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Aller au sommaire du numéro

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Résumé de l'article

Affirmer que l'idéologie politique canadienne est plus conservatrice et statique que celle des États-Unis est un lieu commun. On l'explique généralement par la continuité, mettant de l'avant l'idée que le Canada a été formé d'un ensemble d'éléments culturels qui étaient attachés au collectivisme paternaliste et condamnaient **le libéralisme** et **l'individualisme** américains. Ce trait culturel, qu'a accentué la peur des États-Unis, a même affecté la philosophie libérale. Le présent article étudie la philosophie politique canadienne d'un point de vue opposé. Il se concentre sur l'Ontario, analyse la résistance du Canada à la transformation du réformisme du Haut-Canada et la relie à des circonstances qui tiennent de l'histoire canadienne elle-même.
L'illogisme fondamental du **constitutionnalisme** des **Whigs**, qui était l'idéologie dominante de l'État britannique et, en conséquence, le fondement de l'ordre britannique dans le Haut-Canada, a été responsable de cette transformation.
En proclamant l'existence de principes constitutionnels inviolables sans mettre de limites au pouvoir dérogatoire du Parlement à ces principes, le **constitutionnalisme** libéral rendait possibles les contradictions entre **la constitution** et **la loi**. Les Réformistes du Haut-Canada furent particulièrement sensibles à cet illogisme, parce que des institutions légalement établies ne purent visiblement pas fonctionner en accord avec la loi constitutionnelle. Comme on ne réussit pas en Angleterre à remédier à cette anomalie, les leaders réformistes délaissèrent le **constitutionnalisme** libéral en faveur du gouvernement responsable. Les circonstances de la lutte pour le gouvernement responsable ont exalté le peuple et accordé une autorité particulière à la volonté populaire exprimée dans la législation. Il y eut donc un glissement du **constitutionnalisme** au légalisme dans les relations entre l'État et le citoyen. Mais comme le changement touchait le niveau « provincial » et non « national », le **constitutionnalisme** demeura prépondérant dans les relations fédérales-provinciales. La persistance de ce dualisme culturel est évident, quand on compare les décisions de la Cour Suprême du Canada dans l'Affaire Morgentaler et dans le Rapatriement de la Constitution.

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From the Rule of Law to Responsible Government: Ontario Political Culture and the Origins of Canadian Statism

PAUL ROMNEY

Résumé

It is a commonplace that the Canadian political culture is more "conservative" or "statist" than the American. This trait is usually explained in terms of cultural continuity, the underlying idea being that Canada was formed from a congeries of cultural fragments which esteemed paternalistic collectivism and deplored American "liberalism" and "individualism," and that this initial bias, reinforced as it was by fear of the United States, affected even liberal thought. This paper approaches the Canadian political culture from the opposite direction. Focussing on Ontario, it traces Canadian statism to the transformation of Upper Canadian Reform ideology by the contingencies of domestic history.

A fundamental inconsistency within Whig constitutionalism — the hegemonic ideology of the English state and as such the ideological foundation of British rule in Upper Canada — was crucial to that transformation. In proclaiming the existence of indefeasible constitutional principles, but setting no limit to Parliament's power to legislate in derogation of those principles, Whig constitutionalism permitted contradictions between "the constitution" and "the law." Upper Canadian Reformers were especially sensitive to this inconsistency because of the apparent failure of legally established institutions to function according to constitutional precept. The imperial failure to remedy these functional defects impelled leading Reformers to forsake Whig constitutionalism for the ideology of responsible government. The circumstances of the struggle for responsible government fostered the apotheosis of the community and imparted a special authority to the common will as expressed in legislation. This development promoted a drift from ***constitutionalism*** *towards* ***legalism*** *in relations between the state and the individual, but because it was the provincial, not the "national" community that was thus exalted, constitutionalism remained predominant in federal-provincial relations. The persistence of this cultural dualism is evident from a comparison of the decisions of the Supreme Court of Canada in Morgentaler's cases with its decision in the Patriation Reference.*

* * * * *

For their comments on an earlier draft of this paper, or for illuminating discussion of the subject-matter, I am much obliged to Carl Berger, Douglas Hay, Graeme Patterson, J.G.A. Pocock, R.C.B. Risk, and Robert C. Vipond. Any errors, solecisms, and longueurs are my own.

Affirmer que l'idéologie politique canadienne est plus conservatrice et statique que celle des États-Unis est un lieu commun. On l'explique généralement par la continuité, mettant de l'avant l'idée que le Canada a été formé d'un ensemble d'éléments culturels qui étaient attachés au collectivisme paternaliste et condamnaient ***le libéralisme*** *et* ***l'individualisme*** *américains. Ce trait culturel, qu'a accentué la peur des États-Unis, a même affecté la philosophie libérale. Le présent article étudie la philosophie politique canadienne d'un point de vue opposé. Il se concentre sur l'Ontario, analyse la résistance du Canada à la transformation du réformisme du Haut-Canada et la relie à des circonstances qui tiennent de l'histoire canadienne elle-même.*

L'illogisme fondamental du ***constitutionnalisme*** *des* ***Whigs***, *qui était l'idéologie dominante de l'État britannique et, en conséquence, le fondement de l'ordre britannique dans le Haut-Canada, a été responsable de cette transformation.*

En proclamant l'existence de principes constitutionnels inviolables sans mettre de limites au pouvoir dérogatoire du Parlement à ces principes, le ***constitutionnalisme*** *libéral rendait possibles les contradictions entre* ***la constitution*** *et* ***la loi***. *Les Réformistes du Haut-Canada furent particulièrement sensibles à cet illogisme, parce que des institutions légalement établies ne purent visiblement pas fonctionner en accord avec la loi constitutionnelle. Comme on ne réussit pas en Angleterre à remédier à cette anomalie, les leaders réformistes délaissèrent le* ***constitutionnalisme*** *libéral en faveur du gouvernement responsable. Les circonstances de la lutte pour le gouvernement responsable ont exalté le peuple et accordé une autorité particulière à la volonté populaire exprimée dans la législation. Il y eut donc un glissement du* ***constitutionnalisme*** *au légalisme dans les relations entre l'État et le citoyen. Mais comme le changement touchait le niveau "provincial" et non "national", le* ***constitutionnalisme*** *demeura prépondérant dans les relations fédérales-provinciales. La persistance de ce dualisme culturel est évident, quand on compare les décisions de la Cour Suprême du Canada dans l'Affaire Morgentaler et dans le Rapatriement de la Constitution.*

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The Canadian political culture is most often analyzed by setting up the United States as an object of comparison and proceeding to identify and explain Canadian deviations from the American paradigm. This approach favours an interpretation that stresses cultural continuity. The more empirical inquiries have almost invariably discovered that Canadians were more "conservative" or "collectivist," less "individualistic" or "egalitarian," than their republican neighbours; the more theoretical or ideologically oriented ones have taken these distinctions for granted. In either case, the differences are duly traced back to Canada's origin as a congeries of cultural fragments with a common attachment to paternalistic collectivism and a common hostility towards a neighbour whose "'right-wing' and 'left-wing' are just different species of liberalism."[1] This initial bias, reinforced as it was by the ever-menacing propinquity of the United States, is held to have affected even Canadian liberal thought.

1. George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (1965; rep. Ottawa, 1986), 65.

Nowadays this sort of analysis most frequently takes the form first imposed on it in the mid-1960s by Gad Horowitz. Horowitz embraced Louis Hartz's hypothesis that the political culture of "new" societies was determined by the values of the founding colonists, but he questioned the accuracy of its application to English-Canadian political culture by Hartz and his Canadian collaborator, K.D. McRae. Hartz had ascribed the hegemony of liberal individualism in the American political culture to the monolithically "liberal" values of the first colonizers, positing that the exclusion of "feudal" elements from the original colonial societies had prevented that dialectical reaction between toryism and liberalism which in Europe, he imagined, had culminated in the genesis of socialism.[2] McRae premised that "the central figure of the English-Canadian tradition [was] the American liberal" and proceeded to belittle the significance of socialism in Canada.[3] Horowitz inverted McRae's argument, asserting the original prominence of "tory" values in the English-Canadian tradition and hence the centrality of socialism, "an ideology which combines the corporate-organic-collectivist ideas of toryism with the rationalist-egalitarian ideas of liberalism."[4]

As elaborated by Horowitz, Hartz's "fragment" hypothesis fitted neatly into the conservative-nationalist vision of Canada's past that had come into fashion among anglophone historians as Canadian nationalism reoriented itself from anti-imperialism towards anti-Americanism and the "Whig" interpretation of Canadian history lapsed into desuetude. Coinciding in its advent with the political triumph of continentalism, a crisis which evoked G.P. Grant's political elegy, *Lament for a Nation*, and the political-historical writings of W.L. Morton,[5] it showed that the "cultural-continuity" approach to Canadian political culture could as readily be applied to progressive as to conservative uses. This demonstration quelled any impulse on the part of progressive nationalists to question the conservative aspects of the ascendant historical vision. It is an irony that, as applied to the United States, the Hartz thesis was the highest conceptual flight of a historiographical tradition, epitomised by such titles as *Middle-Class Democracy and the Revolution in Massachusetts* and Hartz's own *The Liberal Tradition in America*, that was soon to sag beneath an authoritative reappraisal of colonial political thought and the increasing emphasis placed by practitioners of the new social history on communitarianism and hierarchy in colonial social life.[6] In the land of G.P. Grant and

2. Louis Hartz et al., *The Founding of New Societies: Studies in the History of the United States, Latin America, South Africa, Canada, and Australia* (New York, 1964).
3. Kenneth D. McRae, "The Structure of Canadian History," in ibid., 234.
4. Gad Horowitz, "Conservatism, Liberalism and Socialism in Canada: An Interpretation," *Canadian Journal of Economics and Political Science* 32 (1966): 144.
5. "Canadian Conservatism Now," *Conservative Concepts* 1 (1959); "The Conservative Principle in Confederation," *Queen's Quarterly* 71 (1964-65); and see above, n. 1. On this phase of Morton's writing, see Carl Berger, *The Writing of Canadian History: Aspects of English-Canadian Historical Writing, 1900 to 1970* (Toronto, 1976), 250-56.
6. Robert E. Brown, *Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780* (Ithaca, N.Y., 1955); Louis B. Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York, 1955). For an overview of the subsequent revisionary trend, see Jack P. Greene and J.R. Pole, eds. *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore, 1984).

C.B. Macpherson, by contrast, the "conservative-liberal" antithesis has continued to thrive as an analytical category.[7]

Certainly historians have done little to contest its primacy among approaches to English-Canadian political culture. J.M.S. Careless essayed a slight revision in declaring that English-Canadian political values "were shaped in the organic, pragmatic Victorian liberalism of the nineteenth century. . . . One may follow Louis Hartz on the power of transferred cultural fragments to mould new societies, yet contend that for English Canada the formative power lay not in the weak remnants of eighteenth-century American empire but in the swamping force of earlier nineteenth-century British immigration."[8] S.F. Wise offered a more thorough critique, which eloquently expressed a historian's discomfort with Hartz's determinism and abstraction and pinpointed the many shortcomings in the thesis as applied to Canada by Hartz and McRae. Wise was chiefly concerned, however, to refute the notion that English-Canadian political culture was originally liberal and to play down the extent to which it became liberal; for example, he criticized Careless for underrating the influence of the established, conservative political culture on the newcomers.[9] Neither he nor Careless mentioned Horowitz, who started from the premise that the original English-Canadian culture was at least partly conservative and could easily accommodate in his analysis an influx (though obviously not a swamping influx) of "organic" English liberalism. Wise's methodological objections to the Hartz thesis might be equally applicable to Horowitzian cultural analysis but, by rebutting McRae's account of the original English-Canadian political culture as Horowitz had rebutted McRae's dismissal of Canadian socialism, his critique tended to uphold Horowitz.

At any rate, whatever damage Wise may have done to Hartzian determinism, he certainly did none to the continuity approach to English-Canadian political culture, of which Horowitz's was only a variant. That approach thrives too as a sort of cultural reductionism, which defers to the proprieties of historical method by acknowledging the influence of subsequent events on Canada's cultural development but in fact notices only events that reinforced the presumed initial Canadian-American cultural antithesis: the War of 1812, the Canadian rebellions of 1837-38, the expansionist menace of "fifty-four forty or fight." In its extreme form, this reductionism is the property of that veteran comparative investigator of American and Canadian political culture, the American sociologist S.M. Lipset, who traces all the differences between the two back to their

7. H.D. Forbes, "Hartz-Horowitz at Twenty: Nationalism, Toryism and Socialism in Canada and the United States," *Canadian Journal of Political Science* 20 (1987) lists an assortment of studies in this vein and suggests reasons for the desuetude of Hartzianism in the United States.
8. J.M.S. Careless, "'Limited Identities' in Canada," *Canadian Historical Review* 50 (1969): 4.
9. S.F. Wise, "Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis," *Historical Papers, 1974* (Ottawa, 1975): 12-13.

supposed origin in the same "formative" or "founding" event, the American Revolution.[10]

There is no point in questioning the proposition that the synonymous threats of American expansionism and democratic republicanism did much to shape Canadian political attitudes. Even taking this collective experience into account, however, to trace the comparative statism of current Canadian political culture so directly to the "conservatism" of the original cultures seems facile. For one thing, in Upper Canada, the main seedbed of English-Canadian political culture, the bulk of the early settlers were not Loyalists, nor British: they were Americans who had left the United States, not for political reasons, but in search of land. In 1812, perhaps 60 or 70 per cent of the inhabitants belonged to this category, and they and their descendants constituted a majority of the provincial electorate into the 1830s.[11] Cultural reductionism necessarily ignores the possibility that this numerous element, with its distinctive political outlook, made a lasting contribution to Upper Canadian political culture. Yet this group and its descendants formed the electoral infantry of a series of successful Upper Canadian political campaigns: the Baldwinite campaign for responsible government, George Brown's campaign to remedy the political consequences of the reunion of 1841, Oliver Mowat's campaign for provincial rights — successive phases of what has been aptly characterized as a single nineteenth-century "party-movement."[12] It seems perverse, while tracing the character of contemporary Canadian political culture back to political elements which resisted these successful campaigns or were dragged along in their wake, to ignore that which carried them to victory.

If one turns to writing on the English-Canadian Reform tradition for an antidote to this cultural reductionism, one is doomed to disappointment. There is no body of work on Reform political ideas comparable to that of Wise on the Canadian conservative tradition,[13] and what there is seems calculated to reinforce the pessimistic vision of Frank

10. See, for example, *The First New Nation: The United States in Historical and Comparative Perspective* (New York, 1963); "Revolution and Counter-Revolution: The United States and Canada," in *The Revolutionary Theme in Contemporary America*, ed. Thomas R. Ford (Lexington, Ky., 1965); "Canada and the United States: The Cultural Dimension," in *Canada and the United States: Enduring Friendship, Persistent Stress*, eds. Charles F. Doran and John H. Sigler (Washington, 1985).

11. Marcus Lee Hansen, *The Mingling of the American and Canadian Peoples* (New Haven, 1940), 89-90.

12. B.P.N. Beaven, "A Last Hurrah: Studies in Liberal Party Development and Ideology in Ontario, 1878-1893," PhD diss., University of Toronto, 1981, 21-23.

13. "Sermon Literature and Canadian Intellectual History," in *Canadian History Before Confederation: Essays and Interpretations*, ed. J.M. Bumsted (Georgetown, Ont., 1972); "Upper Canada and the Conservative Tradition," in *Profiles of a Province: Studies in the History of Ontario*, ed. Edith G. Firth (Toronto, 1967); "God's Peculiar Peoples," in *The Shield of Achilles: Aspects of Canada in the Victorian Age*, ed. W.L. Morton (Toronto, 1968); "Conservatism and Political Development: The Canadian Case," *South Atlantic Quarterly* 69 (1969-70); "John Macaulay: A Tory for All Seasons," in *To Preserve and Defend: Essays on Kingston in the Nineteenth Century*, ed. Gerald Tulchinsky (Montreal, 1976).

Underhill, who — induced to search for Canadian liberalism by his perception that being a liberal meant not voting Liberal[14] — found it in what he thought of as a series of lost causes: Mackenzie-ite, Grit, Progressive. Historians who assume, to the contrary, that the Liberal party has had something to do with the history of Canadian liberalism are prone to variations on the theme of how Canadian liberalism became conservative. Careless, as we have seen, traced the peculiarities of English-Canadian political culture to a swamping influx of "organic, pragmatic Victorian liberalism," which overwhelmed both American Loyalist toryism and American agrarian radicalism. Contemplating the striking difference between the American and the Canadian approach to the alienation of natural resources, H.V. Nelles proposed that "a continuing dialogue with organic conservatism significantly blunted the individualism, materialism and democratic outlook of the Canadian liberal and profoundly modified his view of the role of the state. Liberals saw no contradiction in defending the authority of the state in the collective interest." Nelles illustrated his point by remarking that the Mowat government had championed not individual but provincial rights.[15]

In turning away from the old preoccupation with American influences on the Upper Canadian Reform tradition, recent writing on the subject has seemingly relinquished any prospect of discovering a post-Loyalist American contribution to the Canadian political culture. One study concludes that "ideological conflict in Upper Canada was less a contest between 'conservative' and 'progressive' schools of thought than a struggle between warring conservative traditions."[16] My own contributions have focussed on the ideas of individuals who, as representatives of Irish and English Whig political thought, were as self-consciously aristocratic in their political principles as any member of the Family Compact.[17] Another recent essay outdoes Careless, who described forty years ago how George Brown's *Globe* had tamed True Grit agrarian radicalism by broadcasting British Victorian laissez-faire liberal ideas throughout the Upper Canadian peninsula: we now learn of an Englishman, even younger than Brown and equally new to the province, who was propagating a blend of Cobdenite radicalism — spiked only by the merest dash of Benthamism — even earlier in the Grits' own organ, the *North American*.[18]

Recently, however, the now-venerable reappraisal of American colonial society and political ideas has begun to influence historical writing concerning Canada. Janice Potter has documented the ideology of American Loyalism, showing that its

14. Frank H. Underhill, *In Search of Canadian Liberalism* (Toronto, 1960), ix.
15. *The Politics of Development: Forests, Mines and Hydro-electric Power in Ontario, 1849-1941* (Toronto, 1974), 41.
16. Graeme Patterson, "Whiggery, Nationality, and the Upper Canadian Reform Tradition," *Canadian Historical Review* 56 (1975): 44.
17. "A Conservative Reformer in Upper Canada: Charles Fothergill, Responsible Government, and the 'British Party,' 1824-1840," *Historical Papers, 1984* (Ottawa, 1985); "From the Types Riot to the Rebellion: Elite Ideology, Anti-legal Sentiment, Political Violence and the Rule of Law in Upper Canada," *Ontario History* 79 (1987).
18. J.M.S. Careless, "The Toronto *Globe* and Agrarian Radicalism, 1850-1867," *Canadian Historical Review* 29 (1948); Kenneth C. Dewar, "Charles Clarke's 'Reformator': Early Victorian Radicalism in Upper Canada," *Ontario History* 78 (1986).

propagators conceived of the political order in the terms of classical republicanism and of themselves as a patriotic, Bolingbrokean aristocracy of virtue. Blaine Baker has discovered hints of a similar world-view in Upper Canadian elite ideology. In his recent overview of the development of the Canadian political culture, Gordon Stewart invokes the inspiration of the American revisionists in casting his analysis in terms of the central antithesis of eighteenth-century Anglo-American political culture: that between Court and Country. Using the same antithesis to elucidate the "ideological origins of confederation," Peter Smith bases his analysis on the broader reinterpretation of eighteenth-century political thought of which the American reappraisal forms a part.[19]

According to the new paradigm, the central antithesis in eighteenth-century British political thought, corresponding to that between Court and Country in the political culture, pitted "wealth" against "virtue." This antithesis was rooted in the sudden and unprecedented expansion of credit at the end of the seventeenth century, an expansion stimulated by the financial burden placed on the English state by the War of the Spanish Succession. The sudden invention of a mass of paper wealth posed a twofold threat to the existing balance of power between the Crown and the political nation. On the one hand, it enhanced the power of the Court, or executive, to coerce and corrupt by providing it with the means to pay a standing army and a multitude of placemen. On the other, it weakened the power of the Country — the traditional political nation of freeholders, whose wealth in land guaranteed their political independence and hence their political virtue (virtue consisting in the capacity to make disinterested political choices), by creating a plutocracy whose wealth, deriving principally as it did from the speculative market in government bonds, necessarily deprived its members of the capacity to make disinterested political decisions and rendered them, moreover, as dependent on the government as the government was dependent on them. These developments, by enhancing the power of the executive at the expense of the political nation as a whole, seemed to threaten a free people with enslavement.

In the vocabulary of classical republicanism (as the Country ideology is called), the term that encompassed all these threats to the republic of virtue was "corruption," but the new order generated its own ideology, which used a different language. The new Court ideology derided as barbarism the agrarian simplicity that classical republicanism declared conducive to virtue; it hailed as a deliverance from barbarism the condition of society that classical republicanism condemned as corrupt. Apologists for the new order, among whom David Hume and Adam Smith were to be preeminent, esteemed the

19. Janice Potter, *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts* (Cambridge, Mass., 1983); G. Blaine Baker, "The Juvenile Advocate Society: Self-Proclaimed Schoolroom for Upper Canada's Governing Class," *Historical Papers, 1985* (Ottawa, 1986); Baker, "'So Elegant a Web': Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada," *University of Toronto Law Journal* 38 (1988); Gordon T. Stewart, *The Origins of Canadian Politics: A Comparative Approach* (Vancouver, 1986); Peter J. Smith, "The Ideological Origins of Canadian Confederation," *Canadian Journal of Political Science* 20 (1987). To the list of seminal works cited by Smith (2, n. 2), add J.G.A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, England, 1985).

wealth created by commerce as a means to cultivating the virtues of politeness, sociability, or civility, as it was variously termed, and they defended the enhancement of executive influence through patronage as securing society against the political instability that was fatal to liberty. Appealing from the degenerate present to an idealized past, classical republicanism invoked an ancient constitution of immemorial origin as the source of English liberties — liberties that had been restored by the Glorious Revolution only to be imperilled anew by the Walpolean oligarchic ascendancy. To the ideologists of commerce liberty was modern, an achievement of the Glorious Revolution and the subsequent transformation of the national economy.

It is easy to perceive in this antithesis the elements of the primary ideological confrontation in both Lower and Upper Canada. Smith and Stewart both do so,[20] but Smith alone pursues the implications of this perception, tracing the influence of ideology of commerce through a variety of proposals for British North American union by colonial legal eminences such as R.J. Uniacke of Nova Scotia and three Loyalist chief justices[21] to what he sees as its culmination in the movement for Confederation. He relates these proposals to the plan of imperial union discussed by Adam Smith in *The Wealth of Nations* and cites the example of the United States, where the Bolingbrokean analysis that had sustained the Declaration of Independence (above all, the conviction that England had lost, while the colonies retained, the republican simplicity that alone made freedom possible) had been undermined by the political instability that followed independence. The federal constitution had been accomplished by threatened revolutionary elites, who hoped to establish a buffer against democracy, and the federalists had included individuals — preeminently Alexander Hamilton — who hoped by creating a strong federal government to make America (if not yet the world) safe for commerce.[22] Smith detects in these early plans for British North American union the same motives — a desire to establish strong government, promote commerce, and create an arena of political activity worthy of ambition — that had stimulated Adam Smith and the American federalists.[23]

20. So does Jane Errington, *The Lion, the Eagle, and Upper Canada: A Developing Colonial Ideology* (Kingston and Montreal, 1987), 94, but it does not significantly inform her survey of Upper Canadian attitudes towards Great Britain and the United States. With respect to Lower Canada, see also the important elaboration of *patriote* political ideas in terms of the "court-country" antithesis in Louis-Georges Harvey, "Locke, American Revolutionary Ideology and the Rise of French-Canadian Republicanism, 1815-1837," paper presented to the Canadian Historical Association, 1988. Like Smith, Harvey identifies J.G.A. Pocock as his inspiration.

21. William Smith of Quebec (who had been advocating it at intervals since 1754), Jonathan Sewell of Lower Canada, and John Beverley Robinson of Upper Canada.

22. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967); Bailyn, *The Origins of American Politics* (New York, 1968); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1969).

23. Smith's idea provides an interesting gloss to work on the economic ideas of the Upper Canadian elite: see, for example, Robert L. Fraser, "Like Eden in Her Summer Dress: Gentry, Economy and Society: Upper Canada, 1812-1840," PhD diss., University of Toronto, 1979; Peter A. Baskerville, "Entrepreneurship and the Family Compact: York-Toronto 1822-1855," *Urban History Review* 9:3 (February 1981). Smith himself appears to derive his views on the subject from the work of Donald Creighton.

Regrettably, the court-country model affords no greater security from the trap of cultural reductionism than the conservative-liberal model. Neither Stewart nor Smith takes much notice of the post-Loyalist American element whose contribution to the Canadian political culture we are here concerned to define. In Stewart's case, the omission flows from the fact that his thesis is, in the last analysis, an institutions-based counterpart to Hartzian determinism. In Smith's, it flows from the fact that his thesis is the "court-country" counterpart to W.L. Morton's exposition of "The Conservative Principle in Confederation," which presented Confederation as "a triumphant assertion of the [Conservative] principle of the unity of the whole" at the expense of its "great [but ill-defined] competitor," the Progressive Principle.[24]

Stewart traces Canadian statism to the fact that the Constitutional Act of 1791, informed as it was by Court Whig values, established in Upper and Lower Canada a frame of government more statist than that of contemporary Britain. In order to get from initial statism to ultimate statism, he must play down the importance of Country values in both Upper and Lower Canadian political discourse. This means ignoring the fact that institutions professedly modelled on the British constitution, in however statist a version, necessarily came wrapped in the hegemonic ideology of the British empire —the rather grainy mix of Court and Country values that we call Whig constitutionalism. In the case of Upper Canada, it also means neglecting the very existence of the social element to which criticism of the colony's authoritarian frame of government made the strongest appeal. Canada, he tells us (invoking Hartz), was "a two-fragment culture," the fragments being Loyalist and French-Canadian (he cannot ignore the French, though he dismisses Papineau's leadership of the *patriote* opposition with the remark that "the mainstream of opposition in Lower Canada remained 'court' and statist"). Of what he is wont to call "the 1790-1850 formative period," he says (adding perhaps a pinch of Careless): "This protracted and heated political epoch was the crucible within which Canadian politics were moulded when Loyalist, French-Canadian, and British monarchical values were brought into a new relationship."[25] The critique of oligarchy and patronage that one thinks of as a leading feature of Upper Canadian politics is said to have flourished only between 1836 and 1838.[26] It is not surprising to find Stewart concluding that "the 'country' ideology that had proved so potent in the American case was only a fringe phenomenon in the American colonies." If we ask why, then, the 1790-1850 formative epoch was so protracted and heated a crucible, the answer as regards Upper Canada is close at hand: "In Canada between the 1790s and the 1850s, there was a prolonged struggle between British values and institutions and North American and Canadian conditions."[27] *Conditions:* the word betrays the fact that Upper Canada's post-Loyalist American settlers figure in Stewart's analysis not as human actors but as part of the environment. In Stewart's institutional determinism, just as in Hartz's cultural determinism, the environment can leave no mark on the politics of the new society.

24. Morton, "Conservative Principle," 536.
25. Stewart, *Origins of Canadian Politics*, 5-6.
26. Ibid., 27 and 29.
27. Ibid., 4 and 92.

Smith's Mortonian analysis, by contrast, does not require him to write the post-Loyalist Americans out of history but merely to cast them as losers in the traditional fashion. His presentation of Confederation as an expression of Court ideology reflects the hegemony of the conservative nationalist interpretation of Canadian history, which reads the Quebec Resolutions and the British North America Act as expressions of centralizing intent. Its "cultural-continuity" bias is made explicit when Smith quotes S.F. Wise's insistence on "the essential continuity of Upper Canadian with subsequent provincial history," thereby linking his view of Confederation to Wise's thesis that the Ontario political culture was a synthesis of conservative and reform values in which the former were predominant.[28]

It is in relation to Confederation, of course, that the hegemony of the conservative nationalist interpretation has been most strongly felt. Its influence is especially striking in Elwood Jones's attempt to consider Confederation from the perspective of Upper Canadian localism. Jones may have been the first writer on the history of Canadian political culture to exploit the new understanding of American classical republicanism. He did not explicitly apply the "court-country" paradigm to his subject, but he traced Upper Canadian localism back to the radical Whigs of mid-eighteenth-century America. Here, surely, was the key to the post-Loyalist American settlers' contribution to Canadian political culture — but Jones did not mention them! He identified the Loyalists as the bearers of American localism to Upper Canada and proceeded to declare that "this Loyalist legacy of localism was reinforced by immigration from Britain," identifying the Orangemen in particular as British bearers of this cultural principle. Jones conceded, to be sure, that "localism was not the exclusive property of the Conservatives," and he briefly described a Reform localism which blended classical republicanism with "an intellectual legacy of which Adam Smith, Thomas Jefferson and Edmund Burke were key," but he identified the exponents of this world-view as men who represented "the artisans and the small farmers" and "had little knowledge of finance and initiative for business" (surprising traits in view of his contention that "*The Wealth of Nations* was a Reform handbook").[29] He linked Reformer localism to no national culture or subculture; neither did Bruce Hodgins in an earlier discussion of

28. Smith, "Ideological Origins," 24; Wise, "Upper Canada and the Conservative Tradition," 21 and 32.

29. Elwood H. Jones, "Localism and Federalism in Upper Canada to 1865," in *Federalism in Canada and Australia: The Early Years*, eds. Bruce W. Hodgins, Don Wright, and W.H. Heick (Waterloo, Ont., 1978), 22-26.

Upper Canadian localism, oriented like Jones's on Reform attitudes towards Confederation.[30]

The word localism has its uses, but it needs to be carefully defined if it is not to become meaningless. Anyone can be a localist, given the proper context: Margaret Thatcher is a localist with respect to the European Economic Community and, if the Martians invaded Earth, Mikhail Gorbachev would no doubt prove to be a localist too, though how far he is one with respect to the Baltic states remains to be seen. Invoking the localism of Thomas Hutchinson, the last colonial governor of Massachusetts, Jones quotes W.L. Morton's remark that, in Canada, "the party struggles that were to arise were always over the conventions or the degree of self-government, never over whether there should be self-government in a community of any size." In the preceding paragraph, however, Morton had observed that the American rebels and loyalists differed in the fact "that one placed first in loyalty his American home with its peculiar local ties, the other the whole British community in Britain and America with its single allegiance."[31] By this remark, Morton recognized that there was a crucial difference between Hutchinson's localism and that of (say) John Adams, who laboured to make a legal case for colonial sovereignty within the empire.[32]

The difference between Hutchinson's and Adams's localism was crucial; that between the localism of the federalists and the antifederalists turned out not to be crucial. Likewise, the difference between Baldwinite and True Grit localism turned out to be less important than the difference between Baldwinite localism and that of John Beverley Robinson. There may have been many springs of localist sentiment in Upper Canada, but what we need is an explanation of how the course of history channelled certain of those springs into one powerful stream. It is the thesis of this paper that the relative statism of the Canadian political culture in general, and Oliver Mowat's preoccupation with provincial rather than individual rights in particular, can be traced to the historical contingencies that channelled Baldwinite and True Grit localism into the powerful stream that I call the ideology of responsible government. I shall contend that the peculiarities of this ideology provide an explanation which stands independent of any dialogue between "liberalism" and "organic conservatism."

30. According to Hodgins, a commitment to localism "was a part of the thought of William Lyon Mackenzie; in 1850 it formed a major component in the programme of the original Clear Grits. It probably owes very little to the frontier. It was not completely alien to the Loyalists. It owes quite a bit to the practice and theory of self-government in various Presbyterian, Congregational, Baptist and Methodist denominations and to the pragmatically successful operation of Baldwin's Municipal Government Act of 1849 in the organic structure of small town and rural Upper Canada. Chartist and other British radical ideas entered the amalgam, especially at the journalistic level, and American state experience and theory were never very far away." Bruce W. Hodgins, "Disagreement at the Commencement; Divergent Ontarian Views of Federalism, 1867-1871," in *Oliver Mowat's Ontario*, ed. Donald Swainson (Toronto, 1972), 57. Like Jones, Hodgins opines (66) that "deep down [the Orangemen] were as anticentralist as the Grits, but with a weaker, more pragmatic philosophical base."

31. Morton, "Conservative Principle," 530 and 531.

32. Barbara A. Black, "The Constitution of Empire: The Case for the Colonies," *University of Pennsylvania Law Review* 124 (1976): 1194-98.

In order to do so, I shall discard the "conservative-liberal" antithesis as a frame of analysis in favour of that between *constitutionalism* and *legalism*. By constitutionalism, I mean a particular sort of ideological response to the apprehended infringement of civil rights and liberties by the state: an appeal to standards of state conduct that are supposedly sanctified by long usage, implied contract, or both. By legalism, I mean the justification of such alleged infringements by invoking the lawfulness of the authority by which the impugned action is taken. This antithesis encompasses the critical contradiction of Whig constitutionalism, an ideology which assumed the existence of indefeasible constitutional principles yet set no barrier to Parliament's ability to legislate in derogation of such principles. It therefore reflects the terms of much of the debate as to the merits of Upper Canada's institutions and governance — a debate which impelled most Upper Canadian Reformers to discard Whig constitutionalism in favour of the ideology of responsible government, a more unambiguously statist synthesis. In the following pages, I first work out an approach to the conflict between constitutionalism and legalism in the Canadian political culture. I then trace the emergence of the "constitutionalist-legalist" antithesis in the political culture of eighteenth-century England and its resolution in nineteenth-century Ontario — a resolution which represents, I suggest, the special contribution of the Ontario political culture to Canadian statism.

ii

For the first six decades of Upper Canada's existence, trial by jury was generally applauded as a bulwark of constitutional liberties in the colony. Upper Canadians celebrated the traditional power of the criminal trial jury to censor unjust law by acquitting a defendant in defiance of the law and the evidence — a power resting partly on the jury's immunity from punishment for doing so and partly on the common-law rule that protected a defendant from being tried a second time for an offence of which he had been acquitted; they regretted that the power of the civil jury was less extensive; they deplored the conditions that seemed to compromise the purity of trial by jury by facilitating packing. For its part, the government was obliged to make the best of things, putting up with the occasions when its repressive will was thwarted by a jury.[33]

In 1850 Robert Baldwin introduced a comprehensive reform measure, which eliminated almost all of the features that had previously been a source of grievance. Scarcely had this measure been implemented when the venerated institution became an object of repeated criticism as inefficient and obsolete. Quoting the English historian Henry Hallam's condemnation of it as "a preposterous relic of barbarism," the *Upper Canada Law Journal* declaimed that "trial by jury, if not defensible on reason, ought not to be supported on prestige; if not compatible with the safe, speedy, and economical administration of justice, ought not to be bolstered up and preserved solely because of its antiquity."[34] In 1858, John A. Macdonald drastically diluted Baldwin's reform by

33. The history of the jury in Upper Canada is discussed at greater length in Paul Romney, "From Legalism to Constitutionalism: Trial by Jury, Responsible Government and the Rule of Law in the Canadian Political Culture," *Law and History Review* 7 (1989).

34. *Upper Canada Law Journal* 4 (1858): 75-78.

weakening the lay influence on jury selection. Between 1869 and 1873 a string of statutes, provincial and federal, curtailed access to trial by jury in Ontario in both criminal and civil proceedings. The last of these statutes was the work of Oliver Mowat, a leading promoter of this trend since 1858.

In the 1880s, law reformers turned to the grand jury. "The idea that the grand jury system constitutes in the present day the palladium of British liberties and serves as a shield interposed between the subject and the crown . . . partakes altogether of too mediaeval a character to justify its receiving a moment's consideration," declared John Wellington Gwynne of the Supreme Court of Canada in language reminiscent of Hallam's. "In this country, and in this, the end of the 19th century, [the grand jury's value as a safeguard against executive oppression] hardly deserves consideration," affirmed John Deacon, county court judge of Simcoe.[35] The grand jury survived Sir John Thompson's attempt to abolish it in 1890, more likely because Mowat questioned the dominion's jurisdiction than because of any ardent public attachment to it, but Thompson was soon to deal a drastic blow to trial by jury. In 1892 the Canadian Criminal Code fundamentally altered the nature of the criminal trial jury by authorizing Crown appeal against acquittal, a procedure which is unconstitutional in the United States and discountenanced to this day in the United Kingdom. This legislation seems to have evoked no public fuss at all. In 1930, the enfeeblement of the criminal jury was exacerbated when the provincial court of appeal, entitled until then only to order a new trial, was empowered to convict the defendant and send him back to the trial court for sentencing. So things remained until 1975, when Parliament restricted the court of appeal once again to ordering a new trial.

The fate of trial by jury is one way in which the history of Canadian criminal procedure seems to sustain one of the main arguments cited in proof of the "conservatism" of Canadian political culture: the high value placed by Canadian public opinion on law and order. Two others may be briefly mentioned. One is the leading part taken by the law officers of the Crown in criminal prosecutions at a time when the prosecution of crime in England was still largely the responsibility of private citizens.[36] Another is the privilege which entitled the law officers to the last word to the jury when it would normally have fallen to the defendant — an anomaly which was progressively established as a routine feature of Canadian criminal procedure during the second half of the nineteenth century, at a time when it was increasingly being disparaged in England as inequitable and its use curtailed by the judiciary there.[37] All three examples illustrate the restriction of individual rights in the interest of law and order, but the fate of trial by jury is a specially good illustration of what I call the trend from constitutionalism to legalism. For sound practical reasons, the law officers' role in public prosecutions was a

35. Canada. *Sessional Papers* (1891), no. 66, 7-8 and 26.

36. Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto, 1986), 122-39; Douglas Hay and Francis Snyder, "Using the Criminal Law, 1750-1850" in their *Policing and Prosecution in Britain, 1750-1850* (Oxford, 1988); John Ll.J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of Director of Public Prosecutions of England* (London, 1964), 349-66.

37. Romney, *Mr Attorney*, 209-13.

feature of Canadian criminal procedure from the start, and the question of the "right of reply" was an arcane procedural issue. Both arguably conferred an unfair advantage upon the state vis-à-vis the individual subject, but neither had the popular appeal of trial by jury — which, in the political culture of common-law constitutionalism, was virtually synonymous with the constitution. In Upper Canada, it had been in force from the start in criminal proceedings, and the desire to introduce it in civil proceedings had been an important ingredient in the first settlers' desire to introduce English law into the colony.[38]

The elimination of the jury from most civil litigation was consistent with the tendency of late nineteenth-century legal intellectuals to think of the law as an autonomous, internally coherent system of rules, which could be relied upon, if skilfully applied, to supply a just resolution for disputes.[39] From this perspective, the intervention of a group of laymen, uncomprehending of technicalities and perhaps unsympathetic to the law they did understand, was a source of inefficiency and expense even if the appeal procedure mitigated the effects of wanton perversity. Trial by jury in the criminal courts was also open to some of these objections, though here (ironically enough, in view of the outcome) the rhetoric of efficiency and economy tended to be levelled against the grand jury rather than the trial jury.

Efficiency and economy were popular slogans in Upper Canada because they could be invoked to condemn government patronage. In the days of oligarchic rule, most public offices had been a sort of property or vested right — a monopoly of fee-bearing services often held as a sinecure and administered on the holder's behalf by a salaried deputy. After the abolition of oligarchic rule, the importance of patronage to the emergent system of party politics kept the issue alive. Studded with lucrative fee-bearing offices, and experienced by many people as an expensive and oppressive system in which they became entangled against their will, the administration of justice was a capital point of focus for populist antipatronage sentiment.[40]

Yet the popular appeal of these slogans as directed against oligarchy and political corruption cannot alone explain why the public tolerated the abatement of a time-hallowed bulwark of civil rights and liberties. Trial by jury had long been recognized as inefficient and expensive. Decrying schemes for "new and arbitrary methods of [summary] trial by justices of the peace, commissioners of the revenue, and courts of conscience," Blackstone had warned:

> However convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for

38. Bruce G. Wilson, *The Enterprises of Robert Hamilton: A Study of Wealth and Influence in Early Upper Canada, 1776-1812* (Ottawa, 1983), 52-57 and 116-18.
39. David Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science," *Modern Law Review* 46 (1983): 107-08; Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill, 1983), 87-97.
40. Romney, *Mr Attorney*, 36-55, 178-79, 188-92, and 225-28.

> their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[41]

If, in late nineteenth-century Canada, trial by jury was abated in the interest of economy and efficiency, it was because "the spirit of the constitution" had undergone a fundamental change.

A modern defence of appeal against acquittal, published as an annotation to the case of *Morgentaler* v. *The Queen* (1975), offers a clue to the nature of the change. The author, an Ontario crown attorney, quotes Blackstone's characterization of the jury as a palladium of English liberties (including the passage quoted above) and trusts that Canadians will repel "any erosion of those liberties which are preserved by a proper functioning of the jury system." Appeal against acquittal is not an erosion of those liberties — not "a threat to the jury system as we know it"; rather, by allowing the reversal of "perverse" and "dishonest" verdicts, wilfully returned in defiance of "the proper function of a jury," it preserves them by ensuring "that jury verdicts will continue to rest on a foundation of truth." While Blackstone is cited as an authority of almost scriptural eminence on the constitutional importance of trial by jury, the adjacent passage that records the constitutional revulsion against granting a new trial after an acquittal is dismissed as "a relic of thought from the time of trial by battle... neither now the law nor appropriate to the modern expectation that a court of law can reasonably be expected to attempt to ascertain the truth." Opposition to appeal against acquittal is "a retrograde philosophical step," which amounts to believing that an accused is "entitled to escape from the consequences of his crime by illegal means."[42]

The derisive reference to trial by battle is reminiscent of Henry Hallam's dismissal of trial by jury as "a preposterous relic of barbarism" and of the rhetoric with which late nineteenth-century lawyers assailed the grand jury. What is important for our argument is the use of this rhetoric to discredit, as an assertion of the defendant's right "to escape from the consequences of his crime by *illegal* means," the ancient *constitutional* compunction against appeal from acquittal: a capital incident of trial by jury as known to Blackstone and understood by him to be fundamental to "the spirit of our constitution." Blackstone's authority is cited, in fact, in justification of what he himself

41. Sir William Blackstone, *Commentaries on the Laws of England* (4 vols., Oxford, 1765-69), 4:350. Blackstone's targets were the unpopular game and excise laws, which provided for summary enforcement by justices of the peace and excise commissioners respectively, and the courts of requests, which summarily dealt with small claims according to the perceived dictates of equity and conscience rather than the dictates of the common law: see Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York, 1975), 59; Hay, "Poaching and the Games Laws on Cannock Chase," in ibid., 211-12; P.B. Munsche, *Gentlemen and Poachers: The English Game Laws, 1671-1831* (Cambridge, 1981), 117-19 and 121; H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto, 1985), 26-34.
42. Frank Armstrong, "Guilty in Law — Guilty in Fact," 30 Criminal Reports, n.s., 287.

would have considered a travesty of trial by jury. Directly before the passage quoted above, and included in the excerpt quoted by our commentator, Blackstone remarks that what threatens the institution is not "open attacks, (which none will be so hardy as to make) but . . . secret machinations, which may sap and undermine it." He would surely have recognized appeal against acquittal as one of these.

The annotation to *Morgentaler* v. *The Queen* ignores and tacitly denies the possibility of a distinction between what is legal and what is constitutional. In a judgement rendered in 1924, Justice William Renwick Riddell of Ontario acknowledged the possibility, but only in order to explain why the court could offer no remedy for a breach of the constitution that was justified in law. Riddell wrote:

> In the United States, "the Constitution" is a written document . . . which authoritatively and without appeal dictates what shall and what shall not be done; in Canada, "the Constitution" is "the totality of the principles, more or less vaguely and generally stated, upon which we think the people should be governed." In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be. In the United States anything unconstitutional is illegal; in Canada to say that a measure is unconstitutional rather suggests that it is legal, but inadvisable.[43]

Forty years later, the same difficulty perplexed Chief Justice J.C. McRuer, the sole member of a royal commission of inquiry into civil rights set up by the government of Ontario in 1964. Declaring that provincial legislation was often drawn "without much regard for the essential consideration of the protection of basic civil rights," the commission recommended several measures to deal with the problem, including an enactment defining the attorney general's duties in order to strengthen his hand in preventing such abuses. As a model for such an enactment, designed to facilitate the attorney general's duty of ensuring constitutional administration, the commission cited a Newfoundland statute requiring the attorney general to "see that the administration of public affairs is in accordance with law." This self-defeating language was duly incorporated in the Ontario Ministry of the Attorney General Act.[44]

All of the quoted texts confront us with the problematic nature of the relationship between the constitutional and the legal in jurisdictions which lack an institutionalized check on the legislative power. They confront us, that is, with the critical internal contradiction of Whig constitutionalism. The origin of this contradiction lies in the seventeenth century. Before the Civil War, the trend towards royal absolutism was resisted by invoking the ancient constitution, a supposed charter of indefeasible liberties, immemorial and immutable, which served as an authoritative object of appeal for jurists and statesmen anxious to limit the royal power. The ancient constitution was conceived of as part and parcel of the common law, and the assortment of obnoxious powers and institutions, founded on prerogative, which constituted the oppressive aspects of the

43. *Orpen* v. *Attorney General for Ontario* (1924), 56 Ontario Law Reports 327, at 335.
44. Ontario, Royal Commission of Inquiry into Civil Rights, *Report No. 1* (Toronto, 1968), 942-47 and 952-55; Rev. Stat. Nfld. 1952, c. 9, s. 9(b); Rev. Stat. Ont. 1980, c. 271, s. 5(b).

king's rule were condemned as illegal innovations of the era inaugurated by the Norman succession in 1066.[45] There is a perennial controversy as to whether the concept of immutability meant that the ancient constitution was a body of fundamental law, not subject to statutory amendment, [46] but it may be that circumstances did not call in question the compatibility of the doctrine of parliamentary supremacy with that of fundamental rights enshrined in law. Engaged on Parliament's side in a struggle to vindicate the power of law — whether articulated by the judiciary or by Parliament — to limit prerogative, the king's opponents had no need to fear that the liberties they found in the common law might be overturned by Parliament, and their conception of English history allowed them to project this contemporary harmony into the indefinite past.

The experience of the Civil War, Commonwealth, and Restoration shook this vision. Radical social critics of the 1640s and 1650s condemned the common law itself as a product of the "Norman Yoke," spurning it in favour of basic principles of social equity deducible by natural reason. The midcentury jurist Sir Matthew Hale was compelled to admit the Norman origin of much of the common law, and to distinguish between innovations that were informal and oppressive and those that were good law by virtue of being "received and authoritatively engrafted into the law of England." Hale's distinction meant relinquishing any idea of the law as immutable, and in order to protect the liberties left exposed by this shifting of ground he invoked the notion of contract. The state could be thought of as founded on a covenant between king and people, the terms of which, alterable only by mutual consent, incorporated the ancient liberties so dear to common lawyers.[47]

The notion of a social contract contains the germ of the idea of a written constitution, embodying a fundamental law that is either immutable or institutionally secured from easy amendment. In the absence of agreement as to the specific provisions of the contract, however, the idea could be nothing more than a metaphor implying a reciprocity of obligation between king and people, and the people's right to refuse to obey a king who reneged on his obligations. For specific remedies, Restoration constitutionalists had to rely on the king's effectual subjection to law, and on the power of Parliament to abolish objectionable royal powers that were proved to be grounded in law.[48] Thus the transition from the notion of immutable to that of adaptable law entailed a shift of emphasis from the *substance* of the law to the *process* by which it was made, declared, and administered.

45. J.W. Gough, *Fundamental Law in English Constitutional History* (Oxford, 1955); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, 1957); Howard Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England, 1660-1689* (Chicago, 1977), 13-23.
46. T.F.T. Plucknett, "Bonham's Case and Judicial Review," *Harvard Law Review* 40 (1926); S.E. Thorne, "Dr. Bonham's Case," *Law Quarterly Review* 54 (1938); Gough, *Fundamental Law in English History*, 31-38; Raoul Berger, "Dr. Bonham's Case: Statutory Construction or Constitutional Theory?" *University of Pennsylvania Law Review* 117 (1969).
47. Gough, *Fundamental Law in English History*, 109-16; Nenner, *By Colour of Law*, 103-13 (Hale is quoted at 104); Christopher Hill, "The Norman Yoke," in his *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17th Century* (London, 1958).
48. Nenner, *By Colour of Law*, 40-48 and 191-94.

Circumstances still fostered belief in the mutual compatibility of the doctrine of parliamentary supremacy and that of the common law as the repository of fundamental liberties, and the triumph of the cause they both served in 1688 was to entrench both of them as principles of Whig constitutionalism, but an ambiguity had entered the relationship. Though apologists justified the Glorious Revolution by appealing to the ancient constitution, it contained the germ that would transmute the constitution from the early seventeenth-century common lawyers' charter of indefeasible liberties into what Mr. Justice Riddell would one day call, with delicious exactitude, "the totality of the principles, more or less vaguely and generally stated, upon which we feel the people should be governed" — into a matter of what was "advisable" and "inadvisable." Though they acclaimed it as establishing those safeguards against arbitrary government which it later became customary to call the rule of law,[49] in reality it superseded a somewhat arbitrary executive by a potentially more arbitrary legislature. The divine right of kings gave way to the divine right of Parliament.[50]

The transmutation did not occur overnight — the notion of fundamental law was too politically potent, too deeply engrained in the political culture for that. Instead, the bounds of parliamentary absolutism spread haphazardly under the impulse of social expediency. Blackstone's *Commentaries* epitomize this phase of the political culture, confidently asserting the existence both of absolute natural rights and absolute legislative sovereignty and shuffling uneasily when forced to confront the mutual inconsistency of the two propositions.[51] It was in these shuffling silences that the characteristic Whig consciousness of a distinction between the legal and the constitutional had its abode — in the recognition of the theoretical possibility that Parliament could commit wrongs for which there was no speakable remedy. It was awareness of the need to avoid the unspeakable remedy that gave the English constitution its character of being shaped by considerations of what was "advisable" and "inadvisable."

Meanwhile, the very ambiguity of the Revolution nourished a vigorous constitutionalism by leaving open large questions as to the extent of the executive power. Did the new political order — did the ascendancy of due process of legislation and adjudication — legitimize powers and doctrines which the old order had applied oppressively, but which had not been expressly extinguished by legislation? The question epitomized the confrontation between classical republicanism, with its appeal to the past, and "regime Whiggism," with its view of the Glorious Revolution as the very source of modern liberty. It evoked conflicting answers from the greatest lawyer of the Walpolean oligarchy, Lord Chief Justice Mansfield, and his preeminent judicial opponent, Lord Chancellor Camden. In a leading case, in which he condemned general search warrants as an invention of post-Restoration Stuart tyranny, Camden dismissed the plea that they had been in regular use since the Revolution. A custom that had originated since the Revolution was "too modern to be law; the common law did not

49. H.W. Arndt, "The Origins of Dicey's Concept of the Rule of Law," *Australian Law Journal* 31 (1957).

50. Gough, *Fundamental Law in English History*, 174-213.

51. Ibid., 188-91.

begin with the Revolution; the ancient constitution which had almost been overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to an ancient and venerable edifice...."[52] In Parliament Camden attacked the growing ascendancy of the doctrine of parliamentary supremacy, at least as applied to the colonies, by condemning the proposed Declaratory Act as "a bill, the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution...."[53] Less familiar with what it took to avoid the unspeakable in the colonies than in Britain, his audience jeered and lost America.

Camden's denunciation of the Declaratory Act as *illegal* contrasts strongly with Blackstone's denigration of legislation "fundamentally opposite to the spirit of our constitution." Blackstone spoke as one vexed by Parliament's power to enact such laws; Camden simply denied the power. As late as 1765, then, no less a personage than the lord chancellor of England, the head of the judicial hierarchy, could insist on the existence of indefeasible constitutional principles which could not be altered by legislation. Sustained as it was by such authority, it is no wonder that such thinking continued to be the common currency of late eighteenth-century radical discourse in Britain and America alike.[54] What is wonderful, as we contemplate Parliament's casual extinction of common rights during the eighteenth century and the savage legislative oppression of resistance thereto,[55] is to see how coolly, as late as 1885, A.V. Dicey could write of law as a palladium of civil rights in terms very similar to those employed by early seventeenth-century common-law constitutionalists such as Sir Edward Coke. Dicey's was the view from the top: a reflection of two hundred years during which the elite had used their control of Parliament to uphold their own rights against executive encroachment.[56]

The general ambiguity that characterized the relationship of "law" and "constitution" in eighteenth-century Whig constitutionalism was reflected in the institution of trial by jury. The jury performed its duty under an oath to render a verdict according to the evidence, but radicals conceived of the jury's power and duty as extending to the nullification of laws the jury deemed unjust. This view of the jury emanated from the sense of unjust disfranchisement produced by a highly restrictive property-based franchise, which precluded ordinary Englishmen from the law-making process.[57] It went far beyond any official notion of the jury's functions — no one in

52. Entick v. Carrington (1765), 95 English Reports 807, at 818.
53. *Parliamentary History of England*, 16:178-80 and 168-70; W.P.M. Kennedy, *Some Aspects of the Theories and Workings of Constitutional Law* (New York, 1932), 49-50.
54. For English radicalism, see E.P. Thompson, *The Making of the English Working Class* (Harmondsworth, 1968), 84-97.
55. J.M. Neeson, "The Opponents of Enclosure in Eighteenth-Century Northamptonshire," *Past and Present* 105 (1984); J.M. Martin, "Members of Parliament and Enclosure: A Reconsideration," *Agricultural History Review* 27 (1979); E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1974).
56. Paul Romney, "Very Late Loyalist Fantasies: Nostalgic Tory 'History' and the Rule of Law in Upper Canada," in *Canadian Perspectives on Law and Society: Issues in Legal History*, eds. W. Wesley Pue and Barry Wright (Ottawa, 1988), 125-30.
57. Donald Veall, *The Popular Movement for Law Reform, 1640-1660* (Oxford, 1970), 97-109, and Christopher Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (Harmondsworth, 1975), 271-73.

authority was likely to uphold the theory that a jury was entitled to set itself above Parliament. Yet almost any degree of latitude short of this was justifiable on the ground of Chief Justice Vaughan's observation in *Bushell's Case* (1670) that no jury could be accused of returning a verdict "contrary to law," since the law came into play only once the facts were decided. In establishing the right of an English criminal jury to return a verdict according to conscience, Vaughan's decision made the jury in practice what it was already in radical theory: the censor of the law in issue in the given case.[58]

Inspired by *Bushell's Case,* the Wilkite radicals of the 1760s and 1770s exalted the jury's importance as a buttress of English liberties against a judiciary whose independence was dismissed as a fiction and a legislature rendered unrepresentative by executive corruption.[59] Like the Enclosure Acts, however, the erection of the summary tribunals denigrated by Blackstone shows that, where the wealthy felt no strong interest in the preservation of procedural niceties, what Blackstone called "the spirit of our constitution" was all too susceptible to legislative annulment. As a legacy of the struggle between king and Parliament, the censorial jury was an incident of the adjudicative process which, in the short run, it was as advisable to tolerate silently (limiting its practical force wherever possible by institutional engineering)[60] as it was inadvisable to admit it explicitly. In the long run, the doctrine of legislative supremacy was inherently antithetical to a conception of the jury, however tacit and qualified, which rendered it an embodiment of the sovereign people, possessing coordinate authority with that of Parliament. As long as the legitimacy of state authority in Upper Canada continued to rest on the government's adherence to the precepts of the rule of law, advocates like John Rolph could applaud the jury as "the only barrier betwixt the law and the people, betwixt tyranny, oppression and good government, the only protection for life, liberty, and property."[61] With the decline of Whig constitutionalism and the rise of the ideology of responsible government, it would become possible to discredit the jury's censorial function as permitting a defendant "to escape the consequences of his crime by illegal means."

iii

It is remarkable that the cultural shift in question occurred more rapidly in Canada than in England, since Upper Canadian politicians were made particularly sensitive to the distinction between the legal and the constitutional by the incongruity between colonial society and the province's legally established political institutions. By preventing the

58. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago, 1985), 236-49.

59. John Brewer, "The Wilkites and the Law, 1763-1774: A Study of Radical Notions of Governance," in *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries*, eds. John Brewer and John Styles (New Brunswick, N.J., 1980), 154-57 and 162-63.

60. Douglas Hay, "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century," in *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, eds. James S. Cockburn and Thomas A. Green (Princeton, 1988).

61. *Colonial Advocate* (Toronto), 1 June 1826.

latter from functioning according to the dictates of Whig constitutionalism, this incongruity produced a confrontation between a constitutionalist critique, which focussed on functional deviance, and a legalist defence, which rested on formal analogy. We shall see, however, that the impossibility of attaining a truly British sociopolitical order prompted some of the most authoritative Whig constitutionalists to abandon its precepts in favour of a mode of responsible government that would make the provincial administration politically responsible to the House of Assembly. The nature of the new order, and the circumstances under which it was achieved, invested the provincial legislature and its acts with special prestige and diminished the authority of the sustaining sanction of Whig constitutionalism, the precepts of the rule of law.

Some writers have denied that the ideology of the rule of law was authoritative in Upper Canada, but their challenge has not withstood close scrutiny.[62] Upper Canada had been established with the express intention of extending English law and liberties to its inhabitants. The authority of the provincial government, as personified in the lieutenant-governor, rested on the same ideological basis as that of the Crown in England. Lieutenant-Governor Simcoe of talismanic name had certified that the colony was blessed "with a Constitution which . . . is the very image and transcript of that of Great Britain."[63] In England, however, social authority rested with a wealthy landed aristocracy, whose dominance in the country at large enabled it to exert a controlling influence on the operations of the government. Where such an aristocracy was lacking, English political forms functioned very differently. In Upper Canada, as a consequence, popular aspirations and executive authority were brought into sharper confrontation than was normal in England. Simcoe had probably supposed that English liberties were guaranteed by the formal analogy between British political institutions and those of the colony, but his words became a licence to criticize the latter as "unconstitutional" by virtue of functional deviance.

For examples we need look no further than those two distinctive institutions of popular representation, the House of Assembly and the jury. In both cases, the colony's more level social contour produced an institution that was less deferential than its English counterpart, and in both cases the institution's representative efficacy was drastically limited by a countervailing authority which was virtually that of the executive itself. In a predominantly smallholding society, in which the influence of local elites on voting was relatively slight, the forty-shilling freehold suffrage resulted in anti-establishment electoral victories in 1824, 1828, and 1834 only to produce a deadlock between the popular chamber and the government-appointed Legislative Council. So it was with the jury. In England the potentially radical effects of *Bushell's Case* were limited by the selection of jurors from elements of society that in general were deferential to the local elite.[64] In Upper Canada, most of those qualified for jury service were

62. See Romney, "Very Late Loyalist Fantasies."
63. Quoted in Gerald M. Craig, *Upper Canada: The Formative Years, 1784-1841* (Toronto, 1963), 29.
64. J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, 1986), 378-89 and 408; Hay, "Class Composition of the Palladium of Liberty"; John H. Langbein, "The Criminal Trial Before the Lawyers," *University of Chicago Law Review* 45 (1978): 284-300.

agrarian smallholders, a debtor class often unsympathetic to the local elite and resentful of laws that offered little protection against oppressive creditors. In this case, the barrier to the institutional expression of public opinion was the absolute discretion in composing the jurors' roll enjoyed by the sheriff, an officer who held his post from the Crown during pleasure and invariably belonged to the local elite. A bill "to restrain sheriffs from packing juries" was debated in the Assembly in 1812; in the 1820s and 1830s a series of such bills was passed, only to be scotched by the Legislative Council. Jury-packing became a standard item in the reformers' list of grievances.[65]

Of course, the more democratic nature of both the House of Assembly and the jury was no less a deviation from the English pattern than the countervailing power of the executive, but Whig constitutionalism, with its emphasis on individual liberties and on procedural safeguards entailing public participation in both legislation and adjudication, legitimized the former deviation but not the latter. The "spirit of the constitution" required of both the Legislative Council and the district sheriff that they be not merely nonelective but "independent," and it was easy for critics familiar with Blackstone's mechanical metaphor of balanced government to argue that the Upper Canadian constitution unduly favoured the executive at the expense of the representative parts of government.[66] Thus two indubitably legal institutions, both closely modelled on English example, came to be perceived as functioning in a manner that was "unconstitutional."

After the War of 1812, as a groundswell of political discontent encountered sharp repression from an entrenched elite sustained by an ideology of divine mission, the confrontation between constitutionalist critique and legalist apology became a pervasive feature of provincial politics. In addition to the controversy over jury selection, two others aptly illustrate the pattern: those concerning the Sedition Act and the law officers' role in assize prosecutions. The colony's leading constitutionalist, William Warren Baldwin, denounced the Sedition Act in the Assembly as unconstitutional for its devolution of ill-defined discretionary powers of punishment on government officials in utter disregard of the canons of due process. Baldwin's speech, larded with quotations from Blackstone, evoked the cool rejoinder from Christopher Hagerman, a future attorney general and puisne justice of the King's Bench, that the act could not be unconstitutional, for it had been duly enacted and now formed part of the law of the land.[67] The law officers' monopoly of assize prosecutions was denounced as a denial of impartial justice, since it deterred victims of progovernment violence from instituting prosecutions against their assailants. Baldwin declared it to be the law officers' duty in such cases not to leave the institution of prosecutions to private parties, as usual, but to take the initiative and uphold the rule of law by discountenancing their supporters' excesses. The attorney general, John Beverley Robinson, defended the established

65. *Colonial Advocate*, 1 July 1824; Romney, *Mr Attorney*, 107, 113, 114, and 291-96.

66. "Every branch of our civil polity supports and is supported, regulates and is regulated, by the rest. . . . Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themselves [*sic*], would have done; but at the same time in a direction partaking of each, and formed out of all." Blackstone, *Commentaries*, 1:155.

67. *Kingston Chronicle*, 21 December 1821.

practice on the ground that the law officers did neither more nor less than the law prescribed: the attorney general in England was legally entitled to intervene in any prosecution, and his habitual forbearance did not entail like restraint on his colonial counterparts, but the provincial law officers made a practice of leaving the institution of prosecutions to private parties, as in England.[68]

As the functional deviance of the colony's institutions became apparent, the propensity of the legal-administrative elite to spurn the constitutional substance of the rule of law in favour of its legal silhouette evoked various reactions. Some radical politicians, inspired by the advent of Jacksonian democracy to the south, abandoned the high ground of constitutional propriety by rejecting Whig constitutionalism in favour of American-style elective institutions.[69] The constitutionalist opposition split into two camps. Advanced constitutionalists, such as William and Robert Baldwin, John Rolph, and Marshall Bidwell, looked beyond the formal arrangement of British institutions to the way they really worked. To be made responsive to the political community, they concluded, the government must be conducted, as in England, by men who possessed the confidence of the people as represented in the legislature. Daunted by the political revolution this entailed, or fixated on Blackstonean principles of constitutional balance, the more cautious constitutionalists shied at a reform that would make the administration politically responsible to the Assembly and advocated instead the introduction of legal responsibility to the legislature as a whole by means of impeachment. This more formalist constitutionalism evaded the basic problem of functional deviance, however, since impeachment could be effective only if Upper Canada possessed the "independent" upper chamber it crucially lacked.[70]

Yet even this formalist variety of Upper Canadian constitutionalism diverged from establishment legalism in challenging the implications of colonial status. Delegate wielders of sovereign power cannot logically be responsible to a legislature that is not sovereign, but the orthodox, Blackstonean conception of sovereignty as indivisible and vested in the imperial legislature was incompatible with colonial legislative sovereignty.[71] To be sure, a model for devolving sovereignty upon a colonial legislature was available to Blackstonean constitutionalists, in the form of the scheme devised by the British government for conceding Irish sovereignty in 1782. In any case, practical responsibility could have been granted without any formal concession as to sovereignty — as was of course to happen in the 1840s. To Upper Canadian constitutionalists, however, the Blackstonean position was in itself an affront. How could the people of the province be

68. Romney, *Mr Attorney*, 104-39.

69. R.A. Mackay, "The Political Ideas of William Lyon Mackenzie," *Canadian Journal of Economics and Political Science* 2 (1937); Lillian F. Gates, "The Decided Policy of William Lyon Mackenzie," *Canadian Historical Review* 48 (1967); J.E. Rea, "William Lyon Mackenzie — Jacksonian?" *Mid-America* 50 (1968); and see generally Gerald M. Craig, "The American Impact on the Upper Canadian Reform Movement before 1837," *Canadian Historical Review* 29 (1948), reprinted in *Historical Essays on Upper Canada*, ed. J.K. Johnson (Toronto, 1975).

70. Romney, "Conservative Reformer in Upper Canada"; Graeme H. Patterson, "An Enduring Canadian Myth: Responsible Government and the Family Compact," *Journal of Canadian Studies* 12:2 (1977); Archibald S. Foord, *His Majesty's Opposition* (Oxford, 1964).

71. Blackstone, *Commentaries*, 1:100-02 and 108.

said to enjoy English liberties at all if they were not represented in a sovereign legislature? Such reasoning looked back beyond Blackstone to an earlier common-law tradition, exemplified in the writings of Sir Edward Coke, which was more favourable to colonial legislative sovereignty.[72] Under the influence of such ideas — especially the Irish Whig tradition of resistance to English imperialism, which William Baldwin had absorbed as a young man before emigrating to Canada in 1799 — advanced constitutionalists in particular saw colonial sovereignty and political responsibility as concomitant questions of right.[73]

Baldwin's belief in the limits of imperial legislative authority is clearly revealed by his reaction in 1823 to the imperial attempt to unite Upper and Lower Canada. If Parliament could alter the Constitutional Act of 1791 — Upper Canada's constitution — without the colonists' consent, he declared, the province had no constitution at all. Citing the mid-eighteenth-century Swiss jurist Emmerich de Vattel, he contended that the act was in essence a treaty between the imperial government and the people of the colony, incapable of amendment, even with the consent of the colonial legislature, unless the legislature had received a specific electoral mandate. On this basis, he moved resolutions to the effect that the Upper Canadian constitution was indefeasible and that Parliament could not legislate for the province in respect of matters expressly reserved to its authority in the Constitutional Act.[74] When Baldwin chaired the public meeting that launched the campaign for responsible government five years later, his son Robert moved a resolution which "held it a principle never to be abandoned" that

> our Constitutional Act as passed by the Parliament of Great Britain and as accepted and acted upon by us, is in fact a treaty between the Mother Country and us . . . pointing out and regulating the mode in which we shall exercise those rights which, independent of that act, belong to us as British subjects, and which, therefore, no power on earth could legally or constitutionally withhold from us; and that thus that act, being in fact, a treaty, can only be abrogated or altered by the consent of both parties to it, that is to say, the Mother Country and the Colony.[75]

Except at such climaxes, however, this aspect of Baldwinite constitutionalism was recessive. Upper Canadian Reformers did not find themselves in direct confrontation with the imperial government, as the American patriots had before their Revolution, but

72. Black, "Constitution of Empire."
73. Romney, "Conservative Reformer in Upper Canada," 54-57; Patterson, "Whiggery, Nationality, and the Upper Canadian Reform Tradition," 34.
74. *Kingston Chronicle*, 7 and 14 March 1823. Baldwin quoted book 1, cap. 3, secs. 32-34 of Vattel's *Le Droit des Gens*.
75. *Documents Relating to the Constitutional History of Canada, 1819-1828*, ed. Arthur G. Doughty and Nora Storey (Ottawa, 1935), 479. The Baldwins' dissent from Blackstonean orthodoxy is also evident in the request that a provincial statute be passed in order to "facilitate the mode in which the present constitutional responsibility of the advisers of the local government may be carried practically into effect": *Canadian Freeman* (Toronto), 11 July 1828. Had they not believed in colonial sovereignty, they must have conceived an imperial statute to be necessary for the introduction of a system which presupposed colonial sovereignty.

with the oligarchy nurtured by the colony's authoritarian frame of government. It was natural to assume that this oligarchy, and its habitual thwarting of imperial benignity in order to advance its own interests, constituted the basic problem of provincial politics.

For a while, the imperial response to colonial grievances seemed to justify this posture. During the years 1825 to 1835, the imperial government repudiated the provincial administration's attempt to disfranchise the late Loyalists as aliens, enjoined the repeal of the Sedition Act (which the Legislative Council had blocked several years running), converted the higher judiciary to an independent tenure, and abolished the so-called prerogative revenues, which the administration could appropriate without legislative sanction.[76] Ultimately, though, all of this mattered little as long as Whitehall refused to concede on the issue of sovereignty. When the imperial authorities appeared to condone the constitutionally questionable repression of 1836-37, a repression seconded by the knotted clubs of immigrant Orangemen, the underlying implication of Baldwinite constitutionalism — that Upper Canada was a distinct community subjugated by an alien oppressor — was starkly emphasized. During the Tory reaction of 1836-39 and the subsequent struggle to wrest internal legislative autonomy from a wavering imperial government, ministerial responsibility was elevated to the status of a universal panacea for the grievances of Upper Canada. The chief agent of its apotheosis was Robert Baldwin, the acknowledged champion of a movement purged of more radical leaders by the failure of the Rebellions of 1837. In hymning the glory of those who stood firm for responsible government against the postrebellion terror, Baldwin cultivated a countermyth to the cult of United Empire Loyalism, by which a provincial establishment indifferent to the precepts of the rule of law had endeavoured to bolster its political hegemony.[77]

The apotheosis of responsible government resulted partly from the intense political drama of this period, and partly from the proven inadequacy of Whig constitutionalism to the colonial milieu. The relatively broad political franchise also helped. In England, too, the advent of responsible government was a major constitutional development, but it occurred gradually, and its establishment in the context of a narrow franchise did little to smother social conflict which was politically focussed on the question of extending the franchise. In Upper Canada, by contrast, responsible government, entailing as it did the subjection of the executive to the House of Assembly, seemed to promise a real devolution of political power upon the mass of the inhabitants.

To this assortment of historical circumstances we should add a specifically ideological feature. The Baldwins were capitalist land speculators of aristocratic social principles, closer in most respects to oligarchs like John Beverley Robinson than to the ordinary colonial farmer,[78] but in one crucial respect this was not so: their insistence on colonial autonomy. In the words W.L. Morton used to distinguish between rebel and

76. Craig, *Upper Canada*, 188-225.

77. Romney, *Mr Attorney*, 141-53 and 169-71; Romney, "From Types Riot to Rebellion."

78. Baker, in the article cited in n. 20 above, presents Dr. Baldwin as a leading exemplar of provincial elite ideology. On William Baldwin see particularly *Dictionary of Canadian Biography*, 7: 35-44; on Robert Baldwin see ibid., 8: 44-59.

loyalist Americans,[79] they placed loyalty to their colonial home ahead of their loyalty to the whole British community with its single allegiance. To be exact, they conceived of their allegiance as belonging to the king in his colonial parliament, not to the king in Parliament at Westminster.[80] This feature of their constitutional doctrine gave it a remarkable symmetry with the world-view of the typical agrarian smallholder of American stock, heir to an age-old localism of which the doctrine of the censorial jury was only one expression. It operated on two, perhaps even three levels. The populist antipathy towards centrally appointed local administrative elites matched the Baldwinite hostility to the imperially sustained central oligarchy. The populist sense of wrongful disfranchisement, flowing from the impotence of the House of Assembly, matched the plight of the community as a whole, disfranchised as it was by the Blackstonean doctrine of indivisible sovereignty. To these patent parallels we may add that between the late Loyalists' sense of being party to the founding compact of the provincial community (a consciousness sparked by the catalytic trauma of the Alien Question)[81] and the Baldwinite view of the Constitutional Act of 1791 as a contract between the provincial community and the empire.

This manifold symmetry gave Baldwinite constitutionalism popular appeal as an ideology of the disfranchised, and it did so in a manner which encouraged agrarian smallholders to associate their feelings of disfranchisement, not with their identity as a social class, but with the colonial community as a whole. By the 1840s, economic growth and British immigration had created a significant professional and commercial bourgeoisie with no strong attachment to the entrenched elite and a leaning towards moderate reform. Class consciousness impelled the colony's farmers to identify the commercial and professional classes as a whole as an enemy, but this class feeling was dampened by the logic of the Baldwinite position, which defined colonial politics as a struggle between the Upper Canadian community and an oligarchic elite whose preeminence depended ultimately on external (i.e. imperial) backing. Aspirations that were basically social and economic were subsumed in the quest for an institutional panacea: colonial internal sovereignty and responsible government.

Of course, the fusion of the Baldwinite and populist world-views was far from complete. The apparent triumph of the campaign for responsible government at midcentury evoked an upsurge of populist demands, including derestriction of the legal

79. Quoted above at n. 31.

80. As Graeme Patterson has put it, they were "culturally-oriented with respect to the mother country" rather than "territorially-oriented with respect to the empire": "An Enduring Canadian Myth," 12. Patterson denies that Baldwin rejected the Blackstonean doctrine of single imperial sovereignty but overlooks the evidence I have cited above: "Whiggery, Nationality, and the Upper Canadian Reform Tradition," 35-41. He correctly insists on the importance of recognizing the extent to which men like Baldwin "were attached to, and actuated by, their varying concepts of law": ibid., 41.

81. Paul Romney, "Reinventing Upper Canada: American Immigrants, Upper Canadian History, English Law and the Alien Question," in *Patterns of the Past: Interpreting Ontario's History*, eds. Roger Hall, William Westfall, and Laurel Sefton Macdowell (Toronto, 1988), 104-07.

and medical professions and the abolition of the Court of Chancery,[82] the last of which Baldwin managed to beat off only with the aid of his French allies. But the peculiar circumstances under which responsible government was attained helped to prolong for forty years the populist fusion (or confusion) of class interest with that of the community in general. The split in the Reform party led in 1854 to a realignment of parties and established the Upper and Lower Canadian conservatives in alliance as a dominant coalition. The crucial role of the *Bleus* in maintaining the conservative coalition in power made it plausible to contend that responsible government was no delusion, but that it had yet to be fully achieved. Liberty had triumphed in respect of relations between Crown and people within the colony, but Upper Canada was still subject to an external oppressor, one headquartered not in London but in Lower Canada. Agrarian radicals rallied behind George Brown in a campaign to emancipate Upper Canada from political subjection to Montreal business interests and Roman Catholicism. With French clericalism as its primary target, this second campaign for responsible government was relieved of the taint of disloyalty that had encumbered the first, and their numbers were swelled by British immigrants (like Brown himself) to whom hostility to all things French and clericalist was all but synonymous with patriotism.

Confederation was hailed as deliverance. Throughout the 1870s, Oliver Mowat could be heard celebrating the fact that Ontario in her new condition was free at last.[83] The British North America Act did not free Toronto from the financial hegemony of Montreal. In the controversy over provincial rights, which erupted after John A. Macdonald's return to power in Ottawa in 1878, the terms of the argument seemed to replicate yet again the never-ending struggle of the Upper Canadian community for independence from an external oppressor. Reform propaganda portrayed Macdonald as the servant of special interests that were lineal descendants of the Family Compact, and as acting at the behest of the Quebec Tories—the "sworn and mortal enemies" of Ontario. "Are the men of Ontario now less faithful in devotion to liberty than their fathers were?" declaimed an election pamphlet of 1883. "Or may Sir John Macdonald succeed where Sir Charles Metcalfe failed?"[84] Only when Mowat had triumphed on all fronts, and the farmers of Ontario found themselves still saddled with the National Policy, would the differences between Baldwinite constitutionalism and populist localism again loom large enough to stimulate an agrarian political revolt.[85]

From this perspective, the ideology of responsible government appears as a distinct variety of the bourgeois egalitarianism that became predominant throughout much of the English-speaking world in the course of the nineteenth century. With the rule of law as its underlying sanction, Whig constitutionalism had expressed a complex balance of

82. William Renwick Riddell, *The Bar of the Province of Upper Canada, or Ontario* (Toronto, 1928), 96.
83. See, for example, the references to Lower Canadian or "French Tory" domination as a thing of the past in his speeches as reported in *Daily Globe* (Toronto), 30 November 1872, 4 October 1877, and 16 December 1878.
84. *Daily Globe*, 4 January 1883; *Ontario Elections, 1883. Pamphlet No. 1: Legislative and Territorial Rights* (Toronto, 1883), 8-9; Beaven, "Last Hurrah," 338-52.
85. S.E.D. Shortt, "Social Change and Political Crisis in Rural Ontario: The Patrons of Industry, 1889-1896," in *Oliver Mowat's Ontario*.

power within a highly stratified society, a balance captured by Blackstone in his depiction of the state as a machine designed to contain the play of adversarial social forces.[86] The new bourgeois egalitarianism played down class distinctions by fostering a conception of the polity as a community of equals. The binding principle of the old conception had been *deference*, the acceptance of one's place in a hierarchy. That of the new was *consensus*, an organic metaphor drawn from physiology and denoting in politics the harmonious cooperation of equals.[87] The notion of consensus as an ingredient of bourgeois-democratic ideology is rightly suspect for its normative connotations, but it is important to recognize the social authority of those norms in actual historical situations. Deriving meaning as it did from a repeated cycle of communal struggle against external oppression, capped by cathartic release, the Baldwinite leitmotiv of exodus from the Egypt of colonial subjection was far more successful than the Tory myth of Edenic exile and redemption in forging the culturally disparate populace of Ontario into a community dedicated to "British" and "Protestant" values.

The resultant communitarianism of the Ontario political culture helps to explain why the sense of a distinction between the legal and the constitutional so rapidly diminished in the provincial political consciousness. In England, even after repeated extensions of the franchise, the persistence of pronounced social inequality favoured the conservation of those aspects of Whig constitutionalism that had served to legitimize the eighteenth-century social hierarchy. In Ontario, the ideology of responsible government endowed the will of the community as expressed in legislation with a special authority, which militated against concessions to social pluralism. *Vox populi, vox dei:* with the whole community perfectly represented in a sovereign legislature, to which the executive was fully responsible, what objection could persist to the divine right of Parliament? As defined and administered under such a system, how could the law oppress? Like eighteenth-century "regime Whiggism," the ideology of responsible government served the ascendant social interests by invoking the glory of a somewhat conservative political revolution in order to demonstrate the obsolescence of cherished traditional limits on the authority of the state.

The tone of the new politics was captured by the Anglo-Canadian pundit Goldwin Smith. As the century progressed, Smith was increasingly alarmed by the absence of checks and balances in liberal democracies with absolute parliamentary sovereignty. Like the comparisons of American and English political institutions by his friends A.V. Dicey and Lord Bryce,[88] his comparison of the United States and Canada posed a salutary challenge to the conventional wisdom that saw the monarchies as more "conservative" than the republic. To Smith, liberty's plight was more perilous in Canada than in either Britain or the United States, since Canadian politicians lacked both the reticence of their British and the legal constraints of their American counterparts in the exercise of power. "In England," he wrote in 1891,

86. Quoted above, n. 66.

87. *The Oxford English Dictionary* cites, inter alia, Goldwin Smith, *Lectures on Modern History* (Oxford, 1861), 24, a reference which illustrates the priority of the physiological meaning and its application to social analysis.

88. H.A. Tulloch, "Changing British Attitudes towards the United States in the 1880s," *Historical Journal* 20 (1977).

> tradition has not wholly lost the restraining power which it had when government was in the hands of a class pervaded by a sense of corporate responsibility and careful not to impair its heritage. An American or Canadian politician in playing his game uses without scruple every card in his hand; traditions or unwritten rules are nothing to him; the only safeguard against his excesses is written law. The Americans are surprisingly tolerant of what an Englishman would think the inordinate use of power by the holders of office; but then they know there is a line drawn by the law beyond which the man cannot go.... The politician in Canada, not less than the United States, requires the restraint of written law.[89]

This particular remark was addressed to the freedom with which Canadian chief ministers invoked the royal prerogative of dissolving the legislature before its term had expired, but Smith was equally apprehensive of legislative power unchecked either by a senatorial upper chamber or by executive veto. The provincial legislative assemblies might lawfully "enact the most momentous change in anything connected with civil right or property, totally alter the law of wills, or profoundly modify the relations between the sexes by the introduction of female suffrage." While "political architects in the United States, looking democracy in the face, [had] attempted ... to provide the necessary safeguards," in Canada the persistence of the political forms of monarchy and aristocracy, though but hollow shells, diverted attention from the desirability of instituting new and effective checks on the legislative will.[90]

Under the old authoritarian system, the way in which the incongruity of English forms and Upper Canadian society subverted the spirit of the constitution had been all too obvious. Smith's observation that the same incongruity was now unseen, though still banefully operative, therefore confirms the link between the apotheosis of responsible government and the decline of Upper Canadian constitutionalism. His critique was politically tendentious, being very much in the spirit of Dicey's contemporary elaboration of the rule of law, which has been interpreted as an ideological counterthrust to the emergence of popular sovereignty in Britain and, in particular, to the apprehended threat posed by collectivist legislation to property rights and freedom of contract.[91] Nevertheless, it poses a salutary challenge to the continuity approach to Canadian political culture and to W.L. Morton's notion that monarchy has fostered a less conformist society in Canada than democratic republicanism in the United States.[92]

The extent to which the Ontario political culture diverged from Diceian values was to be dramatically illustrated by the creation of the Hydro-Electric Power Commission of Ontario. It entailed public ownership, the establishment of public utilities in competition with private enterprise, the threat of expropriation, and a statute passed in 1909 specifically to stay hostile litigation. The threatened private interests mounted a fierce propaganda campaign in Canada, Britain and, to some extent, in the United

89. Goldwin Smith, *Canada and the Canadian Question,* introd. by Carl Berger (Toronto, 1971), 119.
90. Ibid., 143; see also ibid., 129-34 and 149.
91. Sugarman, "Legal Boundaries of Liberty," 106-11; Sir Ivor Jennings, *The Law of the Constitution* (5th edn., London, 1959), 305-17 and passim.
92. W.L. Morton, *The Canadian Identity* (Madison, Wisc., 1965), 85-7.

States, where the affair was exploited by utilities resisting public ownership; one hostile pamphlet included contributions from Dicey and Goldwin Smith. Yet there was no general revulsion even among the legal profession, and the judiciary made no fuss even about the statute that cut off access to the courts. In fact, William Ralph Meredith, chief justice of the Ontario Court of Common Pleas, strongly supported this enactment in private and was said to have drafted the earlier legislation establishing Ontario Hydro. Meredith was a friend and patron of the provincial premier, James P. Whitney, whom he had proceded as leader of the provincial Conservative party.[93]

The battle over Ontario Hydro is particularly important, however, in that it demonstrates not only the preeminently legalist nature of the early twentieth-century Ontario political culture but also the great exception to the rule: the continuing ascendancy of constitutionalism in relations between the federal government and the provinces. This demonstration was given when opponents of the blocking statute tried to persuade the dominion government to disallow it as an unconstitutional interference with private property and vested rights. The petitioners admitted that the power to legislate on property and civil rights was vested in the provinces, but they argued that the BNA Act was "not a complete category of the constitutional rights either of the Dominion or of the Province, or of the citizens either." Their case collapsed when their counsel was forced to admit that he "used the word 'constitutional' in a sense other than legal."[94] According to the ideology of responsible government, individuals had no "constitutional rights" that could withstand abolition by the appropriate legislature. Yet in acknowledging this, the dominion government was admitting that the provincial communities *did* have rights that could withstand the power of the imperial Parliament, for under the BNA Act the dominion government enjoyed an unlimited power to disallow provincial legislation.

It was this very conflict, between dominion claims of right based on statute and provincial claims based on no formal authority, which had made the provincial-rights controversy a confrontation of legalism and constutionalism. Certain provisions of the BNA Act, of which the disallowance power was one, seemed to subordinate the provinces to Ottawa, thereby imperilling provincial claims to constitute sovereign and responsible governments. Since internal sovereignty and responsible government had been conceded to the provinces in the 1840s as a matter of constitutional practice, without a syllable of legislation, a legalist basis existed for the claim that the BNA Act was an act of imperial might, which had annihilated the old colonies and reconstituted them as subordinate entities within a sovereign dominion. The contrary "compact theory of confederation," which saw the BNA Act as registering a compact between locally sovereign provinces and the mother country, was an update of the "Irish Whig"

93. Nelles, *Politics of Development*, 215-306 and passim; Charles W. Humphries, *"Honest Enough to Be Bold": The Life and Times of Sir James Pliny Whitney* (Toronto, 1985), 139-41, 151-6, and 163-8; Christopher Armstrong, *The Politics of Federalism: Ontario's Relations with the Federal Government, 1867-1942* (Toronto, 1981), 54-67; R.C.B. Risk, "Sir William R. Meredith, C.J.O.: The Search for Authority," *Dalhousie Law Journal* 7 (1983); Risk, "Lawyers, Courts, and the Rise of the Regulatory State," ibid. 9 (1984-85).

94. Nelles, *Politics of Development*, 296-300; Armstrong, *Politics of Federalism*, 57-63.

view of the Constitutional Act of 1791—that of a treaty between colony and empire—which William Baldwin had advanced in 1823 and which formed the basis for his insistence on the necessity of colonial legislative sovereignty.[95] Its earliest exponent after Confederation was Mowat's immediate forerunner as premier of Ontario, Edward Blake, the son of an Irish-born Baldwinite. Blake ended his career as an Irish Nationalist MP at Westminster, where he completed the circle by appealing to the Canadian example in order to justify Home Rule.[96]

The provincialist cause was uniformly triumphant, both in the courts of law and in the court of public opinion. The controversy over disallowance was won in the latter, with an assist from the former. In 1881, John A. Macdonald had disallowed an Ontario act which allowed anyone, upon payment of compensation to the improver, to float logs down streams privately improved for that purpose. The statute was reenacted and disallowed twice more. The Judicial Committee of the Privy Council, in a suit arising from the affair that had prompted the legislation, then decided that the act which Macdonald had thrice disallowed as an atrocious interference with private rights was, in fact, a simple affirmation of the law of the land. After that, no dominion government was rash enough to disallow Ontario legislation of any sort, and the refusal to disallow the Ontario Power Commission Amendment Act of 1909 removed the last lingering suggestion that the dominion government might have the constitutional power to veto provincial legislation as an unjust interference with vested rights.[97] Because it was primarily resolved in the Canadian political arena, and not in an English court, the disallowance controversy is a particularly strong demonstration of the way in which the ideology of responsible government worked in the early decades of Confederation to elevate provincial above dominion power.

iv

In nineteenth-century Ontario a single ideology, the ideology of responsible government, simultaneously legitimized the onset of legalism in relations between the state and the individual and the entrenchment of constitutionalism in federal-provincial relations. We have seen that the apotheosis of responsible government was associated with the triumph of political causes possessing a special appeal to the province's agrarian smallholders, especially those of American stock — the seedbed of English-Canadian

95. G.F.G. Stanley, "Act or Pact? Another Look at Conferation," in Canadian Historical Association, *Report and Historical Papers, 1956* (Ottawa, 1957); Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa, 1969); Romney, *Mr Attorney*, 243-8 and 252-4.

96. Margaret A. Banks, *Edward Blake, Irish Nationalist: A Canadian Statesman in Irish Politics, 1892-1907* (Toronto, 1957), 30-1 and 60-2.

97. Armstrong, *Politics of Federalism*, 25-7; Robert C. Vipond, "Federalism and the Problem of Sovereignty: Constitutional Politics and the Rise of the Provincial Rights Movement in Canada," PhD diss., Harvard University, 1983, 199-208; Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada," *Canadian Journal of Political Science* 18 (1985): 275-88. For an authoritative contemporary assessment of the Hydro affair, see A.H.F. Lefroy, *Canada's Federal System, being a Treatise on Canadian Constitutional Law under the British North America Act* (Toronto, 1913), 37-40.

agrarian radicalism. This observation makes it necessary to modify S.D. Clark's judgement that "responsible government developed in reaction rather than in response to the true democratic spirit of the Canadian people."[98] It also compels us to revise the view that links Canadian statism to the early importance of conservative cultural clusters and the fear of American democracy and imperialism. That view traces the state's authority to the persisting legitimacy of monarchical institutions; ours emphasizes the moral authority of the will of the provincial community as expressed by a sovereign and (supposedly) truly representative legislature. Instead of a Canada restrained from American excess by British cultural and institutional checks, we confront a Canada that is worse than either because it lacks both British self-restraint and American institutional checks: in the Diceian language of Goldwin Smith, "a land where tradition has no force and every one goes to the full length of his tether."[99]

Such a Canada has in fact been hinted at in some recent evaluations of the cultural basis of public ownership and state enterprise. Even in 1974, H.V. Nelles concluded that "the much-discussed Toryism that Ontario Hydro is supposed to represent looks much like some varieties of American corporate liberalism," and more recently he and Christopher Armstrong have ascribed the larger scope of the Canadian public sector, compared to the American, to the absence of constitutional constraints on legislative action rather than to any ideological divergence.[100] Without ignoring the dialectic between political institutions and political culture, as Armstrong and Nelles here appear to do, this paper has outlined an aspect of the historical process that brought the English-Canadian political culture of the early twentieth century so close to that of the United States.

Our analysis also affords a new perspective on the traditional primacy of provincial rights in the Canadian political culture. This has generally been linked to the political need to guarantee French-Canadian cultural survival and to ethnic and geographic factors which fostered regional rather than national identity. Ontario's leading role in challenging the centralist view of the BNA Act has been ascribed to selfish opportunism, which tempted by far the wealthiest and most populous province to minimize its obligations to the rest, and to a deep-rooted localism in the provincial political culture. Our linkage of the provincial rights movement with the ideology of responsible government, and our elucidation of its popular appeal, have given a sharper definition to the somewhat amorphous concept of localism and shown how it could be translated into support for provincial rights. In the process, it has demonstrated that Ontario provincialism was grounded in political principle as well as sectionalism. This linkage also helps to explain why provincial rights has been such a force for cultural

98. S.D. Clark, *Movements of Political Protest in Canada, 1640-1840* (Toronto, 1959), 431.

99. Smith, *Canada and the Canadian Question*, 149. Smith continues: "A written Constitution strictly limiting everyone's powers appears to be an exigency of democracy with which the British democracy itself will have some day to comply."

100. Nelles, *Politics of Development*, 494; Christopher Armstrong and H.V. Nelles, *Monopoly's Moment: The Organization and Regulation of Canadian Utilities, 1830-1930* (Philadelphia, 1986), 322.

homogenization within the little republics that together constitute the dominion, though this fact has sometimes been overlooked in contrasting the American "melting-pot" and the Canadian "mosaic."[101]

The relationship between localism and provincial sovereignty brings us back to the symmetry between the seventeenth-century radical ideology of the censorial jury and the colonial ideology of responsible government. Trial by jury came under attack in the nineteenth century in the United States and Britain as well as in Canada, but in the United States, encroachment on the censorial function was contained and later reversed by a libertarian sensibility that was entrenched in the constitution. In Britain, the protection trial by jury affords the criminal defendant has been swiftly eroded since about 1970, as it has become more acceptable there to "go to the end of one's tether," but the jury has yet to suffer the indignity of appeal against acquittal, a change contemplated and rejected by late nineteenth-century law reformers.[102]

The demise of the censorial jury in Canada seems to be linked to the disfranchised community's absorption of the moral outrage of a disfranchised class. In making the provincial legislature the only legitimate organ of local sovereignty in the Canadian political culture, the apotheosis of the sovereign community in provincial parliament assembled undermined the ancient, partial, and tacitly tolerated sovereignty of the local community in jury assembled. Although the BNA Act made the criminal law a federal responsibility, enforcement was made a provincial responsibility; thus the provincial governments can be seen as having assumed the jury's censorial function. After the row evoked by Henry Morgentaler's conviction and imprisonment in the mid-1970s, the celebrated abortionist was allowed to pursue his illegal activities in Quebec unmolested. His subsequent visit to the Supreme Court of Canada resulted from his opening a clinic in Ontario.

To this day, the Canadian constitution retains the character of a compact between communities rather than between individuals. As the primary constitutional principle, to which every other consideration, either of individual liberty or of the general welfare, is subordinate, provincial rights is the counterpart in the Canadian political culture to the Bill of Rights in the American.[103] The contrast between Morgentaler's cases and the Supreme Court's approach in 1981 to the proposed patriation of the constitution highlights this bias, whereby constitutionalism persists in federal-provincial relations while legalism is transcendent in relations between the individual and the state.

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101. Allan Smith, "Metaphor and Nationality in North America," *Canadian Historical Review* 51 (1970); Cook, *Provincial Autonomy, Minority Rights and the Compact Theory*.
102. A.H. Manchester, *A Modern Legal History of England and Wales* (London, 1980), 94-9; Martin L. Friedland, *Double Jeopardy* (Oxford, 1969); Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* (Ithaca, 1969); E.P. Thompson, *Writing by Candlelight* (London, 1980), 99-111 and 224-36; his "Subduing the Jury," *London Review of Books*, 4 and 18 December 1986.
103. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement," 288-94; Vipond, "Federalism and the Problem of Sovereignty," 258-93.

In *Morgentaler* v. *The Queen* (1975),[104] the Supreme Court of Canada refused to admit any distinction between what is legal and what is constitutional when it upheld appeal against acquittal in the face of the ancient constitutional revulsion. In *R* v. *Morgentaler* (1988), [105] the court conceded the substantive point at issue in the earlier trial and rejected as unconstitutional the law under which Morgentaler had previously been convicted. Nevertheless it unanimously rejected the contention of Morgentaler's counsel that the jury had the right and duty to defy a judicial direction to apply a law they thought unjust.

Far different was the outcome in 1981, when the court considered the propriety of Ottawa's proposed attempt to patriate the constitution without provincial concurrence. Seven of the nine judges agreed that the government's intention was legal, but six went on to condemn it as unconstitutional.[106] One Canadian constitutional expert remarked with puzzlement that "a distinction known to continental civil law constitutionalism but not, heretofore, to Anglo-Saxon common law constitutionalism would thus seem perforce to have been introduced into Canadian constitutional law."[107] From a historical perspective, however, the court was merely registering the anomalous (and, it would seem, unrecognized) persistence in federal-provincial relations of an ancient conflict within common-law constitutionalism: that between constitutionalism and legalism.

104. 30 Criminal Reports, n.s., 209.
105. [1988] 1 Supreme Court Reports 30.
106. *Re* Resolution to Amend the Constitution [1981] 1 Supreme Court Reports 753.
107. Edward McWhinney, *Canada and the Constitution, 1979-1982: Patriation and the Charter of Rights* (Toronto, 1982), 84.