but there was no disagreement about the general principle that the disallowance of provincial legislation was legitimate as long as, and only as long as, it was confined to jurisdictional questions. That consensus was shattered in the 1880s. As the nation-building pretensions of the Macdonald government grew, so did its use of disallowance. As disallowance came to be used more broadly, so its legitimacy became more questionable and the debate surrounding it more partisan.

The growing controversy over use of disallowance came to a head in 1881 when the Macdonald government struck down Ontario's *Rivers and Streams Act*. The dispute centred on an act of the Ontario legislature which declared that all persons have the right to float logs down Ontario waterways. In addition, the legislation stipulated how those who had invested time and money in improving these waterways were to be compensated for their efforts by those who benefitted from the improvements. The law had been passed in part to resolve a dispute between Peter McLaren, who had widened a tributary of the Ottawa River and Boyd Caldwell, a logger whose attempts to use the widened river had been thwarted by McLaren. McLaren complained that the Ontario law deprived him of his property rights. Having at considerable expense transformed a stream that was unnavigable "in a state of nature" into a small river, McLaren maintained that he had certain proprietary rights, among them the absolute right to decide who could use the river and at what price.[28] He therefore petitioned the federal government to have the law disallowed.

As Caldwell, whose political connections were to the Liberal party, was able to get the ear of the Liberal government in Ontario, so McLaren, a Conservative, was successful in persuading the Macdonald government to strike down the Ontario law. It is a sign both of the depth of partisan feeling and constitutional moment that when it came time to explain the reasons for the disallowance, John A. Macdonald himself took responsibility for writing the official report. Macdonald concentrated in his report, as McLaren had in his petition, on the effect of the *Rivers and Streams Act* on property rights. "The effect of the Act," Macdonald asserted, "seems to be to take away the use of his property from one person and give it to another, forcing the owner, practically, to become a toll-keeper against his will, if he wishes to get any compensation for being deprived of his rights." He continued:

> I think the power of the local legislatures to take away the rights of one man and vest them in another, as is done by this Act, is exceedingly doubtful, but assuming that such right does, in strictness, exist, I think it devolves upon this govern-

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[28]Hodgins, *Dominion and Provincial Legislation* at 174.

> ment to see that such power is not exercised, in flagrant violation of private rights and natural justice, especially when, as in this case, in addition to interfering with private rights in the way alluded to, the Act overrides a decision of a court of competent jurisdiction.

"On the whole," he concluded, "I think the Act should be disallowed."[29]

Macdonald's defence of his disallowance of the *Rivers and Streams Act* was a turning point in the development of the provincial rights movement in Ontario in that it provoked the first concerted attack on the veto power itself. The disallowance of the Ontario *Act*, first exercised in 1881 but repeated each time the Ontario legislature repassed it, became an essential element of the struggle for provincial autonomy for several reasons. It was the first occasion in which disallowance had been used against Ontario to strike down an act clearly within provincial jurisdiction. That is, it was the first time Macdonald had strayed from the guidelines he had set down for the use of disallowance. Adam Crooks, the Attorney General for Ontario, made the most of Macdonald's apparent inconsistency when, in his reply to Macdonald's report, he pointed out that the disallowance of legislation on the grounds of injustice flew in the face both of the rules of 1868 and subsequent practice. In light of Macdonald's own actions (in the Goodhue will case for instance) the disallowance of the *Rivers and Streams Act* was "singular," "exceptional," and incompatible with the view that the federal and provincial governments are "alike sovereign in their nature, within the limits of the subjects assigned to each respectively."[30] The federal government had done precisely what Macdonald himself had said it must not do. It had assumed the responsiblity of reviewing "the provisions of a provincial Act within (the province's) competency." In so doing, the Macdonald government had failed to respect "the responsibility and sovereign authority of the provincial legislature in considering, making and framing all such laws respecting property and civil rights within the province, and the other subjects exclusively assigned to it by the Confederation Act. . . ."[31]

The Mowat Government's protest was joined by Liberal Members of Parliament and the Liberal press. Edward Blake reminded Macdonald of the 1868 guidelines, pointed out the evident inconsistency of his action in the Rivers and Streams case, and returned to the general principle on which the original guidelines had been based. "It would impair the Federal principle, and injuriously affect the autonomy of the institutions of our several Provinces," Blake argued, "were this power to be exercised on subjects which are within the exclusive competence of the Local Legislatures, on the ground that in the opinion of His Excellency's advisers, or of the Parliament, any such legislation is wrong."[32] The Toronto *Globe* put it more pithily:

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[29]*Ibid.* at 178.

[30]*Ibid.* at 183.

[31]*Ibid.* at 185. See also London *Advertiser*, (28 April 1882).

[32]Canada, Parliament, *House of Commons Debates*, at 908-909 (14 April 1882). In addition, see the speech by Guthrie on the same day at 896-897.

> Never once for fifteen years has the Dominion interfered, never at all has there been any cause for interference. And now, for the first time in the history of the Confederation, the Dominion has asserted a right to interfere in matters within our own concern under the Constitution, within our own province. An Act dealing with our own rivers and streams has been flung back in our face, and the whole force of the Union used to prevent its becoming law.[33]

"The interference," proclaimed the *Globe*, "was in fact a violent invasion of Provincial rights perpetrated by the Dominion Premier."[34]

Macdonald was unpersuaded by these criticisms, but his parliamentary rejoinder differed in one crucial respect from the explanation contained in the official disallowance report sent to the Ontario government; a difference which, offered in the spirit of conciliation, had the unexpected effect of deepening his opponents' distrust. The principle that guided the exercise of disallowance, Macdonald maintained before Parliament, was simply that the "independence of every legislature should be protected unless there is a constitutional reason against it."[35] Sir John was compelled to admit that the *Rivers and Streams Act*, as a matter respecting property and civil rights, was probably within the competence of the Ontario provincial legislature. It was neither "illegal" nor "unconstitutional" in the precise sense in which he used the terms in the 1868 guidelines, and he as much as admitted that he could not defend the federal government's decision to strike down the act on these conventional grounds. But according to Macdonald, the act was still objectionable - if not in the narrow then in the broad sense of the term jurisdiction. The principle of provincial autonomy was not dispositive in this case because the *Rivers and Streams Act* "violated distinctly the most important" of the conditions set out in the 1868 report; that is, it affected "the general interests" of the Dominion.[36] Where Macdonald at first argued that the federal government had acted to protect private rights and the *public* interest, he now shifted ground to argue that the federal government had acted to protect private rights and the *national* interest. The difference was meant to save his action from the Mowat Government's trenchant criticism by making the grounds for the *Act*'s disallowance consistent with the guidelines of 1868.

In 1873 Macdonald had rejected the suggestion that the New Brunswick schools question affected "the general interests" of the country. He now strained to show how an act passed to resolve a dispute between two lumbermen could be called a matter of national importance that required nullifying legislation that everyone, even Macdonald, admitted fell within provincial jurisdiction:

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[33]Toronto *Globe*, (24 January 1883).

[34]*Ibid.* (26 January 1883).

[35]Canada, Parliament, *House of Commons Debates* at 920 (14 April 1882).

[36]*Ibid.* at 921.

> We were protecting a man from great wrong, from a great loss and injury, from a course which, if pursued, would destroy the confidence of the whole world in the law of the land. What property would be safe? What man would make an investment in this country? Would capitalists come to Canada if the rights of property were taken away, as was attempted under this Bill? This was one of the grounds on which in that paper of mine, of 1867 (sic), I declared that, in my opinion, all Bills should be disallowed if they affected general interests. Sir, we are not half a dozen Provinces. We are one great Dominion. If we commit an offence against the laws of property, or any other atrocity in legislation, it will be widely known. . . [37]

The dispute between McLaren and Caldwell, according to Macdonald, was a matter of no mean significance. The protection of property rights and their uniform enjoyment had become a national necessity. At stake were the reputation, the prosperity, perhaps even the whole future of Canada.

What is significant here is not the tortuousness of the argument - that is obvious enough. What is significant is that in attempting to defend the Rivers and Streams disallowance on the broadest grounds of national interest, Macdonald's almost desperate attempt to show that this was in some sense a jurisdictional question backfired badly. Instead of propitiating the autonomists by showing that this veto was exercised according to the well understood rules of 1868, his defence of the Rivers and Streams veto almost inadvertently led the autonomists to question the rules themselves. And once the subject had been opened, they were quick to conclude that any use of disallowance - even for jurisdictional reasons - threatened the integrity of provincial legislation and the federal principle in a way that could not be tolerated.

The Rivers and Streams case thus recast fundamentally the debate over disallowance. The provincial autonomists had argued for the first fifteen years of Confederation that the disallowance power, when used as a jurisdictional veto "to guard (the federal government) against encroachments by the Provinces," was consistent with the federal principle and the fundamental conventions of responsible, parliamentary self-government.[38] Macdonald's tortured defence of the Rivers and Streams veto forced the autonomists to reconsider this compromise. It demonstrated that as long as disallowance could be used legitimately and routinely to strike down provincial legislation on the pretext that a provincial act offended "the general interests of the Dominion," it could be used against provincial legislation that clearly was *intra vires* the provincial government. The autonomists began to understand, in other words, that the great flaw in the power of disallowance was that it granted discretion to the federal government to determine whether legislation was jurisdictionally sound and consistent with the national interest. And they began to realize, equally, that as long as disallowance was controlled by someone like Macdonald, the definition of what was in the na-

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[37] *Ibid.* at 924.

[38] London *Advertiser*, (9 February 1883).

tional interest was almost infinitely expandable. If a question as parochial as the one at issue in the Rivers and Streams case could be construed as a matter of national importance, almost anything could; and as Macdonald came in the 1880s to disallow provincial laws more frequently on the shadowy grounds that they were inconsistent with the "national interest" the autonomists tumbled to the conclusion that the power of disallowance had become a dangerous weapon in the Prime Minister's larger plan of centralization.[39]

The Rivers and Streams case stood out larger than life to the provincial autonomists, in other words, because it made them see that as long as the federal government felt free to use the veto, it could fabricate dubious, indeed phony, jurisdictional claims to extend its own jurisdiction at the expense of legitimate provincial goals. Seen in this new light, Macdonald's disallowance of the *Rivers and Streams Act* was not an isolated and discrete violation of his own guidelines, it was part of a larger attempt to create a centralized state. The federal government had been given the power of disallowance, according to the London *Advertiser*, in order "to protect itself against encroachments, by the numerous Provincial Legislatures:

> but it never was intended that the Federal Government should use this defensive power for aggressive purposes. It never was intended that a power conferred for the purpose of upholding its own jurisdiction should be employed to destroy the more ancient fabrics of the Provinces. But this is what is being done, and political partizans in the press and in the Legislature are crying out against centralization at the very time they are defending by gross misrepresentation these unwarrantable encroachments upon self-government in the Provinces. No centralization![40]

What was at stake in the Rivers and Streams case, the *Advertiser* argued, "was not simply a matter of rivers and streams" nor even "a matter of private rights or the compensation to be given therefor." What was at issue, rather, was "something above and beyond both," namely "the right of the Province to enjoy the inestimable privilege of local self-government" on matters "within (its) own sphere."[41] The autonomists had believed that their sphere of jurisdiction was protected by "a barrier of a superior law."[42] The Rivers and Streams episode demonstrated, to the contrary, that the federal government was prepared to "trample under foot the barriers which the principles of the Constitution impose."[43] The charge, in short, was not simply that Macdonald had applied his rules inconsistently, but that the rules were themselves flawed. Macdonald's

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[39]La Forest notes that "nearly one-half of the thirty-eight Acts disallowed during this period (i.e. 1881-1896) were vetoed on the ground that they interfered with the railway policy of Canada" even though most were within provincial jurisdiction. See La Forest, *Disallowance and Reservation* at 58.

[40]London *Advertiser*, (7 February 1883).

[41]Toronto *Globe*, (24 January 1883).

[42]London *Advertiser*, (14 March 1883).

[43]*Ibid.*, (10 December 1883).

policy of disallowance was "a death blow" aimed "at the Federal system, and the responsibility of the Provincial Ministry to the Local Legislature and electorate."[44] That is why the Rivers and Streams case elicited such a fierce response.

III

The autonomists insisted on making the disallowance of the Rivers and Streams bill a major constitutional issue because it illustrated graphically that, however defined, a federal veto threatened provincial power and the larger idea of federalism on which provincial power rested. But this summary still fails to capture the deepest strain of the autonomists' objection to Macdonald's use of disallowance. For if the Rivers and Streams episode was a turning point in the understanding and practice of disallowance in Canada, it is still more significant for the light it sheds on the broader intellectual context in which the provincial autonomists positioned themselves. As the foregoing passages suggest, the autonomists took issue with the Macdonald government's use of disallowance not merely because it deviated from the established rules that were meant to govern and limit the use of the veto power, nor simply because they came to believe that the veto power could not be reconciled with the federal principle under any circumstances. The more general and ultimately more serious claim, rather, was that disallowance was incompatible with the ideal of the rule of law and with the larger "transatlantic project" of liberal reform being carried on in the name of the rule of law.

In one respect there is nothing surprising about the autonomists' emphasis on the rule of law. Most were lawyers turned politicians who, if nothing else, had a solid professional interest in asserting the importance of law. Most were committed to the view that politics was best studied and understood through the lens of constitutional politics and legal forms. Moreover, the ideology of the rule of law was a crucial component of their imperialism. One of the basic claims for the superiority of the Empire and British civilization was its ancient and honourable tradition that arbitrary power must be curbed and that the rule of law is especially important in protecting liberty against tyranny. By the mid-Nineteenth Century this view had been reduced to a common political slogan and a test of conventional legitimacy. Certainly in Canada no mainstream politician would have dissented from it.

In the late Nineteenth Century, however, the ideal of the rule of law came to be associated more precisely with a powerful intellectual movement of Anglo-American legal reform which attempted to show how a scientific understanding of law could be put to the service of liberal ends. The spiritual home of this "legal liberalism" (as it has been called) was in the universities, and while it "began to appear as early as 1850" it "became most conspicuously abundant in Anglo-American academic circles during the 1870s and 1880s"; that is, at precisely the moment the provincial rights movement was gaining momentum.[45] In England

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[44]Toronto *Globe*, (6 June 1881).

[45]Robert Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise" in Gerald L. Geison, ed., *Professions and Professional Ideologies in America* (Chapel Hill: University of

the movement was centred at Oxford and came to be associated with Dicey, Pollock, Anson, Salmond and Bryce; in the United States, it was most closely associated with Harvard and the efforts of Langdell, Holmes, Ames and Williston. In either case it profited from an extraordinary transatlantic collaboration among legal scholars who were also friends. There were, of course, many important differences among such scholars, some of which reflected different national styles and problems, others of which are more idiosyncratic and difficult to categorize. Still, it is possible to describe relatively easily, at least at the level of intellectual caricature, what united these various minds and what forms the core of legal liberalism.[46]

The movement of legal liberalism was concerned with placing the law, and more specifically courts guided by scientific principles, in the service of individual liberty. As David Sugarman has pointed out, legal scholars like Dicey were much taken with John Stuart Mill's celebration of creative individualism, and they took no less seriously than did Mill the problem of protecting individual autonomy either from other individuals or from the state, or both.[47] Given the apparently natural predilection for individuals and political bodies to want to expand their power at the expense of others, the crucial political problem for late-Nineteenth-Century liberalism was to set clear limits or boundaries within which each actor is sovereign, that is free to will without interference from others. The task for liberalism was to distinguish public from private, state from society, other-regarding from self-regarding behaviour. In short, the irreducible liberal aim was to maximize liberty by keeping each actor within appropriate and assigned limits.

The distinctive contribution of legal scholarship in the late Nineteenth Century was to suggest that the law contained objective principles that could be used to enforce the boundaries or limits of individual or state behaviour. Rather than entrusting the protection of liberty to the discretion of political officials whose judgment could be distorted by self-interest in one of its many forms; rather than making the protection of rights a matter of statesmanlike balancing of individual and public considerations, the view of legal liberalism was that the boundaries should be settled, deduced scientifically from a number of general principles, and applied objectively by the courts.

The greatest champion of this vision of the rule of law was A.V. Dicey, whose *Law of the Constitution* (1885) furnished an extraordinarily influential interpretation of the systematic, purposeful development of the rule of law in England. Dicey's story of the triumph of the rule of law in England was unapologetically nationalistic: the British story stood in stark contrast to the baleful decline of the rule of law in France. Yet for all his anglophilia, even Dicey seems to have been

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North Carolina Press, 1983) at 69.

[46]My brief description of legal liberalism draws heavily on the work of Robert Gordon, especially his article "Legal Thought and Legal Practice in the Age of American Enteprise," *supra* at note 45.

[47]See David Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism, and Legal Science" (1983) 46 Mod. L Rev. at 102-111.

willing to admit that the rule of law (and from that the rule of courts) was most deeply entrenched not in Britain, but in the United States where the common law was supplemented by judicial review and by a legalistic conception of federalism.[48] The European "americomania" that Dicey described as a correspondent for *The Nation*, and which he seems to have shared, was an entirely apt manifestation of legal liberalism.[49]

To the legal liberal, the beauty of the American conception of the rule of law was its versatility in describing and explaining a whole universe of legal and political relationships between individuals and the state. The premise of legal liberalism, as Duncan Kennedy has noted, "was that the legal system consisted of a set of institutions, each of which had the traits of a legal actor" and each of which was comparable or even convertible one to the other.[50] "Each institution had been delegated by the sovereign people a power to carry out its will, which was absolute within but void outside its sphere." "The physical boundaries between citizens" were in this sense "like those between states," and "the non-physical division of jurisdiction over a given object between legislature and citizen was like that between state and federal governments." Moreover, each legal actor had to worry that this sphere of sovereignty would be challenged, violated or compromised by another actor. Precisely "(b)ecause all the actors held formally identical powers of absolute dominion, one could speak equally of trespass by neighbor against neighbor, by state against citizen, and by citizen against state." And precisely because the problem of setting and maintaining boundaries was the same throughout the system, the task of the judge was "identical whether the occasion of its exercise was a quarrel between neighbors, between sovereigns, or between citizen and legislature." The task of the law - be it the common law, the law of federalism or judicial review under the *Bill of Rights* - was to prevent usurpation and preserve rights.

This understanding of the purpose and function of the law was developed largely in the universities, but it cannot be overstressed that it was at its base a project to reform the way in which the law was actually applied by lawyers and courts. The historical importance of this conception of legal liberalism consists in its influence in shaping political and legal practice in the 1880s, 1890s and beyond. In England, for example, Dicey's understanding of the rule of law was a crucial element in the political debate over the legitimacy of administrative tribunals and the regulatory state. In the United States, this conception had great appeal to the Supreme Court in what has been called the *laissez-faire* era, that is roughly 1880-1930. In Canada, the least studied of the three jurisdictions, this vision of the rule

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[48]On this point see Sugarman, "Legal Boundaries" at 109-110; and H. A. Tulloch, "Changing British Attitudes Towards the United States in the 1880s" (1977) 20:4 The Historical Journal at 825-840.

[49]Tulloch's description of the phenomenon of 'americomania' is especially suggestive in this regard. See Tulloch, "Changing Attitudes" at 833-839.

[50]The quotations in this paragraph are all taken from Duncan Kennedy, "Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" (1980) 3 Research in Law and Sociology, 3-24, at 7.

of law was adapted for practice in a rather pure, albeit inchoate, form by the provincial rights movement.

The Canadian legal community contributed little to the general or theoretical elaboration of legal liberalism in England and the United States, but it followed developments in both places closely. In a few important cases the external influence in shaping the Canadian legal mind was quite direct and explicit. The case of David Mills stands out. Member of Parliament for some thirty years, newspaper editor, law professor, Minister of Justice under Laurier, associate justice of the Supreme Court of Canada - Mills was one of the leading defenders of provincial rights in Ontario in the formative period after Confederation. Mills is especially important for understanding the larger assumptions behind the provincialist movement because he developed a theory of provincial autonomy that was arguably unparalleled in English Canada. It is by no means coincidental that Mills learned his law at the University of Michigan under one of the great mid-century systematizers of American law, Thomas Cooley. Through Cooley and others, Mills was introduced directly to a system of law that anticipated many of the core concepts of legal liberalism, and he kept abreast of American legal developments thereafter.[51]

In most of the other cases, the foreign influence was less direct but scarcely less important. American cases were cited frequently in Ontario courts well before Confederation,[52] and the names of Story, Kent and others cropped up not infrequently in the provincialists' defence of provincial autonomy.[53] More typically, however, especially from the 1880s on, Canadians looked to English law for guidance and to English lawyers for authority.[54] The autonomists had read Dicey,[55] admired Bryce[56] and generally attempted to keep astride of developments in English law.

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[51]Writing in 1898, Mills noted: "I do not think that there is any (American) constitutional case reported before 1885, which I have not read more than once . . . . " Mills Papers, Mills to Fitzpatrick, 3 September 1898.

[52]See Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law and History Review at 219-263.

[53]When Mills, who taught law at the University of Toronto in the 1890s, was asked by a correspondent to furnish a set of readings on various legal subjects, he replied: "On Federal Constitutional law, my lectures have never been written out, and so I will not be able to place them at your disposal; but as a substitute therefor, I would recommend you to take the first volume of Kent's "Commentaries" and examine the students upon these lectures relating to United States jurisprudence, and the little volume by Cooley, and Mr. Clement's book on the "Constitution of Canada." Mills Papers, Mills to Perry, 6 January 1899.

[54]See Baker, "Reconstruction of Legal Thought" at 263-292.

[55]Mills seems to have considered Dicey an authority on parliamentary government. When he was asked about the constitutional propriety of prolonging the life of the legislature, Mills referred his correspondent to "Professor Dicey's book on the British Constitution," in which would be found "a very excellent discussion of this subject." Mills Papers, Mills to Cameron, 4 May 1901.

[56]Next to Gladstone, Bryce was arguably the English Liberal with whom the provincial autonomists most clearly identified. Mills wrote glowingly of Bryce's eulogy of Gladstone, for example (Mills to Clarke, 25 May 1898). And Bryce, as a leading advocate of Irish home rule, appears to have encouraged Edward Blake to make the most of the Canada-Irish "home rule" analogy. See Edward Blake, "The Irish Question," speech delivered to the "Eighty Club" (London: 1892).

The provincial autonomists were quick to realize that the doctrine of legal liberalism provided a congenial framework for understanding their own experiences with and hopes for federalism. For autonomists like Mills, the *B.N.A. Act* was a "superior law," a "constitution" which divided legislative jurisdiction into two independent "spheres" of power which "are mutually exclusive."[57] Within each sphere, therefore, each government was "sovereign" or "supreme," subject only to the will of its electorate. If the federal government attempted to act on a matter within provincial jurisdiction, it was in effect "trespassing" on another government's property. "So far as the Provinces continue their autonomy as Provinces," the London *Advertiser* concluded, "the Federal Government has no more authority than it has over the affairs of the State of New York."[58] "The Provinces for Provincial purposes are not in the Union. For all these exclusive purposes, they are as much out of the Union as if no Union existed."[59] So understood, the defence of provincial autonomy against Macdonald's centralizing schemes became by the mid-1880s a major plank of the Liberal Party's platform, both nationally and provincially.

Nor were the autonomists hesitant to trade on the conceptual similarities between federalism and liberalism. The purpose of federalism, after all, was to preserve the "freedom," "autonomy," "independence," indeed the "rights" of the individual provinces from other governments in much the same way as the object of the liberal state was to protect the rights of individuals from overbearing governmental power. The autonomists were quite aware of the rhetorical possibilities of describing provincial autonomy as a form of liberalism, and they made the most of the analogy between provincial and individual rights, between federalism and liberalism.

Thus David Mills, who in addition to leading the Liberal attack on Macdonald in Parliament wrote most of the provincialist editorials for the London *Advertiser*, explained to his readers that, within the sphere of their jurisdiction, the provinces had the right to do what they pleased so long as it did not encroach "upon the rights of others."[60] That qualification understood (and it is an exception that again reflects Mills' liberalism), the provincial legislatures were free to act as they pleased. They were as free, that is, as any rights-bearing individual in a liberal state.

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[57]The idea that the provincial governments are supreme within the "sphere" allotted to them by the Constitution; that this is the basis of their "autonomy," "independence" and "rights"; and that the federal government's exercise of disallowance therefore amounted to "usurpation" or "trespassing," suffused the autonomists' discussions of federalism. For representative samples, see London *Advertiser*, (28 April 1882); (13 October 1882); (18 October 1882); (2 December 1882); (10 January 1883); (24 January 1883); (7 February 1883); (9 February 1883); (12 February 1883); (14 March 1883). Also see Toronto *Globe*, (6 June 1881); (9 September 1881); (5 January 1883); (8 January 1883); (24 January 1883); (24 February 1883).

[58]*Ibid.* at (7 February 1883).

[59]*Ibid.* at (13 October 1882).

[60]*Ibid.* at (26 March 1883).

Mills drew out the implications of the analogy explicitly. The federal government, he argued, had no more right to second-guess the wisdom of an act that was within provincial jurisdiction than the state had a right to tell citizens what religious beliefs they must hold, what foods they should eat, what colour clothes they should wear, or what crops they must plant:

> We go to the farmer, and we find him cultivating his fields in a way which we think a system of scientific agriculture does not warrant. We tell him that the prosperity of the country depends upon the prosperity of each individual, and that the wrongheadedness of himself and hundreds of others are interfering with the general well-being of the country. We call in some one else of our own way of thinking who expresses similar opinions. He replies, "I am cultivating my own lands; upon them I am master of my own actions; in their cultivation my judgment and not yours must prevail, because I, and not you, have exclusive jurisdiction here. It is possible I may err, but I don't think you are infallible, and since the judgment of somebody must prevail, the law which gives me exclusive control here says that it is my judgment and not yours which shall be preferred. It is your privilege to give me advice, but it is not your right to give me commands."[61]

The idea that the state had a right to tell individuals how to act or behave within that sphere of individual autonomy was, from this perspective, simply indefensible. "The most absolute Government that the world has ever known never ventured to carry out in minute detail any such political theory," and nothing could justify it if it tried.[62] "It may be wrong to invest money in a steamboat instead of a farm," he argued in another version, "but these are wrongs based upon the rights of a man to do what he pleases with his own -- the right of preferring his own discretion to the discretion of his neighbor."[63] These illustrations all occurred in the context of Mills' attempts to explain why Macdonald's use of the disallowance power was wrong. As individuals have rights to do as they please consistent with the rights of others, so too the "Local Legislature has the power to do as it chooses, so long as it does not interfere with the corresponding rights of others."[64] And just as the state has no right to tell the farmer how to plant his crops, so "(n)either Sir John Macdonald nor any other outside party has any right to substitute their judgment for the judgment of those to whom the constitution has entrusted the matter."[65]

The analogy between federalism and liberalism was useful, in other words, for explaining the autonomists' growing discontent with the Macdonald administration. The protection of rights turned on the strict maintenance of the boundaries that separated individual from individual, state from individual and, in feder-

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[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.* at (9 February 1883).

[64] *Ibid.* at (12 February 1883).

[65] *Ibid.* at (26 March 1883).

alism, state from state. For the provinces to enjoy their rights, each government, federal and provincial, had to "keep within the boundaries drawn by the constitution" just as the state had to recognize the boundaries of legitimate public power if individual rights were to be maintained.[66] The difficulty in federal Canada, according to the autonomists, was that the Macdonald government had shown scant regard for these jurisdictional boundaries and for the provincial rights they protected. Nowhere was this clearer to the autonomists than in the controversy over disallowance, and that is why it became a rallying point. The Rivers and Streams case was interpreted as a grave threat to provincial rights because it signalled the federal government's intention to "interfere" with, "violate," "trespass" upon, "invade," "plunder" and "usurp" provincial rights. As long as the exercise of disallowance was considered acceptable, it was subject to the "treachery," "vindictiveness" and "intrigue" of a Prime Minister trying to "impose his will upon" unwilling provinces.[67]

As the autonomists viewed the problem of disallowance within the context of the rule of law, so they looked to it to provide a solution. If the federal government was using the veto power to impose its political will upon the provinces, then the remedy was to have "a clear, explicit amendment to our Constitution, which (would) put an end to the vetoing power of the Dominion Administration,"[68] and which would leave the resolution of jurisdictional disputes "as in the neighboring republic, entirely to the courts."[69] Only this would "relieve the Local Legislature from all possible intrigue between the leader of the (provincial) Opposition and his confederates in the Dominion Administration."[70]

Of course this was not the first time an amendment to do away with disallowance had been suggested; Mills had objected to it as early as 1869.[71] But it was only in the 1880s, with the theory of the rule of law and the practice of the Macdonald administration fresh in their minds, that it became fashionable to advocate the abolition of disallowance. David Mills used the editorial columns of the London *Advertiser* to advance the idea of abolishing disallowance formally;[72] the Toronto *Globe* supported the idea of a constitutional amendment to jettison the veto;[73] and Oliver Mowat made it the first item on the agenda of the first Interprovincial Conference of provincial premiers in 1887.[74] The federal govern-

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[66]*Ibid.* at (14 March 1883).

[67]Toronto *Globe*, (24 February 1883).

[68]London *Advertiser*, (10 December 1883).

[69]Canada, Parliament, *House of Commons Debates* at 876, (28 March 1889).

[70]London *Advertiser*, (10 December 1883).

[71]Canada, Parliament, *House of Commons Debates* at 97, (28 April 1869).

[72]London *Advertiser*, (26 February 1883); (6 July 1883); (15 July 1883); (10 December 1883).

[73]Toronto *Globe*, (6 June 1881).

[74]For a thorough account of the Interprovincial Conference of 1887, see Morrison, "Oliver Mowat and the Development of Provincial Rights in Ontario: A Study in Dominion-Provincial Relations, 1867-1896" in *Three History Theses* (Toronto: Ontario Department of Public Records and Archives, 1961) c. 5.

ment was obviously opposed to any such change, but this did not deter the autonomists from trying to convince the Imperial Parliament that the disallowance power should be expunged from the *B.N.A. Act* - even if that had to be done without the federal government's consent. Even here the convertible categories of constitutional law and private law, federalism and contracts, proved a useful guide. The *B.N.A. Act*, the autonomists urged, should be understood as a "contract" among the several provinces which collectively had agreed to delegate a specified set of legislative powers upon a federal government that, by the terms of the contract, they had created. As the federal government was a creation of the contract, not one of the contractees, it was legitimate to alter the terms of the contract without its consent.[75]

In any event the autonomists' demands fell on deaf ears. Neither the federal government nor the imperial authorities took the provincial "compact theory" particularly seriously. Indeed the imperial authorities did not even pay the provincial premiers the courtesy of replying officially to the request. This failure, however, served only to redouble their efforts. If they could not read disallowance out of the *B.N.A. Act* altogether, they could at least render it expendable. To that end, Edward Blake proposed an amendment to the *Supreme Court Act*, the object of which was to make judicial review a more attractive alternative to disallowance than it previously had been.[76]

Blake's argument followed directly from the premises of legal liberalism. The idea of the federal principle, he argued, was to create two mutually exclusive compartments of legislative power in which "the sphere of the jurisdiction of the one is limited by the sphere of the jurisdiction of the other."[77] To allow the federal government to strike down provincial legislation was in effect to allow "one of these two limited Governments. . . (to) decide the extent of the limits, of what in

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[75]For a more detailed analysis of the compact theory see Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921* (Queen's Printer, 1969) c. 4.

[76]Blake's successful amendment strengthened the reference case procedure. The reference case provided a judicial alternative to disallowance that combined the expeditiousness associated with disallowance with the appearance of neutrality associated with judicial proceedings. In fact, Blake presented the reference case procedure less as an alternative to disallowance than as a supplement to it. But most seem to have realized that with a more satisfactory reference procedure in place, there would be no need for disallowance. See the comments of the Conservative Minister of Justice, Sir John Thompson, who was responsible for administering the new procedure: ". . . if the court pronounced (an act) to be unconstitutional it would be most absurd, and practically impossible, for the Minister of Justice to advise that it should be disallowed, after the highest tribunal had decided that the Act was within the powers of the Provincial Legislature." *House of Commons Debates* (7 August 1891) at 3587. Reference cases have since become an important feature of Canadian constitutional law whereas disallowance has passed into virtual disuse. Under the circumstances, it is not too much to connect the waxing of one with the waning of the other. Certainly there can be no question that, at a more general level, judicial review has replaced disallowance as a form of federal boundary management. On reference cases in this early context, see Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" in W. R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964) at 220-248.

[77]Canada, Parliament, *House of Commons Debates*, at 4089 (29 April 1890).

a sense, is its rival government."[78] Disallowance thus permitted a "political executive" to discharge "a legal and a judicial function."[79] Understood as such, it violated one of the fundamental principles of Anglo-Saxon law, for it allowed the federal government to judge cases in whose outcome it had an interest. There was a sense, Blake argued, in which the act of disallowance therefore "is the decision of a party in his own cause."[80] It would be far better to enlist "neutral, dignified and judicial aid" in the enforcement of jurisdictional boundaries.[81] It would be far preferable to leave the interpretation of the constitutional division of powers to those who are trained to see federal and provincial jurisdiction, in Mills' memorable phrase, "as if they were separated by land marks visible to the eye."[82]

On the surface, this concerted attack on disallowance triumphed impressively. The view that policing the boundaries between federal and provincial jurisdiction is a "legal and judicial function" became dogma, and as dogma changed so practice was gradually altered. To be sure, the practice of disallowing provincial legislation did not disappear overnight, but by the early decades of this century the disallowance power had almost completely been replaced by judicial review.[83] In light of the historical record, it seems plausible to suppose that the power of disallowance became unusable by the early decades of this century because the crucial audiences - provincial premiers, federal cabinet ministers and certain portions of the electorate - came to view the veto power as the autonomists wanted them to view it: as a violation of constitutional principle to which political costs were attached and for which there was a principled, that is judicial, alternative. This certainly seems to have been the attitude of Ernest Lapointe, Mackenzie King's veteran Minister of Justice, who rose before the House of Commons in 1937 to explain that as long as "the provincial legislatures feel that they are still supreme and sovereign within the sphere of their jurisdiction" it would be difficult for Ottawa to veto provincial acts.[84] The very fact that disallowance has essentially passed into desuetude suggests that the Mills-Blake-Lapointe view of disallowance remains dominant.

IV

Yet at a deeper level, the Millsian attack upon disallowance did not end the debate over disallowance so much as return it to its point of origin; and in doing so, it brought to the surface paradoxically the problem of protecting individual

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[78] *Ibid.*

[79] *Ibid.* at 4088.

[80] *Ibid.* at 4089.

[81] *Ibid.*

[82] London *Advertiser*, (14 March 1883); see also *House of Commons Debates*, at 576 (8 March 1875): "The line which separated the powers of the Local Legislatures from those of the Parliament of Canada, was as distinct as if it was a geographical boundary marked out by the surveyor."

[83] See La Forest, *Disallowance and Reservation*, c. 8-10.

[84] Canada, Parliament, *House of Commons Debates*, 1937, vol. 3, at 2294.

and minority rights that had been largely submerged in the 1880s and 1890s. To recall, a number of the leading Confederationists had assumed that disallowance would and should be used to protect individuals and minorities from tyrannical provincial legislation. As we have seen in detail, this view of disallowance was quickly repudiated both by Conservative and Liberal administrations, who preferred to use disallowance as a jurisdictional veto when they used it at all. As we have also seen, the debate over disallowance therefore quite quickly resolved itself into a debate about federalism and the integrity of provincial communities and their legislatures.

Mills' original contribution to this debate in the 1880s and early 1890s inadvertently challenged the terms of the debate, for his contention that disallowance violated the rule of law, and his analogy between individual and provincial rights, re-introduced the theme of individual rights and the problem for which disallowance had once been seen as the solution. Mills had meant to use the analogy between individual and provincial rights to strengthen the case for the complete and utter autonomy of local decision-making. But the analogy was only as strong as the object of the comparison was deep. In Mills' view, the rights of the provinces were worthy of protection in the same way or to the extent that the rights of individuals were worthy of protection. To Mills the idea of rights protected by law was not simply a neat linguistic analogy which helped him to illustrate the dangers of federal disallowance; it was, more fundamentally, a valuable and intrinsically worthwhile model of political organization. Mills found the rights analogy persuasive, in other words, because he believed not merely that provincial rights could be compared to individual rights, but because, as a liberal, he believed that individuals have rights.

The difficulty with the analogy between provincial and individual rights, therefore, is that it cut both ways. On the one hand, it reinforced the argument for provincial autonomy by providing an unassailable foundation for the integrity of provincial legislation. But the same association that strengthened the claim for provincial autonomy could be used just as easily to undercut it. For if the basis of the claim for provincial autonomy was its likeness or comparability to individual autonomy, could the consistent provincialist really sit idly by as a provincial legislature violated the rights of its citizens? If the provincial autonomists were really committed to the rule of law as the bulwark of liberty, could they simply ignore it when a provincial legislature abridged the liberty of some of its citizens? And if they couldn't, did not disallowance provide one means by which to thwart vicious provincial legislation, even (or perhaps especially) that provincial legislation that was clearly within provincial jurisdiction?

One answer to these questions was supplied by Mills himself when, as Minister of Justice in the Laurier cabinet between 1897 and 1902, he discharged the responsibility of vetting provincial legislation with a view to its disallowance. Considering Mills' firmly held and frequently expressed view that disallowance ought to be abolished, it is curious that as Minister of Justice he considered the use of disallowance at all. Yet use it he did. In all, Mills was responsible for recommending the disallowance of thirteen provincial and territorial acts in his tenure

as Minister of Justice, which is to say that he disallowed as many acts in his five years as Minister of Justice as his predecessors in the post had vetoed in the previous ten.[85]

The way in which Mills used the veto power is still more remarkable than the sheer number of laws disallowed, however. Mills' patience was tested most sorely by the government of British Columbia, which passed a series of bills at the turn of the century that attempted to prohibit Asians either from immigrating to or working in British Columbia. In most cases, Mills seems to have proceeded on the traditional assumption that the federal government could legitimately invalidate only those laws that were *ultra vires* the British Columbia legislature or were inconsistent with some more general federal policy. Thus when Mills was called upon to judge a B.C. law that effectively prohibited the immigration into the province of any person who could not write out an application "in the characters of some European language," he did not hesitate to exercise the veto.[86] Such educational requirements, he wrote, were simply "inconsistent with the general policy of the law" of the federal government.[87] When, on the other hand, the B.C. Legislature acted in a way that was clearly within its exclusive jurisdiction, Mills usually stayed his hand. Having explained that the aforementioned immigration bill was repugnant to the federal government's policy, Mills turned around in the same memorandum to explain that he could do nothing to blunt the effect of a similarly discriminatory law that disenfranchised Chinese, Japanese and Indian voters in Vancouver municipal elections. "Such enactments," he explained dryly, "are entirely local and domestic in their nature, and sufficiently justified, so far as the powers to be exercised by the government of Canada are concerned, by the fact that the local legislature has considered their provisions expedient or desirable."[88]

In fact, however, Mills was neither able, nor it seems was he disposed, to contrive such a neat, jurisdictional rationale for every one of the B.C. acts that came to his attention. Mills' duty as Minister of Justice in these cases was complicated by the fact that B.C. 's legislation had elicited a formal diplomatic protest from the Japanese government against the province's actions. Mills was under significant pressure from the Foreign Office to prevent these provincial acts from jeopardizing Britain's relations with Japan. In the course of disallowing two acts that sought to disqualify those of Japanese and Chinese extraction from being employed by provincial corporations, he essentially suggested to the government of B.C. that the disallowance of these acts was a small price to pay for "a friendly sentiment on the part of Japan in matters of commerce and otherwise."[89] The

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[85]Tabulated from the tables in Hodgins, *Dominion and Provincial Legislation*, vol. 1 (1867-1896) and 2 (1896-1920). Between 1887 and 1897, the federal government disallowed thirteen provincial acts, most of them from Manitoba.

[86]*Ibid.*, vol. 2 at 594.

[87]*Ibid.* at 595.

[88]*Ibid.* at 597.

[89]*Ibid.* at 556.

B.C. laws might well have been *ultra vires* anyway as the legislation dealt with matters - immigration and the rights of aliens - on which the federal government has paramount authority. From Mills' point of view, however, the existence of clear imperial interests obviated any need for a detailed jurisdictional analysis along these lines. For the purposes of disallowance, it was sufficient that the B.C. legislation conflicted with larger, imperial interests.

Yet by shifting the discussion over the B.C. laws from jurisdiction strictly speaking to the larger, political interests at stake, Mills also made it easier to inject into the review of these laws the very considerations of justice that he had earlier argued were incompatible with the exercise of disallowance. For at the root of the Foreign Office's fears that the B.C. legislation could poison British-Japanese relations, was the serious, and from Mills' perspective legitimate, complaint that the B.C. laws discriminated gratuitously and unjustly against the rights of Japanese workers in the province. In his explanatory report to the B.C. government, Mills could easily have confined himself to a description of the *real-politik* of the situation, concluded that the B.C. legislation had to be sacrificed for the larger good of the Empire, and left it at that. He did not. He considered the premier of B.C. to be an "unscrupulous and dangerous" character; he seems personally to have disliked the B.C. policy; and as a result he apparently could not resist the temptation to read the B.C. government a lesson in liberalism.[90] The problem with the legislation, he argued, was not merely that it threatened to become an irritant in British-Japanese relations; the problem was that the legislation was "*justly* regarded as offensive by a friendly power."[91] In the end, Mills' decision to disallow some but not all of the acts on jurisdictional grounds clearly reflected the dilemma that he faced in attempting to find a balance between provincial sovereignty, the larger interests of the Empire, and what he called quite explicitly "the justice of the case."[92]

Admittedly, it is easy to overstate the importance of such considerations of justice, of the rights of a minority subjected to systematic discrimination, in Mills' calculations. These considerations were probably no more than an undercurrent in his discussion of the B.C. legislation, and Mills was himself ambivalent on the the question of equal rights for Asian immigrants. Still, given the very powerful pressure to exclude such considerations altogether from the discussion of disallowance, even such an undercurrent is noteworthy. Moreover, when the issue was one which Mills considered to be morally unambiguous - protecting the rights of property for instance - the question of rights came to the fore.

The most striking example in this latter category concerns Mills' threat to strike down an Ontario law that required companies not incorporated in Ontario to apply and pay for a license to do business in the province. Again, Mills could well have disposed of the Ontario law simply on jurisdicti ɔnal grounds. As he put

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[90]Mills Papers, Mills to Laurier, (18 May 1900).

[91]Hodgins, *Dominion and Provincial Legislation* at 556. Emphasis added.

[92]*Ibid.* at 557.

it in his official report to the Attorney General of Ontario, the *Licensing Act* arguably trenched both on the federal government's authority to legislate for the "peace, order and good government of the country" and on its exclusive power to regulate trade and commerce; it flew in the face of several judicial precedents; and the Ontario *Act* was similar to several others that had already been disallowed.[93]

What is curious, then, is that when the Premier of Ontario, George Ross, responded to Mills' report with a promise to amend the sections that were jurisdictionally questionable, Mills rejoined by saying in effect that Mr. Ross had misunderstood the federal government's objections. "The question is not," Mills wrote, "whether you have the power to tax Dominion corporations more than you do those of the local legislature, created for a similar purpose, but whether we ought to permit the policy of the Dominion to be frustrated by such unjust provincial legislation." The real objection to the Ontario law, therefore, was not that it exceeded provincial jurisdiction - although Mills was certainly suspicious of it on those grounds. The more basic problem, rather, was that it imposed a burden on companies incorporated under federal law that it did not impose on Ontario companies, that it discriminated against federal corporations as if these were somehow "foreign corporations." Were the shoe on the other foot, were Ottawa to pass a similar licensing law that disadvantaged Ontario corporations, Mills was quite sure that Ontario "would at once cry out against our legislation, not because it was *ultra vires*, but because it would be unjust." All the federal government was asking was that Ontario "recognize the principle of equality." He concluded: "I think you see what my position is. The question of *ultra vires* in this matter is quite subordinate to the general question of public policy."[94]

These opinions cannot easily be reconciled with the purely jurisdictional use of disallowance that was current in the 1870s, much less with Mills' unconditional denunciation of disallowance that he made quite routinely in the 1880s. But it would be a mistake to conclude that Mills' position was, on this evidence, either inexplicably contradictory or expediently self-serving. What Mills' position brings to light, rather, is the enormous ambiguity of an analogical system that was meant to accommodate both provincial autonomy and the liberal protection of rights. The possibility that there might be an insoluble tension between the component parts of the system did not manifest itself as long as Mills could assume that provincial autonomy and liberal rights were mutually reinforcing; in effect, as long as Liberals controlled most provincial legislatures and Tories the federal Parliament. The possibility, post-1896, that provincial legislatures would act unjustly and that he would be in a position as a federal minister to stop injustice in its tracks before and in preference to a legal challenge, forced him to consider violating the rule of law (in the form of provincial autonomy) in order to protect the rule of law (in the form of individual rights). That is the deep tension, not to say incoherence, in Mills' Canadian application of the late-nineteenth-century understanding of the rule of law.

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[93] *Ibid.* at 17-18.

[94] *Ibid.* at 26-27.

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The tension in Mills' thought between federalism and liberalism helps to explain the curious evolution of the power of disallowance; it also sheds light on the contemporary debate over the implications of the *Charter of Rights* for the preservation of community and liberty. One of the most subtle and provocative analyses of the *Charter*'s meaning in this regard is Charles Taylor's recent contribution to the series of research reports published in conjunction with the McDonald Commission, an essay entitled "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada."[95] Taylor is concerned with, in the Canadian context, the "malaise of modernity" which in one form or another and to one degree or another seems to afflict all modern societies. By modern, Taylor means societies centrally dedicated to the maximization of freedom understood in two distinct, and not perfectly compatible, ways. The first meaning of freedom, associated especially with the classical liberalism expounded by philosophers like John Locke, focuses on individuals as rational, independent agents "who discover their purposes in themselves" rather than seeing themselves as "part of some cosmic order, where their nature was to be understood by their relation to that order."[96] What follows from this definition of freedom as self-definition is that "as a free subject, one is owed respect for one's rights and has certain guaranteed freedoms." The condition of freedom thus understood is that one "must be able to choose and act, within limits, free from arbitrary interference of others." The "modern subject," in short, "is an equal bearer of rights. This status is part of what sustains his identity."[97]

But if freedom has often been defined as bearing rights and centred on the individual, there is another sense of modern freedom which is better defined as self-governance and which has centred on the community. "The fact that we govern ourselves is an important part of our dignity as free subjects." But this definition of freedom as self-governance leads in quite a different direction than the first definition for it suggests that "the modern subject. . . is far from being an independent, atomic agent." On the contrary, "an individual is sustained. . . by the culture which elaborates and maintains the vocabulary of his or her self-understanding."[98] The full realization of freedom so understood can only be achieved through identification with the community and participation as a citizen.

These two definitions of freedom - as individual rights and citizen participation - have co-existed in some form of dynamic balance since they were first expounded during the Enlightenment; there is nothing new in this. What is distinctive about the situation that we face in the late twentieth century, according to Taylor, is that the individualistic, atomistic, rights-based dimension of modern lib-

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[95]Charles Taylor, "Alternative Futures" *supra*, note 1.

[96]*Ibid.* at 190.

[97]*Ibid.* at 193.

[98]*Ibid.* at 194.

eralism has begun to crowd out or threaten the "community" dimension.[99] This threat can be illustrated in a number of ways. The demand for greater individual freedom, defined especially in terms of material well-being, requires, among other things, a population that is mobile; a government that can provide a wide range of services efficiently and that operates a welfare system to mitigate the effects of economic dislocation and historical patterns of discrimination; the concentration of public and private energies to distribute goods and opportunities efficiently; and a system of courts which will protect rights "even against the process of collective decision-making of the society, against the majority will, or the prevailing consensus."[100] Yet as Taylor points out, these conditions of individual freedom serve to undermine community. Mobility destroys the fabric of stable, traditional communities; the need to provide services creates bureaucratized, largely unaccountable, government; the "culture of rights" effectively "circumvent(s) majority decision making through court judgments" and so "further entrenches taking a distance from community decision-making"; and concentration creates the sort of centralization that makes citizenship remote and participation difficult and unrewarding.[101] The result - perhaps most plainly evident in the United States - is governmental overload, ungovernability, litigiousness and a decline in even the most routine forms of citizen participation. "Looked at in the light of the full demands of the modern identity," Taylor concludes, "the atrophy of citizen power negates an important dimension of our dignity as free agents, and hence poses a potential long-term threat to the legitimacy of a modern society."[102]

The alternative to these modern strains and tensions, Taylor argues, is not to abandon modernity (which is probably impossible anyway), but to revitalize the other side of the modern project, what he calls the "participatory model," which stresses decentralization, political participation, attachment to community and the democratic protection of liberty. Taylor clearly endorses the participatory model as a matter of principle. More importantly, he argues that it is particularly well suited to Canada where, he says, "the sense of citizen dignity" has tended historically "to take the participatory rather than the rights forms" and where there is a long history of regional resistance to centralization.[103]

It is here that Taylor allies himself most closely with what Richard Simeon and others have called the provincialist understanding of Canada. For like the provincialists who opposed the entrenchment of a *Charter of Rights* on the grounds that it would undermine the integrity of local decision-making, Taylor is careful to tie the preference for greater decentralization to democratic or participatory aspirations. Decentralization is desirable because it offers the best opportunity to counter "the malaise of modernity." "The fate of the participatory

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[99] *Ibid.* at 206.

[100] *Ibid.* at 209.

[101] *Ibid* at 207.

[102] *Ibid.* at 224.

[103] *Ibid.* at 211.

model in Canada," he argues, "of the continued health of our practices of self-rule, depends on our continuing resistance to centralization. . . .":

> If our aim is to combat, rather than adjust to, the trends to growth, concentration and mobility, and the attendant bureaucratic opacity and rigidity of representative democracy, then some measures of decentralization are indispensable, with the consequent strengthening of more localized, smaller-scale units of self-rule.[104]

In the end, Taylor sketches this choice for Canada:

> In a sense, to oversimplify and dramatize, we can see two package solutions emerging out of the mists to the problem of sustaining a viable modern polity in the late twentieth century. One is the route of political centralization, at the cost of some citizen alienation but compensated for by an increasing incorporation of the American model in which dignity finds political expression in the defense of rights. The other is the route of continued decentralization, and a continued attempt to maintain and extend our historic participatory model, at the cost of putting a greater and greater strain on political vision and inventiveness through mechanisms of political coordination.[105]

Taylor's preference is clear. "If we look at Canada's future. . . in terms of the way this country can best face the strains of modernity and the dangers of political breakdown implicit in them - then there seems no doubt that the centralizing solution would be an immensely regressive step."[106] Apart from everything else, Taylor concludes that some basic commitment to decentralized authority "is more in line with our traditional political culture."[107] Indeed, "the strength of our historic regional societies makes it virtually mandatory for us to practise a more decentralized style of government than other comparable federations."[108]

Taylor's defence of the participatory model of politics is extremely attractive, but it succeeds, I believe, only at the cost of distorting the historical tradition that is meant to sustain it. Taylor would have us believe that one of the reasons that a participatory form of politics is accessible to Canadians in a way that it may not be to Americans is that our political tradition, rooted in regional self-government, has historically "been more identified with the participatory model," while "the habit of litigation, and the elements of atomist consciousness that go along with it, are deeply rooted in American history."[109]

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[104] *Ibid.* at 221-222.

[105] *Ibid.* at 225.

[106] *Ibid.* at 224.

[107] *Ibid.* at 225.

[108] *Ibid.* at 224.

[109] *Ibid.* at 211.

Yet even with the necessary qualifications, this characterization of provincialism in Canada, much less the Canadian-American contrast, is overdrawn. For one thing, it is by no means clear that the "continuing resistance to centralization" in Canada has in fact been undertaken with a view to preserving and promoting greater citizen participation or that it serves as an historical precedent for the "participatory model" on which Taylor would have us build.[110] For the fact is that the intellectual strategy of the provincial rights movement, the earliest and most successful example of resistance to centralization in English Canada, entailed a basic ambivalence, if not hostility, to the ideal of full democratic participation of the sort Taylor thinks desirable. The core idea that informed the legal understanding of provincial autonomy, after all, was to put jurisdiction first. What mattered was not whether the provincial or federal governments acted well or wisely, but merely whether they acted permissibly or legally, within the boundaries of their jurisdiction. This was the crucial condition of autonomy and everything, including a broader form of political discussion, fell to it. In the autonomists' legal mind the defence of autonomy depended on treating the discussion of the most controversial issues as if they raised only jurisdictional questions that could be discussed and resolved in terms of rights. The integrity of provincial communities depended, more specifically, on separating law and politics as far as possible; on separating the question of whether a measure was "wise or unwise, expedient or inexpedient," from the legal question of whether a given legislature had the jurisdictional right or capacity to act.[111]

What followed was a system of constitutional rules in which the federal government was meant to be barred not only from acting in areas of provincial jurisdiction, but in which political discussion was reduced to and centred on the determination of jurisdiction. It was a system in which jurisdictional claims themselves were not really to be discussed so much as derived from the black letter text of the Constitution - and this by courts not representative bodies. And to the extent that jurisdiction was unclear and a matter for debate, it was a system in which both levels of government soon learned that jurisdictional uncertainty provided a good pretext for refusing to address issues that divided the electorate.[112] Despite their liberal "creed that a wise decision can only be arrived at through the discussion of it from every point of view," the autonomists' scrupulous attention to the defence of provincial autonomy made them limit and narrow discussion - in precisely the way that Taylor says discussion is narrowed when political questions are discussed in terms of rights.[113] The provincial autonomists in Ontario, in sum, insisted on defending their claims in the very language that Taylor associates with the "rights model," and to that extent their conception of

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[110] *Ibid.* at 221.

[111] *London Advertiser* (26 March 1883). See also the issue for 23 March: "But it is not the question of the wisdom or justness of the measure which we have to consider in the case. The question is as to the constitutional rights of those to whom the people have entrusted with certain powers, to be the sole judges as to the legislation required in the public interest under these exclusive powers."

[112] The Ontario government's various efforts in the 1890s to avoid dealing with the question of prohibition are a good example.

[113] *London Advertiser* (19 July 1884)

politics suffered from some of the very symptoms that a participatory form of decentralized power is meant to cure.[114]

Put slightly differently, it is not entirely clear that the principles on which provincialism has rested historically are as hostile to the "rights model" as Taylor's depiction of these "two packages" would imply. Beneath the important superficial differences there is actually a deep affinity between the claim for provincial autonomy mediated by the rule of law and Taylor's "rights model." At the level of political rhetoric, for instance, it is useful to remember that provincial governments still couch their claims to power in terms of rights, and they still reinforce these claims by comparing provincial rights to individual rights.[115] It is possible that one of the reasons that Canadians accepted the idea of an entrenched *Charter of Rights* so readily is that the long-standing debate over provincial rights had long since inured them to the usefulness and attractiveness of the language of rights, of legal boundaries, and of courts as impartial arbiters.

There is a still deeper, substantive affinity here between the historical pursuit of provincial autonomy and the "rights model" that Taylor slights. If the provincial autonomists were successful in protecting the integrity and sovereignty of local self-government, the record suggests that they neither could nor wanted to disentangle themselves completely from the liberal regard for the protection of individual freedom that informed the vision of the rule of law. To the extent that the provincial autonomists were liberals, therefore, it is arguable that in legitimizing a rights model of federalism the provincial autonomists both protected provincial power and actually laid the conceptual groundwork for the *Charter of Rights* that places substantive limits on provincial power; that the *Charter* represents the fulfilment of the liberal premises that informed the movement for provincial autonomy, in a way, however, that is not necessarily congenial to provincial autonomy; in sum, that the *Charter* follows in the tradition of, and is the better alternative to, the power of disallowance as a way of protecting individual rights.

Taylor is surely right to say that the problem of community remains the crucial, unresolved question facing Canadians. He is probably right, as well, that as

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[114]I have elaborated on this point in "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada," Canadian Journal of Political Science (June 1985) 18:2 at 267-294.

[115]The constitutional conferences leading to the promulgation of the *Constitution Act, 1982* provided several good examples of the way in which the provincial governments exploited the analogy between liberalism and federalism. In arguing for greater constitutional control over the development of natural resources, both Alberta's Peter Lougheed and Saskatchewan's Allan Blakeney compared the provincial governments' position to that of (individual) property owners who simply wanted to vindicate "the rights of the owner," including the "right to receive value for the resource as a commodity." (Proceedings of the First Ministers' Conference on the Constitution, September 1980; Premier Lougheed at 119-120). As Premier Blakeney put it: "Ownership by a province becomes important, then, because it allows a province to do all those things that *any* owner can do. . . . " (Saskatchewan position paper, 12; emphasis added). Premier Lougheed drew out the analogy again in stating Alberta's position on changes to the amending formula. The priority of his government, he said, was for an amending formula "that protects us against the rights of the tyranny of the majority" (Proceedings, 124).

long as it remains unresolved, there is bound to be a decentralizing impulse in Canadian politics that will always distinguish it from American politics. But it is too simple, even if attractive, to picture the alternative futures of Canada as resting on a choice between "two packages" - one decentralized and participatory, the other centralist and rights-oriented. The truth is that these visions cannot be so easily "packaged" or disentangled from a history in which each is implicated in the other. Like it or not, the *Charter of Rights*, and more recently the Meech Lake Accord, are in all their awkwardness a fair representation of the various traditions from which they have grown. The attempt to preserve rights while allowing legislatures to override them under certain circumstances; the attempt to protect minority linguistic rights across the country while acknowledging that Quebec is a distinct society; the attempt to protect mobility while allowing provinces to prefer their own citizens if need be; the declaration that rights are fundamental but also, and explicitly, subject to reasonable limitation - all of this reflects not merely a compromise between two visions of Canada, but the extent to which each vision entails or is parasitic upon the other.[116] What we are left with is not a choice between our history and our future, between our more participatory tradition and the modern malaise, between 1867 and 1776. We are left, rather, with two visions of Canada produced, bound inextricably together and held in tension by our history. The challenge is to find principles that will allow the different strands of the Canadian constitutional tradition to grow and intertwine from their common source.

[116]For an argument along these lines, see Patrick Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. at 117-156.