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Provincializing Constitutions: History, Narrative, and the Disappearance of Canada's Provincial Constitutions

by

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Abstract

Constitutional scholarship in Canada since Confederation has been characterized by two primary narratives. The dualist narrative, which characterized constitutional scholarship between the late-nineteenth and mid-twentieth centuries, focussed on the parallel developments of provincial and federal constitutions. The monist narrative, which has become the dominant model of interpretation since the mid-twentieth century, focusses on the federal constitution as a singular foundation of constitutionalism in Canada. As a result of the shift from dualism to monism, provincial constitutions have become largely ignored in Canada and subsumed by the "mega-constitutional" politics of the federal constitution. This paper examines provincial constitutions to highlight the significant reorientation of constitutional scholarship in Canada over the past 150 years, which has become primarily focussed on post-Confederation constitutional history and written constitutionalism.

Keywords

Canadian constitution, subnational constitutionalism, narratives, constitutional history, federalism

The newspaper reports say that two thousand people crowded the bunting-wrapped streets of Niagara-on-the-Lake in July 1892 to mark the centennial of the reading of the proclamation that established the province of Upper Canada and its system of representative government, as outlined in the Constitutional Act of 1791. The Lieutenant Governor of Ontario read verbatim the proclamation issued a century earlier by his predecessor John Graves Simcoe that called for the election of a Legislative Assembly. The importance of the occasion, Ontario Premier Oliver Mowat told the crowd, was that it marked "the first step in the political history of the Province" ("Responsible Government" 1892).[1] It was clear to him and to those assembled that the anniversary marked an important milestone in Ontario's constitutional evolution. A century later, however, the event's bicentennial passed largely unnoticed. Instead, the national referendum on the Charlottetown Accord, which proposed wide-ranging reforms to the Canadian constitution, crowded newspaper headlines and dominated constitutional discussion. Compared to the clamorous noise of constitutional reform in those years, the establishment and development of constitutional government in Upper Canada and other British North American colonies were barely-heard whispers from a very different era.

The contrast of anniversaries in 1892 and 1992 reveals a deeper change in constitutionalism in Canada, which since the mid-twentieth century has become almost exclusively focused on the *Constitution Act, 1867* and *1982*, and written constitutionalism more generally. This is nowhere more obvious than in the strange silence surrounding provincial constitutions in Canada, which form a great disappearing act in Canadian political history. Once regarded as foundational elements of Canadian constitutional law and politics, they have become largely ignored and subsumed by the "mega-constitutional" politics of the federal constitution (Russell 2004).

The diminishment of provincial constitutions in Canada is less a reflection of their secondary significance than the changing narratives of the constitution in Canada, which over time have come to focus almost exclusively on the federal constitution as the singular legal architecture of the state in Canada. A number of political scientists who have reflected on the paucity of attention to provincial constitutions have concluded that it is largely the result of their basis in varied documents and unwritten principles (Cheffins and Tucker 1976; Rowe and Collins 2015). What is often missed, however, is that a reorientation in

constitutional and legal scholarship over the past one hundred and fifty years has produced a constitution that is largely unmoored from the pre-Confederation foundations of its development. This article broadly traces this change in key writings of prominent constitutional scholars – those who wrote systematically about the historical development and legal principles of the constitution in Canada – revealing how the developing historical narrative of constitutionalism in Canada, which came to focus almost exclusively on the post-Confederation period, emphasized written constitutionalism and the federal constitution in particular. Provincial constitutional lineages, once central in Canadian constitutional scholarship, consequently became largely ignored and subsumed into a singular framework anchored in the *Constitution Act, 1867*.

As pre-Confederation constitutional history faded from the focus of constitutional scholars, so too provincial constitutions. This was not a coincidence. The growing concentration on the British North America Act as "the" Canadian constitution placed it as the primary focus of constitutional concern. Anything that came before, notably the development of political autonomy and constitutional government in British North American colonies, largely faded from view. By essentially regarding distinct British North American colonies as provinces in waiting and Canada as a nation founded in 1867, they reframed the constitutional development of those political societies into intimations of Confederation. Provinces are thus less likely to be regarded as constitutional communities in their own right, but rather as subsidiary cohorts of the Canadian constitutional order. This is often understood through the lens of the "act or pact" debate on the meaning of Confederation, but more substantially it is a reflection of the parameters of history in understanding constitutional law (Cook 1969). The diminishing presence of provincial constitutions in the writings examined here is a symptom of the wider diminishing (and almost near disappearance) of the pre-Confederation period from Canadian constitutional analysis.[II]

The first part of this article lays out the legal foundations of provincial constitutions in Canada and compares them to subnational constitutions in other federal jurisdictions. It highlights the peculiar position of Canada's provincial constitutions in this wider framework, and questions why Canada's federal constitutional architecture has developed in a relatively unique way. The following sections turn to examine the writing of constitutional history in Canada, and traces the place of provincial constitutions and pre-Confederation

constitutionalism in key legal works published in Canada. This shows that the narrative of constitutional history bears greatly on our understanding of federalism today, though often in implicit ways. Much has been written about the development of federalism in Canada, especially in the early years of judicial review and post-Charter of Rights reorientations (Cairns 1971). It is not the intention of this paper to reengage these debates, but rather to add to the discussion an often overlooked element. The development of constitutional narratives serves to shape the common sense of what the constitution is and is not, and to understand the relative absence of provincial constitutions therefore requires careful attention to the historical narration of the constitution in Canada.

1. Subnational Constitutions in Federal States

It is not common to hear about provincial constitutions in Canada today. In fact, provincial constitutions are so absent from political discourse and academic scholarship that they seem almost non-existent. As Wiseman (1996: 143) notes, "provincial constitutions barely dwell in the world of the subconscious. They are apparently too opaque, oblique, and inchoate to rouse much interest, let alone passion." Despite the perennial constitutional battles between levels of government that have become a regular feature of Canadian political culture, it is rare to hear provincial politicians invoke their province's constitution in political debate. Constitutions are one of the strongest symbols of legitimacy in politics, and yet for Canadian provinces, they are not part of the toolbox of political rhetoric. As Baier suggests (2012: 191), this may be in part because of the "national unity imperative" that has dominated Canadian politics from the mid-twentieth century.

It is not the case that provinces do not have constitutions, but rather, that their constitutions are less readily identifiable than the federal constitution. Of course, as is the case in the British constitutional system inherited in Canada, many of the most important and practical aspects of the constitution are unwritten conventions. Unlike the *Constitution Act, 1867* and *1982*, which might be readily pointed to as Canada's constitution (the renaming of the *British North America Act* to the *Constitution Act* in 1982 certainly removed room for ambiguity in this regard), most provinces do not have clear constitutional documents. British Columbia, which has had a *Constitution Act* since it entered Confederation in 1871, is the exception here, and as Campbell Sharman has argued, it "provides a good example of the

scope and importance of provincial constitutional documents quite independent of the *BNA Act*" (1983: 88). There have been more recent calls in Quebec to create a written provincial constitution, but most provinces have not expressed interest in enshrining formal written constitutional documents (McHugh 1999/2000; Turp 2013; Richez 2016).

In this regard, Canada is rather unusual compared to other federal states around the world. Most other subnational jurisdictions have some form of a constitution that provides a clear legal and political apparatus (Tarr, Williams, and Marko 2004). American and German states and Swiss cantons, among the world's oldest federal jurisdictions, have formal constitutions. Australian states, perhaps the most analogous jurisdictions to Canadian provinces, each have a written constitution, many of which have been subject to formal amendment. It is clearly established that Australian states entered the Commonwealth of Australia as distinct constitutional jurisdictions maintaining their separate constitutions and constitutional lineages. Section 106 of the Australian constitution recognizes "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission of the State." The explicit recognition of the continuation of state constitutions is vital to understanding Australian federalism, and constitutional scholars there have noted that "the colonies were deliberately called 'States' and not merely 'provinces' to indicate their status as constituent self-governing political communities" (Aroney, Gerangelos, Murray, and Stellios 2015: 608). While state constitutions have not been popularly ratified, they nevertheless form an important element of the constitutional architecture of modern Australia.[III]

2. Pre-Confederation Constitutional Development in British North America

Provincial constitutions in Canada are varied and are less visible in part because they are based on a history of gradual development, which is anchored in a period before the province's entry into Confederation, with the exception of Alberta and Saskatchewan, which were jurisdictions created by the Canadian government after Confederation. It is critical to note that the constitutional narratives examined here are settler expressions of legal and political order, which rarely account for indigenous practices and norms of governance. The focus on settler constitutionalism is, as Borrows (2010) argues, only a partial understanding

of constitutionalism in Canada. The development of European constitutional cultures in British North America was divided among different colonies that, despite shifting boundaries, eventually became Canadian provinces. In each of these cases, a myriad of statutes, conventions, royal instructions, and orders in council may be cited as elements of provincial constitutions. Most important among these is the principle of responsible government, which remains the foundation of parliamentary democracy in Canadian provinces but which is not spelled out in any particular constitutional document.

The disappearance of provincial constitutions is directly connected to the diminishing place of pre-Confederation history in modern legal scholarship, a process that began following the turn of the twentieth century. Baker (1985: 287) has illustrated how Upper Canadian legal culture quite literally dissipated in legal studies as a result of the disbursal of law libraries, creating a "discontinuity in the organic development of Canadian legal culture." As many of the sources that formed the basis of a distinct local legal culture vanished, so too did the historical narrative on which it was largely based. Though later constitutional scholars would seek to uncover the roots of an autochthonous Canadian constitution – one that developed as a consequence of growing autonomy and expressions local political sovereignty – by focussing on the period after Confederation, they in fact helped to deracinate Canadian constitutionalism, pulling it away from the roots that had germinated from the eighteenth century.[IV] The practical consequence of this, as this essay examines, is that provincial constitutions are not typically part of considerations of Canadian constitutional law and history.

The late eighteenth and early nineteenth centuries saw the remarkable transnational spread of constitutions and constitutional innovation in the Americas and Europe, or what Linda Colley (2014: 263) has called a "contagion of constitutions." Societies in British North America were certainly not impervious to this.[V] It was during this pivotal period that the foundations of modern Canadian constitutionalism developed, with the shaping of local constitutions occupying considerable space in political debate and public sphere deliberation (McNairn 2000). This pattern was echoed in pre-Confederation colonies that adapted cardinal elements of the "British constitution" – notably representative institutions and responsible government – to their North American societies (Buckner 1985). Throughout the late-nineteenth and early-twentieth centuries, commentators pointed to pre-Confederation constitutions as the local foundations of self-government and political

autonomy (Ajzenstat 1990). For example, on the centenary of the Constitution Act, 1791, Toronto politician Oliver Aiken Howland (1891) described it as the watershed in the development of self-government in Canada.

Understanding provincial constitutions therefore requires understanding the deeper historical lineages from which they developed.[VI] In the case of Nova Scotia, the 1749 Instructions to Edward Cornwallis, the colony's first British governor, established a legislative and judicial framework that are considered foundations of the province's constitution (Beck 1957: 143). By contrast, the Constitutional Act, 1791, may be considered a statutory foundation of Ontario's constitution. For provinces that joined after the initial union of 1867, specific statutes may form part of the province's constitution. The Manitoba Act, 1870 or the Alberta and Saskatchewan Acts of 1905 are examples where a statute may be recognized as the constitutional foundation of the province. Beyond these individual constitutional developments, the Constitution Act, 1867 recognizes "provincial constitutions" in Part V, which outlines the provinces' legislative, judicial, and vice-regal composition. The varying and uncodified nature of these constitutions means that, as Wiseman (1996: 156-159) discovered, even provinces themselves seem to struggle with defining precise parameters of their constitution.

The largely uncodified nature of provincial constitutions has meant that they are almost perceived not to exist. Yet, with the exception of changes to the office of the Lieutenant Governor, provinces have wide control over their constitutions. As a result, changes to provincial constitutions are relatively uncomplicated, and tend to elicit less sustained notice as a result. Most notably, the lack of entrenched constitutions has allowed several provinces to abolish their second legislative chambers with relative ease, especially compared to the recurrent frustrations of Senate reform at the federal level.[VII] There has been little effort in Canada's provinces to entrench statutory provisions as a way of formalizing the constitution, or implementing clearer regulations for amending provincial constitutions. This could mean, for example, requiring a "super majority" of legislators or a public referendum to approve changes to fundamental aspects of the constitution, such as the formation of the legislature or the electoral system. The absence of such an entrenchment, Tarr (2012: 190) argues, "may suggest that provincial constitutions are viewed as different in dignity from the federal constitution. They are more akin to ordinary statutes than to fundamental law." The laws

and conventions that form provincial constitutions are therefore less likely to be described as such, though this has not always been the case.

3. Constitutional Dualism in Early Post-Confederation Scholarship

From the initial legislative debates on the subject of Confederation, there were concerns that a new written federal constitution would overshadow provincial constitutions. Christopher Dunkin commented on the "absence of a feature from the scheme – the non-provision of anything like provincial constitutions," adding that as a result "there may be no two of our six or more local constitutions framed on the same model" (Canada 1865: 501). Antoine-Aimé Dorion shared Dunkin's concern about the vagueness of local constitutions, noting that they were essential aspects of the federation plan, and should be "laid at the same time before the House" (Canada 1865: 267). Others like Dorion who opposed the federation scheme believed that the ambiguity of local constitutions would exacerbate the dominance and status of the federal powers. Leonidas Burwell, for example, argued that provinces should have separate written constitutions that could be regulated by judicial review (Canada 1865: 446). Similarly, in Nova Scotia, opponents of Confederation like Thomas Coffin worried that the plan was "one calculated to sweep away our constitution" (Nova Scotia 1865: 292). In deliberating on the plans for a federal union, the desire to maintain and even formalize local constitutions was thus an important element, especially for those who worried about the centralizing effects of Confederation.

When the British North America Act came into effect in 1867, its historical development and future prospects quickly became popular topics for legal scholars and public writers alike, generating sustained public interest in a way that would not be seen again until the major constitutional reforms of the late twentieth century. Even if its contents were rhetorically dull and uninspiring, the British North America Act provided a document that could be pointed to as the basis of Canada's constitution. Though some were initially reluctant to recognize a "written" constitution for a British society that typically venerated the mythos of an "unwritten" constitution, it was impossible to escape the fact that within a few short years of its enactment, the British North America Act was a central feature of constitutional politics and adjudication.

Compared to the new federal constitution, provincial constitutions seemed much more ambiguous. The concern that Christopher Dunkin expressed about the vagueness of local constitutions and their inherent dissimilarities led to attempts to clarify provincial constitutions so that they could be examined and understood alongside the federal constitution. Shortly after Confederation, Liberal Opposition Leader Alexander Mackenzie rose in the House of Commons in Ottawa to ask that some order be given to the muddled morass of provincial constitutions in Canada. His motion asked for all documents pertaining to the pre-Confederation British North American colonies, including imperial despatches, Orders in Council, royal instructions, statutes, and charters, be organized together in a readily accessible volume. Some of these documents, he argued "conferred certain political rights, which will not be found in the particular charter respecting that Province" (Canada 1882: 167). Prime Minister John A. Macdonald, who was certainly no proponent of provincial rights, expressed surprise that such a compendium did not already exist, and agreed that various aspects of provincial constitutions should be gathered up and catalogued together. The House decided to have the Library Committee look into the "important" matter and assemble a more definitive volume of provincial constitutions in Canada.

The motion would not make much of a difference, as it turned out. Six years later, constitutional scholar John George Bourinot (Canada 1888: 232) complained to the same parliamentary committee that "all the organic laws and documents establishing changes in the constitutions of those countries are only found scattered in a large number of volumes to be consulted at much inconvenience by the parliamentarian, publicist and historical student."[VIII] The particular difficulty here was that the federal and provincial constitutions seemed to follow two different timelines, with the provinces that pre-existed the federal Canadian state claiming a much longer lineage of constitutional history than the new federal state. As a result, a quandary of post-Confederation constitutional scholarship was the question of what happened to the constitutions of the separate British colonies that joined Confederation. Did they continue to form independent constitutions of these provinces, or were they superseded by the Canadian constitution? The practical effect of this question was largely inconsequential; the legislative institutions of these provinces continued to exist after Confederation unaffected by the British North America Act, which in any case guaranteed provinces the ability to amend their local legislative institutions. Nevertheless, the issue of

provincial constitutions had important symbolic value for constitutional writers who sought to trace unique constitutional lineages of provinces beyond the British North America Act.

Two important features distinguished the first generation of post-Confederation constitutional scholarship. First, most of the authors who popularized constitutional scholarship were born and raised in the colonies that formed British North America before Confederation, and they wrote at a time when the meaning of Canada as a nationality and as a constitutionally distinct entity was uncertain and thought to be in a continuing state of transition. The constitutional nationalism that would come to define scholarship in the later twentieth century was largely absent in this period.[IX] Second, the prevailing legal logic of the time informed constitutional scholarship, especially the emphasis on legal liberalism and the focus on separate and autonomous jurisdictions.[X] Federalism thus formed a central place in late-nineteenth century constitutional scholarship, especially the unfolding understanding of autonomous federalism, based on the separate and independent spheres of provincial and federal levels of government. What tends to be lost to the more pronounced political controversies about the nature of federalism in those years is attention to the distinct transformation of constitutional narratives. Based on the compact theory of Confederation, the "provincial rights" movement, as Vipond (1991: 10) points out, germinated chiefly from a concern "to show how a federal constitution could be fit squarely and comfortably into a larger, pre-existing, and deeply rooted cultural system" and to ensure that the federal constitution "reconciled with the constitutive symbols that anchored their self-identity."[XI] The provincial rights movement was, from this perspective, less about "decentralizing" the federal constitution than it was about maintaining commitments to the existing constitutional architecture that defined the evolution of political life in the province.

The most prominent works of constitutional scholarship published in Canada in the decades following Confederation unambiguously argued that pre-Confederation constitutions continued to operate in Canada as the bases of provincial constitutions. Bourinot was the most widely recognized authority on constitutional law and history in late-nineteenth century Canada (Banks 2001). In addition to his work as a parliamentary clerk, he published dozens of books, pamphlets, and articles on Canadian constitutionalism and political history. In his *Federal Government in Canada*, based on a series of public lectures he delivered in Toronto, he traced the independent constitutional lineages of the provinces most vividly. Examining the constitutional acts of the province of Canada and the collected

statutes and documents pertaining to the other pre-Confederation provinces, he rejected the idea that the provinces were created anew at Confederation. He wrote (1889: 124-126), "the provinces never intended to renounce their distinct and separate existences as provinces, when they became part of the confederation… The constitutions of the four provinces, which composed the dominion in 1867, are the same in principle and details." He added that this extended to provinces that subsequently joined Confederation, so that "local or provincial constitutions are now practically on an equality, so far as the executive, legislative and all essential powers of self-government are concerned."[XII] As much as Bourinot sought to illustrate the development of a new Canadian constitution in much of his writings, he stressed that it should not be seen to signify the extinction of provincial constitutions. Importantly, he regarded the federal and provincial constitutions as "equal," and his narrative of constitutionalism in Canada reflected the duality of constitutions at the federal and provincial levels. It was clear to him that understanding the constitution in Canada required examination of provincial constitutions.

Bourinot's framing of provincial constitutions related directly to his emphasis on the pre-Confederation constitutional history of Canada. In his widely circulated book *How Canada is Governed*, which was aimed at a general readership and went through twelve editions, Bourinot emphasized pre-Confederation constitutional development as the foundation for understanding contemporary constitutionalism. The fundamental political freedoms and constitutional government enjoyed in modern Canada, he wrote, could only be discovered "as we look back of the century that has passed between the Treaty of Paris, which ceded Canada to England in 1763, and the Quebec convention of 1864" (1895: 33). Similarly, a chapter on provincial constitutions in his *Manual of the Constitutional History of Canada* (1888: 90-102) traced the development of legislative institutions in separate colonies in the eighteenth and nineteenth centuries. These were not matters of purely historical interest, but were central to understanding contemporary constitutionalism in Canada, especially the civil rights that were central elements of provincial jurisdiction.

Bourinot was not alone in emphasizing the pre-Confederation development of provincial constitutions. The nature of provinces' constitutions was also a central concern for William Henry Pope Clement, who published his influential *Law of the Canadian Constitution* in 1892. Clement was a Toronto lawyer who later became a judge in the Yukon and on the Supreme Court of British Columbia. The first chapter of the book traced the history of pre-

Confederation constitutions, dating back to the creation of the Nova Scotia Assembly in 1758, because, he explained, "the slate was not cleaned" by Confederation (25). He expanded this point further in the following chapter, titled "What Became of Pre-Confederation Constitutions?" Its purpose, he averred, was "to ascertain whether, under the B.N.A. Act, the provincial constitutions *continue*; for if so, then the same connection between the legislature and the executive, which existed before confederation, must still continue with respect to subjects of provincial cognizance" (46). It was clear to him that provincial constitutions that antedated the British North America Act were not "wiped out" by that Act and continued to operate in Canada. A strong defender of classical federalism, Clement emphasized the importance of recognizing the separate constitutional lineages and frameworks of provincial and federal governments in Canada.

Other constitutional authorities shared a similar emphasis on constitutional duality in Canada by stressing the separate historical development of provincial constitutions. This is especially evident in the writing of Toronto lawyer Dennis Ambrose O'Sullivan, whose emphasis on the separate and distinct nature of provincial constitutions became more pronounced over time. His popular *Manual of Government* was published in 1879 with the instructive subtitle *The Principles and Institutions of Our Federal and Provincial Constitutions.* In the revised and expanded reissue of the book in 1887 under the main title *Government in Canada*, O'Sullivan extended his chapter on provincial constitutions and stressed the continuity of the pre-Confederation constitutions of former colonies. The constitutions and Nova Scotia and New Brunswick, which were both based originally on royal instructions, were "unaffected by the [British North America] Act and continued as they were before 1867" (128). Ultimately, he claimed, constitutional jurisprudence had given credence to the provincial perspective that they had not voided their own constitutions by joining Confederation and that "the old Constitutional Acts were not repealed" (136). His emphasis was clear in the updated preface, in which he voiced his concerns that the federation was becoming "something different from what the framers of it intended." The federal government's veto power was an "accident of the Canadian federation," according to O'Sullivan (1887 vi), stressing the absolute sovereignty of provinces within their legislative jurisdictions.

The importance of provincial constitutions was perhaps most evident in Quebec, where the development of a constitutional culture that ensured religious, linguistic, and legal

protections had long been germinating. Not surprisingly then, one of the most explicit calls for the recognition of pre-Confederation provincial constitutions in the late nineteenth century came from Thomas-Jean-Jacques Loranger, a Quebec judge who wrote extensively on legal matters. His *Letters Upon the Federal Constitution Known as the British North America Act, 1867* was published in English in 1884 after being originally published in French. Throughout the pamphlet, Loranger avoided referring to the British North America Act as the constitution, instead using the term "Federal Union Act." The provinces, he argued, continued to be governed by their pre-Confederation constitutions, particularly the endowment of parliamentary authority on provincial legislatures.

For Loranger, therefore, the Constitutional Act of 1791 marked the beginning of provincial constitutional existence in Quebec and Ontario because it provided them with parliamentary institutions. This, he added emphatically, was not repealed by the 1867 Act (1884: 14). Pointing to recent court appeals, he concluded that the "principle, that the provinces retained their old powers when they entered confederation and have continued to be governed by their former constitutions, was judicially consecrated" (41). The importance of this matter was clear in his pamphlet, as he feared that the attempt to deny the enduring existence of provincial constitutions threatened the "French race" in Quebec. Inhabitants of the provinces, he wrote, "have a common interest in opposing the excessive centralization of federal power, the lowering of their legislatures, and the gradual disappearance of their constitutions" (vi). For Loranger, the need to stress the fact that provinces maintained unique "constitutions" was an essential element of his forceful defence of provincial rights.

4. Monist Counter-Narratives

The sense of a creeping centralization of constitutionalism that prompted Loranger's pamphlet was not without foundation. A number of writers in the decades following Confederation put forward an argument that the British North America Act marked a complete break from the past. Loranger's worry about the "lowering" of provincial legislatures, for example, was illustrated in a book written by Fennings Taylor (1879), the Deputy Clerk of the Senate, which argued that provincial "legislatures" were subordinate bodies to the Parliament of Canada, which as a "parliament," had inherent rights and privileges not accorded to ordinary legislatures.[XIII] This was obvious, Taylor believed,

because the British North America Act expressly described a federal parliament, whereas the term was never used to distinguish provincial assemblies. This semantic dispute highlighted a growing tendency following Confederation to regard the British North America Act as a moment of constitutional rupture, especially for many defenders of the federal government's position in unfolding constitutional adjudication.

From this perspective, there was only one level of constitutionalism in Canada after 1867, which effectively extinguished prior constitutional development. Edward Douglas Armour, who served as editor of the *Canadian Law Times* between 1881 and 1900, frequently used his editorial prerogative to reinforce his preference for highly centralized federalism. In an otherwise positive review of Clement's *Law of the Canadian Constitution*, for example, he took exception with the book's focus on provincial constitutions, insisting instead that "the British North America Act is a new departure from an old system of government" (1892: 301). This meant, as he stated elsewhere (1884: 631), that "the pre-confederate Provinces as political societies, are extinct, and their territories constitute the several provincial sub-divisions of the Dominion." Though this position was at clear odds with prevailing constitutional scholarship, it was a powerful way for opponents of the provincial rights movement to narrate an alternate understanding of the "new" Canadian constitution. As James Cockburn (1882: 430), a strong centralist member of Macdonald's caucus, stated bluntly, at Confederation "we surrendered our Provincial systems and existences. We had nothing left; nothing in reserve. All the old chartered constitutions were repealed and swept away as if they had never been." According to his argument, the British North America Act was not merely a federal constitution, but a revolutionary constitutional order that rendered void all aspects of pre-Confederation constitutions. His insistence here that those constitutions were erased "as if they had never been" is a particularly striking admission, and reflects the minimization of pre-Confederation history in the narratives that would come to characterize later constitutional scholarship in Canada.

While provincial constitutions figured centrally in earlier constitutional treatises, the term virtually disappeared in later works. The authors, part of a generation that Paul Romney considers errant centralists (1999: 161-180), contributed to a narrative of constitutional development that repositioned provinces as subconstitutional units. They tended to follow the nationalist teleology of Canadian history that was perhaps most vividly captured in historian Arthur Lower's popular *Colony to Nation* (1964: 332), first published in 1946, in

which he made it clear that Confederation had "wiped out [the] old provinces of Canada, New Brunswick, and Nova Scotia and created in their place four new provinces, Ontario, Quebec, New Brunswick, and Nova Scotia." As a result of this perspective of history, provincial constitutions, insofar as they were mentioned, were largely limited to the legislative configuration outlined in the British North America Act. In distinct contrast to earlier constitutional scholarship, these writers did not devote much space to pre-Confederation history. The implication was that Confederation marked not only the genesis of a new political jurisdiction, but also of an entirely new and different constitutional order. The constitutional narrative that emerged in the mid-twentieth century was one that placed strong emphasis on the British North America Act as a constitutional watershed and largely displaced pre-Confederation constitutionalism from the picture. Scholars consciously moved away from the focus on British legal contexts that had become popular at the outset of the century.[XIV] It is hardly coincidental then that many of the constitutional centralists of the twentieth century – proponents of what Adams (2006) calls the "newer constitutional law" – were also strong Canadian nationalists who were especially preoccupied with the growth of Canadian political autonomy.

The increasing professionalization of the social sciences at the turn of the twentieth century meant that legal and historical studies tended to be more rigidly divided, with pre-Confederation constitutional matters, especially the development of responsible government, becoming a common focus of historians in the early part of the century.[XV] For example, Chester Martin's popular *Empire & Commonwealth*, published in 1929, focussed extensively on history before 1867; Confederation does not appear until the book's last chapter. As an historian, Martin evidently worried about the development of contemporary legal constitutional scholarship, and particularly the "tendency to regard the *British North America Act* of 1867 as the 'constitution of Canada'" (327). He emphasized instead that the development of constitutional self-government in Canada "is to be sought not in the written statute but in those unwritten 'conventions' which came to govern the relations between Crown, councils, and Assemblies in the old 'royal' provinces. In that sense the most fundamental part of our constitution – both provincial and federal – is not, and never has been, 'written'" (328).

For legal scholars, however, the focus on written constitutionalism became the central focus, especially as it related to judicial review. The growing preoccupation with written

constitutionalism is perhaps clearest in the writings of William Paul McClure Kennedy, one of the most influential constitutional scholars of the twentieth century. His most famous work, *The Constitution of Canada*, was first published in 1922 and has been reissued as recently as 2014. Impressive in size and scope, it would be the last major work on Canadian constitutional law to dedicate extensive space to pre-Confederation constitutional development.[XVI] The bulk of the book examines constitutional development in British North America before Confederation, and again, it is only in the final chapters that Confederation is considered in detail. Despite the fact that it remains Kennedy's most well-known work, it was after its initial publication that he started to voice a more robust sense of centralized constitutionalism. In particular, he pointedly criticized the Privy Council's regard for the British North America Act as an ordinary British statute rather than fundamental constitutional law. Writing in the *Canadian Bar Review* (1937: 400), Kennedy claimed that "In the far-off days of 1864-67, the men who made the Dominion of Canada had express vision that its peoples would forget that they were Lower Canadians, Upper Canadians, New Brunswickers or Nova Scotians and would become Canadians in a new nation." The failure of that vision in the intervening years of constitutional jurisprudence meant that the British North America Act needed to be repealed and reconstructed. It was an astonishing admission from Canada's leading constitutional scholar, but marked a wider change in constitutional thought that increasingly displaced the constitution in Canada from its historical development. Small wonder then that Kennedy (1931: 554) complained about the "dull" nature of older constitutional writing, saturated deep with historical detail, which seemed to him to be impervious to "actual modern issues."

The source of Kennedy's barely-concealed anger was the belief that the Privy Council deviated Canadian constitutionalism from the centralized course intended by its framers, a sense that would define much of the constitutional scholarship of the mid-twentieth century. The pertinent point here is less about the conflicting views of federalism that this divide reflected than the fact that the focus on the Privy Council became so pervasive that it effectively erased provincial constitutions from constitutional discussion. Defining the scope of provincial constitutions and detailing their development before Confederation would seem at odds with the mission of recasting Canadian federalism as a strongly centralized system. In his numerous articles on the perceived errors of the Privy Council, for example, Dalhousie Dean of Law Vincent MacDonald (1948: 23) argued that, contrary to the court's

interpretation, the Canadian constitution embodied a "special kind of centralized or quasi-federalism."

The decline in consideration of provincial constitutions is particularly overt in Robert Dawson's 1933 collection titled *Constitutional Issues in Canada, 1900-1931*. The first excerpt included is Charles Stuart's 1925 speech to the Saskatchewan Bar Association (Dawson 1933: 6), in which he commented on the relative lack of mention of provincial constitutions, especially when compared to state constitutions in the United States. The reason for this, he averred, was that while states had written constitutions, Canadian provincial constitutions were of the "utmost variety in their origin." His fundamental point, however, was that provincial constitutions "are entirely outside the British North America Act" (7) found instead in the separate and largely unwritten development of political institutions of separate colonies. Interestingly, however, the next document in Dawson's collection was a 1925 speech by federal Minister of Justice Ernest Lapointe (1933: 15), who claimed that provinces "have no Constitution other than the British North America Act; all their powers they derive from that Act." The apparent contradiction in these two sources from the same year is a telling reflection of the changing attitude toward the relationship between provincial constitutions and the federal constitution.

It was an assumption that became pervasive in constitutional scholarship in the mid-twentieth century. Adams (2006: 438) notes that "the scholars of the newer constitutional law fundamentally altered the landscape of Canadian constitutional thought by abandoning the formalist traditions of early twentieth-century scholarship." This alteration is perhaps most pronounced in the ideas of Frank R. Scott, whose many writings on the constitution were unambiguous in their effort to bolster a strongly centralized federal structure. In his various essays on the Canadian constitution, Scott rarely mentioned provincial constitutions and devoted little space to pre-Confederation history. He wrote bluntly (1950: 203) that "the phrase 'Constitution of Canada' includes the provincial constitutions." It is very clear that for Scott, the British North America Act was a radical point of departure from the past and effected a total reconstitution of political order in British North America. He stated, for example (1977a: 252), that the purpose of Confederation was "to take away from local governments many of their existing powers," meaning that "the post-Confederation provinces therefore started with their previous autonomy much reduced." Not only did Scott exclude provincial constitutions from his writing, but he also claimed (1977b: 246) that all

laws and political rights exercised by provinces were derived from the British North America Act, and not pre-Confederation constitutions.

A dedication to written constitutionalism emerges in many twentieth century sources. Most works on Canadian constitutional law and politics from the mid-century onward featured a chronology of constitutional development that began in 1867 and were largely understood according to the written provisions of the British North America Act. The narrative laid out in Peter Russell's *Constitutional Odyssey*, one of the most important works on constitutional history written since the mid-twentieth century, starts with the deliberations on the British North America Act. Most constitutional scholars in the second half of the century echoed Quebec lawyer Paul Gérin-Lajoie's definition (1950: 4) of capital-C "constitution" as "the document or set of documents containing the 'fundamental law.'" From this definition, he could conclude that "the provinces of Canada have no rigid constitution" (41). The implication was that the political structures of provinces were to be understood through the written words of the Canadian constitution. "The starting point for the study of provincial constitutions is the British North America Act," Cheffins and Tucker claimed (1976: 257). As the written constitution of 1867 became the primary focal point for describing constitutionalism in Canada, much of the history that preceded Confederation vanished from sight.

5. Implications of Monist Narratives

The term provincial constitution may seem rather peculiar today because of its general diminishment in constitutional scholarship over the twentieth century. It is not that the protection and assertion of provincial rights declined over the twentieth century (indeed, it can be said that it amplified during that time), but that claims of provincial rights became restricted almost entirely to debate over the federal constitution. This was certainly cemented by the mega-constitutional controversies and political clashes, as well as the preponderant attention to rights adjudication following the "Charter revolution" in the 1980s. The consequence of this shift has in large part been that pre-Confederation constitutional history has been either largely ignored or problematically recast as the anticipatory antecedents of the modern federal constitution. The problem of the Confederation chasm, which rather arbitrarily divides much in Canada's history, is thus particularly acute in constitutional studies.

Beyond the implications for constitutional history, however, a few further points highlight how the diminishment of provincial constitutions and the longer narrative of constitutional development in which they are anchored has influenced public policy and constitutionalism today.

A key risk in not acknowledging or understanding provincial constitutions is that gradual changes to them may go unnoticed or under-examined. Over the past few decades, a number of provinces have codified greater centralization of executive authority, though such changes are rarely deemed to be "constitutional" in nature.[XVII] This was a problem that began to develop soon after Confederation.[XVIII] In the late nineteenth century, Ontario legislator William Macdougall (1875: 20), concerned by what he considered the virtually unrestrained power of the provincial government to amend its constitution, suggested that the province's constitution be subject to formal ratification to be altered or amended. Ironically, his criticism was aimed at Oliver Mowat – a primary actor in the early constitutional battles over the British North America Act – for what he considered to be his disrespect of the province's constitution.

Canadian provinces have exercised their ability to amend their (unwritten) constitutions – obvious most recently in a number of attempts to reform the electoral system in British Columbia, Prince Edward Island, and Ontario. In all three cases, the proposed changes were seldom qualified as constitutional reform, and given the grumbling that the very idea of constitutional change tends to elicit in Canada, that may have been advantageous to provincial politicians. Even though the proposed reforms would have been constitutional changes, they were not recognized as such. Proposals to introduce electoral reform at the federal level, on the other hand, have prompted some legal observers to point out that it is a constitutional issue, perhaps even requiring formal constitutional amendment (Macfarlane 2016).

Despite the long history of unwritten constitutional principles in Canadian provinces, some have argued for the formalization or entrenchment of provincial constitutions, particularly in Alberta and Quebec.[XIX] The matter of enshrining the provincial constitution has been most prevalent in Quebec, owing to the unique constitutional politics of the province. The vital importance of language and culture in Quebec has been reflected in concerns for their constitutional protection. Quebec's language law, for example, as a provincial statute does not have formal recognition or protection as a "fundamental law,"

which is a key reason that advocates argue for an enshrined provincial constitution. It is particularly interesting to note that most references to a new Quebec constitution tend to be characterized by the assumption that Quebec does not currently have a constitution; there are few references, for example, to the nineteenth century development of responsible government or the expansion of representative institutions. Thomas-Jean-Jacques Loranger's nineteenth-century plea to guard against the "gradual disappearance" of separate provincial constitutions seems entirely unrequited in this modern constitutional debate. Instead, discussions of developing a provincial constitution tend to proceed from the premise that a constitution must be written in order to exist, and that the "unwritten" historical development of political rights have little bearing on modern constitutionalism.

6. Conclusion

For the first generations of post-Confederation constitutional scholars, the subject of the constitution in Canada typically included consideration of two levels of constitutions – provincial and federal. This was based on a narrative of constitutionalism that located constitutional origins of different provinces in their pre-Confederation development. Alongside this narrative, however, gradually emerged a tendency to understand the British North America Act as a radical departure in Canadian constitutional history. The narrative that followed from this perspective was one that favoured a more centralized federal government and traced a timeline of development that usually began in 1867. As a result, the separate constitutions of provinces tended to be subsumed into the larger story of Canada's federal constitution.

The shift in constitutional narrative mirrored the more recognized constitutional debate about the nature of federalism in Canada and its interpretation (or transformation, as the argument may be) by the Privy Council. The irony here is that the preoccupation of the provincial rights advocates on the adjudication of the British North America Act contributed to a constitutional culture focussed almost exclusively on that legislation. By focussing on the meetings of British law lords in central London, the defence of provincial rights became refracted almost exclusively though the adjudication of the act – of "the constitution" – and less through the claims to inherited constitutional identities. The later push back against the provincial rights advocates only further bolstered the monist narrative of the constitution in

Canada. The practical consequence of the tendency to minimize pre-Confederation Canadian history is that it homogenizes distinct constitutional origins and cultures as aspects of Canadian constitutional history rather than the contours of discrete constitutional communities.

The study of provincial constitutions in Canada has thus become a study of the effects of historical narrative in constitutional scholarship. The relative absence of provincial constitutions in Canada is the product of a largely deracinated constitutional history that tends to position the establishment of a new constitutional order in 1867 as a de novo foundation. It is also a significant reflection of the growth of the culture of written constitutionalism in Canada. Aside from the "unwritten" conventions that continue to govern parliamentary affairs and the crises that they have engendered, there is little attention given to the development of constitutional institutions in Canada and its provinces.[XX] In the post-Charter era of Canadian constitutionalism, political rights and individual freedoms are predominantly understood as protections guaranteed by written law.

The sesquicentennial of Confederation in 2017 is often described as the anniversary of the Canadian constitution. That anniversary, however, is only one milestone in a much longer and varied narrative of constitutional development in Canada's past, which continues to bear resonance today. Pre-Confederation constitutional history did not cease to be relevant in 1867, though its imprint on Canadian constitutionalism today may be hard to see, as both public and scholarly attention focusses on more recent constitutional developments. Amidst the attention to the one hundred and fiftieth anniversary of Confederation, then, it is worth looking again at the Upper Canada centennial celebrations in Niagara-on-the-Lake in 1892 to see what all the fuss was about.

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[I] Despite the headline of the article, the anniversary marked the establishment of representative government. The proceedings of the centennial event were published in 1893 as *The Centennial of the Province of Upper Canada, 1792-1892.*

[II] An important exception is the tracing of the constitutional history of Quebec since the sixteenth century in Jacques-Yvan Morin and José Woehrling 1994. For a recent anthology of constitutional history before 1867 in Quebec and Ontario, see Laforest, Brouillet, Gagnon, and Tanguay 2015.

[III] Though as Nicholas Aroney (2012: 222) argues, popular ratification of state constitutions could bring about dramatic changes in Australian constitutional practice and the "logic upon which the constitution operates."

[IV] Russell (2004: 125) notably considers the quest for constitutional autochthony in Canada as the objective of developing and ratifying a written constitution in Canada.

[V] Enlightenment ideals of liberty and constitutional government circulated widely in early Canadian politics, as

Ducharme (2010) persuasively illustrates.
[VI] For a brief overview of the pre-Confederation development of provincial constitutions, see Read (1948).
[VII] Upper legislative chambers were abolished in Manitoba in 1876, New Brunswick in 1891, Prince Edward Island in 1893, Nova Scotia in 1928, and Quebec in 1968. As with the absence of written constitutions, Canadian provinces are relatively unique among subnational jurisdictions in having unicameral legislatures.
[VIII] Bourinot (1888) published his petition, along with a list of relevant constitutional documents, as a pamphlet for wider public circulation, notably titled *Federal and Provincial Constitutions*.
[IX] On the rise of constitutional nationalism, which was closely tied to constitutional centrism, see Adams (2015).
[X] See Risk (2006). As Vipond (1991) has indicated, legal liberalism was a central tenant in the provincial rights movement in Ontario.
[XI] For a similar argument, see Hodgins (1972: 56).
[XII] This point is also raised in Bourinot's famous *Parliamentary Procedure and Practice* (1884: 64-72).
[XIII] For a critical rejoinder to Taylor, see Watson (1880).
[XIV] Baker (1985: 278) calls this the development of "legal neo-colonialism." The writings of A.H.F. Lefroy and Alpheus Todd, both committed to the imperial unity, are primary examples of this tendency.
[XV] On the professionalization of history in Canada, see Wright (2009).
[XVI] An exception here is Lederman (1981), who emphasizes the pre-Confederation development of responsible government in his collection of essays.
[XVII] See for example O'Flaherty (2008).
[XVIII] See for example Banks (1986).
[XIX] For a brief commentary on the idea of a written constitution for Alberta, see Morton (2004).
[XX] Most notable in recent times was the 2008 prorogation controversy; see Russell and Sossin (2009).

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