

JOHN LOCKE AND THE CONSTITUTION ACT, 1867

**JOHN LOCKE AND
THE CONSTITUTION ACT, 1867**

**By
JONATHAN MACFARLANE, B.A.**

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AUTHOR: Jonathan MacFarlane, B.A. (University of Calgary)

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ABSTRACT

Historians argue that Confederation was the result of pragmatic and self-interested politics at work in the British North American colonies. Confederation is not considered as having a philosophical dimension. Is it possible that the Canadian founders could have drafted a constitution devoid of any political philosophy? This thesis argues that the Constitution Act, 1867, formerly known as the British North America Act, 1867 is consistent with if not remarkably similar to the liberal political philosophy of John Locke.

The thesis argues that the 1867 Constitution Act is compatible with Locke's prescription for government as found in his Second Treatise of Government. The thesis finds consistency between the Act and the Second Treatise in the relationship between the executive and legislative branches of government. The thesis finds consistency between the Constitution Act and Locke's Letter Concerning Toleration, as pertains to rights to religious minority education. The Constitution Act protects the Lockean right not to be taxed without representation. The thesis examines the Constitution Act's residual clause, known as the "P.O.G.G. power," and finds compatibility with Locke. The thesis concludes by comparing contemporary Canadian constitutionalism with the Lockean liberalism in the 1867 Constitution Act.

The thesis does not argue that the founders were Lockean in their thinking or their intent when they drafted the 1867 Constitution Act. Rather than seek a causal relationship better left to historians of ideas, the thesis restricts its focus to questions of philosophical correlation.

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CHAPTER 1

LOCKEAN LIBERALISM IN THE CANADIAN FOUNDING

Histories of Canadian confederation suggest that confederation came about only by an unlikely concatenation of circumstances.¹ Looking to political scientists yields a finding that perhaps there was some philosophy, or appeal to certain political values in confederation. The difficulty which arises from an examination of the analyses of the political thought behind confederation lies in their heterogeneity. Whereas the historians of confederation fail to satisfy readers in their agreement that confederation was bereft of philosophical considerations, the political scientists satisfy only insofar as they agree that there was indeed some philosophical basis for political union in British North America; where one remains unsatisfied (not to say confused), is in the *disagreement* among political scientists as to *what sort* of philosophical thought is behind Canadian confederation. This thesis argues that there is philosophical thought underlying

¹ Peter J. Smith provides a list of political scientists and historians who contend that "Confederation was born in pragmatism without the attendance of a readily definable philosophic rationale" (E.R. Black, Divided Loyalties: Canadian Concepts of Federalism (Montreal: McGill-Queen's University Press, 1975) 4). Others in Smith's citation include Peter Waite (The Life and Times of Confederation 1864-1867: Politics, Newspapers, and the Union of British North America (Toronto: University of Toronto Press, 1962)), Donald Smiley (Canada in Question: Federalism in the Eighties, 3rd ed. (Toronto: McGraw-Hill Ryerson, 1980)), J.K. Johnson and J.M.S Careless ("John A. Macdonald," in J.M.S. Careless, ed., The Pre-Confederation Premiers: Ontario Government Leaders, 1841-1867 (Toronto: University of Toronto Press, 1980)). For the complete reference, see Smith, "The Ideological Origins of Canadian Confederation," in Janet Ajzenstat and Peter J. Smith, eds., Canada's Origins: Liberal, Tory, or Republican? (Ottawa: Carleton University Press, 1988), p. 73. Additions that may be made to Smith's list include Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? (Toronto: University of Toronto Press, 1993) esp. 12) and Donald Creighton, Road to

confederation. This flies in the face of what historians argue. Political scientists have suggested a variety of possible philosophical influences. This thesis addresses one influence identified by several political scientists, and examines the Constitution Act, 1867 to assess that document from the perspective of Lockean liberalism.

To demand identification of a single philosophical influence is to demand gross oversimplification. Indeed, few of those who study the theoretical origins of confederation paint the thought of the founders with one brush. Every credible picture of the political thought behind confederation is more sophisticated than that.

In the interest of situating the project of this thesis in the context of extant thought on confederation, the paper briefly examines the dominant theoretical positions. Four general positions are described. The first is the traditional historian's position that confederation resulted from the politics of pragmatism. The chapter then explores what was the first and what may still be the dominant paradigm of political thought of confederation, the "Tory Touch" thesis. Following discussion of the "Tory Touch" is a presentation of two sides of the contemporary debate, a debate between those who see confederation as essentially a republican or civic humanist project, and those who see Canada's founding as a liberal one.

Each position is illustrated by an examination of one supporter, where possible, the originator or chief proponent of a doctrine. Donald Creighton, and more specifically his seminal text Road to Confederation² is representative of the pragmatically political depiction of confederation. Gad Horowitz, the original author of the "Tory Touch" thesis,

Confederation (Toronto: MacMillan of Canada, 1964). This is by no means intended to be an exhaustive list.

demonstrates the school of thought which identifies a Tory, collectivist ideology in Canada's founding. Horowitz' "Conservatism, Liberalism, and Socialism in Canada: An Interpretation" forms the basis for this paper's account of the "Tory Touch" thesis.

The final two schools of thought are demonstrated in Canada's Origins: Liberal, Tory, or Republican?, the volume edited and contributed to by Janet Ajzenstat and Peter J. Smith.³ The co-authored Canada's Origins illustrates the common ground between liberals and republicans. There is less disagreement between these two positions than between the first two herein described. Those who believe civic humanism to have been the important influence on confederation, as well as those who identify liberalism as the significant factor, accept that confederation involved a debate informed by both liberal and civic humanist ideas.

This summary of competing schools of thought provides a scholarly context for this paper's project: Analysis of the 1867 Constitution Act as a document of Lockean liberalism. The thesis is *not* intended as a critical analysis of the competing theoretical positions, nor a comparison of their respective merits and weaknesses. The summary of theoretical positions establishes a basis (if not a justification) for using Locke to examine the 1867 Act.

Confederation as Pragmatic Politics: Donald Creighton

Donald Creighton's Road to Confederation tells us the story of confederation. He documents what the founders did, and the factors leading up to confederation. What

² Donald Creighton, Road to Confederation (Toronto: Macmillan of Canada, 1964).

³ Janet Ajzenstat and Peter J. Smith, Canada's Origins: Liberal, Tory, or Republican?, (Ottawa: Carleton University Press, 1995)

Creighton fails to supply is what the founders were thinking. This is certainly not due in to negligence on Creighton's part; it is simply a task which he did not set for himself.

As Road to Confederation recounts, union of the three maritime colonies, New Brunswick, Nova Scotia, and Prince Edward Island, was the project which was originally proposed. While maritime union died as an idea, it opened the door for the idea of Canadian confederation.

Creighton identifies certain broad historical influences which, if they did not directly cause confederation, were at least extremely conducive to it. His historical catalysts can most easily be understood as a varying but interrelated set of historical trends that acted cumulatively to bring about the project of Canadian confederation. The American Civil War is the factor to which Creighton refers frequently; however, it is a factor best understood when coupled with what Creighton identifies as a growing fear of British military abandonment in the British American colonies. The two other major factors Creighton describes as inciting confederation are the desire in British America for an intercolonial railway and the belief that union would favour economic expansion and gain for the member colonies.

The picture Creighton paints of the British American colonies is one of a disorganized mass of small, parochial governments. "Badly governed within, the provinces were weak and vulnerable to pressure and danger from without. And their survival, as a collective whole, was now obscurely threatened by the vast continental upheaval that had been begun by the American Civil War."⁴ Creighton's reference to the American Civil War comes only a few short pages into his introduction. Preceding it is

the contention that it is the enthusiasm of Arthur Gordon, governor of New Brunswick, which really gave momentum to the idea of maritime union, which in turn, while never adopted, nevertheless lent strength to the idea of union of all the British American colonies.⁵ After identifying Gordon as a key figure in starting the union movement, Creighton goes on: "Gordon had the best of reasons for appreciating just how great the danger of the Civil War could be."⁶ The remaining portion of the first part of Creighton's first chapter is devoted to describing the *Trent* affair of 1861, which Creighton contends nearly led to war between Great Britain and the United States. "On the 8th of November, on the high seas, Captain Wilkes of the S.S. *San Jacinto* stopped the British Mail Packet *Trent* and took from her by force two Confederate diplomatic agents, James Murray Mason and John Slidell, and their two secretaries."⁷ Gordon, who had been governor of New Brunswick for approximately six months at that point, was witness to the perilous strain the incident placed on Anglo-American relations.

Creighton's introduction is significant. He identifies Gordon as the figure who really started the ball rolling on what was to become confederation; moreover, the impact of the American Civil War on Gordon and the danger it posed to the disorganized, parochial British American colonies is emphasised early and at length. From the beginning to the end of Creighton's Road to Confederation, the reader is given the impression that Canada came about in largest part due to the threat of U.S. invasion.

⁴ Creighton, Road to Confederation, 7.

⁵ *Ibid.*, 1.

⁶ *Ibid.*, 7.

⁷ *Ibid.*

Creighton writes that the fear of invasion encouraged talk of union, for purposes of defence. "Dislike of American resentment against Great Britain, fear of often-asserted American continental ambitions, fear that both these powerful urges would in the end express themselves in the invasion and conquest of British America - these were deep-seated feelings that nourished a quiet, persistent hostility to the Northern cause."⁸ This hostility served to fuel the fear in the British American colonies. Sentiment in the colonies was that regardless of the outcome of the war, there was great danger of invasion. Were the Union armies victorious, they might well be emboldened by their success and turn their considerable force northward, with a conscripted army of almost a million men. Were they turned back by the Confederate forces, it seemed equally likely that the Union armies would turn their attention to the British American colonies, as a consolation prize. Either way, the colonists feared revenge for the hostility the British Americans had expressed toward the Northern cause.

Fear of the Americans was heightened by withdrawal of British military support:

For a generation Great Britain had been attempting to cut her military costs in North America and to persuade the Canadians to practice the virtues of self-reliance. The efforts were not novel; but as the American Civil War went on they were continued and intensified . . .⁹

At the same time that British Americans began to perceive an increased military threat, their traditional source of military protection was receding. This could only exacerbate their trepidation.

⁸ Ibid., 17-18.

⁹ Ibid., 82-83. See also 86-89, 212-215.

While Creighton gives most frequent weight to the fear of American invasion, he records other influences. The colonists had for more than a decade desired an intercolonial railway to increase facility of trade between the British American colonies; however, no agreement could be reached. The *Trent* affair of 1861 lent new urgency to the project, however. "Most of the transports bearing the imperial reinforcements to Canada failed to ascend the St. Lawrence before it was sealed with ice; and . . . about seven thousand British soldiers were triumphantly transported in sleighs through northern New Brunswick to Rivière du Loup in Canada."¹⁰ An intercolonial railway would have eased the transport of troops immensely. With colonists' fearing invasion from the south, the railway added a military significance to its economic importance.

There are, then, two facets to the railway. One is the increased security a rail line would provide by enabling transportation of troops, arms, and communications between the colonies. The railway can also be seen as a device by which economic expansion would be attained in a united British America. There is some ambiguity in Creighton as to whether colonial union was sought in order that a railway might be built, with the expectation that economic expansion would occur, or whether the railway was sought in order to facilitate confederation and lead to increased prosperity.¹¹ It seems reasonable to consider a railway as one possible expedient to economic expansion; however, it becomes clear through other passages in Creighton's Road to Confederation that British Americans believed confederation promised economic advantages with or without a railway.

¹⁰ Ibid., 8.

¹¹ See Ibid., 20, 81.

It seems to be this economic gain which constitutes the "pragmatism" of confederation. On October 10th, 1864 at the Quebec conference, for the first time delegates from the Canadas and the maritime colonies expressed their approval of the idea of confederation, endorsing John A. Macdonald's resolution: "that the best interests and present and future prosperity of British North America will be promoted by a federal union under the Crown of Great Britain . . ." ¹² It is the reference to the prospect of present and future prosperity that was important to many of the delegates. After Macdonald's motion had been seconded, George Etienne Cartier ". . . rose and . . . reviewed once more the main reasons, political and economic, for union - and union now - of British America." ¹³ Creighton describes many instances where the pro-union delegates from the respective colonies made appeals to economic prosperity to convince sceptics. "Brown, in an elaborate speech, over an hour long and heavily freighted with statistics, set out to demonstrate how the combined human and material resources of the British North American provinces would make a great nation." ¹⁴

Creighton states the point bluntly: "If the northern provinces were to survive and develop, they must organize and centralize their separate, haphazard, and uncoordinated activities. Political union would supply the impulse for growth and expansion and the strength for defence." ¹⁵ Two major factors or influences promoting confederation can be seen in this passage. The first is "growth and expansion." It seems that Creighton is referring to economic growth and expansion. His second principal influence is the

¹² Joseph Pope, Confederation: being a Series of Hitherto Unpublished Documents bearing on the British North America Act (Toronto, 1895), 5, cited in *Ibid.*, 139.

¹³ Creighton, Road to Confederation, 139.

¹⁴ *Ibid.*, 128.

aforementioned "strength for defence." Canadian confederation came about, according to Creighton, in order to enhance present and future prosperity, and to increase defensive capability.

It is not simply that Creighton depicts confederation as being motivated by tangible concerns such as defence and economic development; it is that he believed confederation was a profoundly unphilosophical project:

For [the founders] the favourite political myths of the Enlightenment did not possess an even quaintly antiquarian interest. They saw no merit in setting out on a highly unreal voyage of discovery for first principles. They would have been sceptical about both the utility and the validity of abstract notions such as the social contract and the natural and inalienable rights of man. The magic formulae of the American and French Revolutions - 'life, liberty, and the pursuit of happiness' and 'liberty, property, security, and resistance to oppression' - would have sounded in their ears like irrelevant and questionable rhetoric.¹⁶

Creighton's founders were not interested in "principles." It is worth noting that in making this contention, Creighton does not cite memoirs, correspondence, newspaper articles or editorials of the day. In fact, he is drawing exclusively on his own interpretation of the personalities involved. He leaves the respectable realm of historical record (to the standards of which Creighton usually adheres) for the highly uncertain and murky domain of speculation. Not only is his contention that confederation was an unphilosophical project tenuously speculative, but as I intend to show, relying on Creighton's own historical standards, erroneous as well.

¹⁵ Ibid., 8.

¹⁶ Ibid., 141-142.

It cannot but be contradictory to refer to the two great factors leading to confederation as fear of invasion by the United States and a desire for economic expansion, and then to dismiss in broad terms considerations such as "liberty, property, security, and resistance to oppression."¹⁷ According to Creighton, Canadians and Maritimers alike were concerned about military expansion from the south. What is this but a motivation of liberty, security, and resistance to oppression? If the colonists feared for their lives, they were motivated by *security*. If they feared oppression by the Americans, they feared for their liberty. The principles of the American Revolution, at which Creighton scoffs no less than at those of the French, can also be seen as motivating factors for the founders of confederation. For what are economic and defence concerns, broadly expressed, but motivations to secure "life, liberty, and the pursuit of happiness?"¹⁸

The phrase "life, liberty, and the pursuit of happiness" is a modification of the right to "life, health, liberty, [and] possessions,"¹⁹ in John Locke's Second Treatise of Government. In fact, if Creighton's history is accurate (and one has no reason to doubt that it is), and confederation did indeed come about primarily because of fears of American invasion and a desire to empower the British North American economy, confederation can be seen as a project of civil government consistent with Lockean

¹⁷ Ibid., 142.

¹⁸ Ibid.

¹⁹ John Locke, Second Treatise of Government Chap. II, par. 6. There are many editions of Locke's Two Treatises of Government, first published in 1690 with changes in 1694 and 1698. They are divided into short, numbered sections and it is to these that the numbers in the subsequent footnotes refer. All references are to the corrected edition of 1764 which incorporated all the changes that Locke had made during his lifetime. This

political teaching. Locke not only argues that all men have a right to "life, health, liberty, [and] possessions," he also contends that it is for the protection of these things that men enter into civil government. "Men . . . enter into society . . . only with an intention in every one the better to preserve himself, his liberty and property."²⁰ Creighton's entire purpose is to demonstrate the influence that economic and security concerns had to incite the founders to undertake the project of confederation. If this is so, then logically, they undertook confederation ". . . the better to preserve" their lives, health, liberty, and property.

It may be argued that Locke's writing refers to individuals, who, not yet living under government, agree to submit to one society, and not, as was the case with confederation, to extant governments uniting under a larger one. Yet while Locke refers to individuals, his teaching is not necessarily so limited.

Indeed, there is no reason why Locke's theory cannot be seen to apply beyond the level of individual men. The motivations to civil association attributed to individual men are no less valid for clan or family; or a larger group still, such as a town, village, or province. The motivations to coalesce identified by Locke are applicable at the level of the colonial governments. Creighton's Road to Confederation itself demonstrates this, by identifying these motivations at work on the scale of the respective Canadian and Maritime governments. Moreover, Locke's theory of consent, as elaborated in Chapter VIII of the Second Treatise, provides the necessary argument to justify actions of the

edition is to be found in John Locke, Second Treatise of Government, (Indianapolis: Hackett Publishing Company, Inc., 1980), C.B. Macpherson, ed.

colonial government as the extension of the will of the individuals of Canada. "For when any number of men have, by the consent of every individual, made a community, they have thereby made that community *one body, with a power to act as one body* . . ." ²¹ In Chapter VIII of the Second Treatise, Locke goes on to develop a theory of consent and representation which justifies the actions of a legislative assembly as extensions of the will of its individual citizens. An examination of Locke's theory of representation and consent is not the project of this thesis. ²² It is sufficient for the purposes of this thesis that Locke's theory of the beginning of political society is consistent with Creighton's account of confederation.

The Tory Touch: Gad Horowitz

Creighton's pragmatic or conservative history of Canada's founding is not the only account in which Locke makes an unlikely appearance. Gad Horowitz' "Tory touch" thesis, long considered a seminal work in Canadian political thought, admits not only the presence but the dominance of Lockean liberalism in Canada's political history. Horowitz' description of Lockean influence, as well as some implications of his work on the "Tory touch," provide important context for this thesis.

²⁰ Ibid., Chap. IX, par. 131, (p.68). See also Chap. IX, par. 123, 124, Chap. XI, par. 134, 138, 139, Letter on Toleration, Mario Montuori, ed., (The Hague: Martinus Nijhoff, 1963), pp. 83-85.

²¹ Locke, Second Treatise of Government, Chap. VIII, par. 96 .

²² One such account of Locke's theory of consent is available in John W. Yolton, A Locke Dictionary (Oxford: Blackwell Publishers, 1993), pp. 51-53.

Horowitz applies the political-historical method of analysis of his teacher, Louis Hartz to Canada's origins.²³ "The Hartzian approach is to study the new societies founded by Europeans (the United States, English Canada, French Canada, Latin America, Dutch South Africa, Australia) as 'fragments' thrown off from Europe."²⁴ According to Hartz and Horowitz, these fragments do not manifest themselves as exact ideological duplicates of their original countries. Rather, the fragments contain only isolated ideological traits, traits which exist in a broader spectrum in the mother country. Hartz subscribes to a dialectical model of history, in which the thesis of toryism and the antithesis of liberalism combine to yield a synthesis of socialism. He sees the United States as a purely "liberal" fragment of British society. Lacking toryism with which to combine, liberalism is the dominant ideology in America, uncontested in its victory. Hartz describes the Canadian situation as very similar. Horowitz explains that "[t]he United States, English Canada, and Dutch South Africa are 'bourgeois fragments,' founded by bearers of liberal individualism who have left the tory end of the spectrum behind them."²⁵ In Hartz' original application of this method, this view of new societies as ideological fragments of their original countries is used to explain the absence of socialism as a political force in the United States.

Horowitz shares Hartz' dialectical view of history, but emphasises the very differences between Canada and the United States which Hartz notes but dismisses as insignificant. As Horowitz claims, "Hartz notes that the liberal society of English Canada

²³ Gad Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation," in Canadian Journal of Economics and Political Science XXXII, no. 2, May 1966, p. 143.

²⁴ Ibid.

has a 'tory touch,' that it is 'etched with a tory streak coming out of the American revolution."²⁶ Horowitz argues that while the influence of the "tory touch" may be proportionally minor, its presence is of paramount significance. "The danger of a pan-North American approach is that it tends either to ignore the relative strength of Canadian socialism or dismiss it as a freak. It explains away, rather than explains, the strength of Canadian socialism."²⁷ Horowitz contends that the toryism which came to Canada through the United Empire Loyalist movement sets the stage for at least some socialist synthesis to occur. Specifically, feudal toryism's trait of an "organic" view of society combines with the "equality" of liberalism to produce socialism. To support this contention, Horowitz describes the success of socialist political parties on the federal and provincial stages. The details of his argument are not of concern; his conclusions are.

"My argument . . . is not to deny that liberalism is the dominant element in the English-Canadian political culture; it is to stress that it is not the sole element . . ."²⁸ Horowitz does not deny that Canada is essentially liberal in its origins; rather, he wants to add his interpretation of defining characteristics of toryism (and the fact that it leads to socialism) to this existing liberal essence. For this thesis the implications of toryism and socialism for Canada are not of primary importance. Horowitz' admission that Lockean liberalism is the dominant political theoretical influence on Canada's founding (even if Horowitz does not believe that its dominance affords it principal significance) suffices to lend a justification to the enterprise of this thesis. Horowitz writes that "Here Locke is not

²⁵ Ibid., p. 144.

²⁶ Ibid., p. 148.

²⁷ Ibid., p. 149.

²⁸ Ibid., p. 156.

the one true god; he must tolerate lesser tory and socialist deities at his side."²⁹ Nevertheless, Locke is the dominant "god" according to Horowitz. Although he makes clear that while he accepts that dominance, he is not interested in it. So Horowitz ignores Locke. Horowitz is one of many political scholars who analyze the political culture of Canada, accepting Locke as its philosophically dominant influence yet failing to proceed beyond the point of identification.

It is not the purpose of this project to support or refute Horowitz' contentions concerning the presence of toryism and socialism; insofar as he discusses those contentions, Horowitz' work is irrelevant to this thesis. What is important is his recognition of Lockean liberalism in the Canadian founding, and his failure to explore this influence. Not unlike Creighton's failure to supply his reader with a description of the thought of Canada's founders, Horowitz' failure to explore what he himself describes as the dominant political influence on Canada's founding cannot be attributed to negligence. Horowitz simply was not interested in the dominant influence.

It is, however, a question of interest to the discipline of Canadian politics as a whole. Horowitz is not the only political historical author who ignores Locke while acknowledging his influence. As Janet Ajzenstat contends:

George Grant, [and] Gad Horowitz . . . admit the influence of Locke, but regard collectivism as the heart of Canadian identity. [. . .] Charles Taylor and James Tully offer a not dissimilar picture; Locke is present, but the anti-Lockean elements are more interesting and more promising as a model for Canada's political future.³⁰

²⁹ Ibid., p. 155.

³⁰ Janet Ajzenstat, "Retrieving Canadian Constitutionalism," unpublished, A12.1-.2

Whether the anti-Lockean elements are more interesting or promising does not imply that the Lockean elements are, themselves, uninteresting or unpromising. It is to the exploration of this substantive question that this thesis sets itself: In what form do these Lockean elements manifest themselves?

Civic Humanism vs. Liberalism: Ajzenstat and Smith

Before this essential question is examined, there remain two schools of thought concerning confederation to be explored. They are both new, "revisionist" theoretical perspectives, which disagree less with one another than with previous scholarship such as that of Creighton and of Horowitz. The first theoretical position can be described as the civic humanist paradigm, and is evident in the work of Peter J. Smith. The second theoretical viewpoint is a fairly straight-forward liberal one, demonstrated by Janet Ajzenstat.

It will prove useful to discuss the two together, as they agree with one another as to where theorists such as Creighton and Horowitz err. Ajzenstat and Smith contend that the "tory-liberal" or liberal-laurentian paradigm within which political scientists and historians have worked has shackled Canadian political thought; no one has been able to explore possible historical criticism of liberalism in Canada from any source other than a tory position, because the dominant paradigm simply does not conceive of it. "Insofar as historians and political scientists have looked for a critique of liberalism in nineteenth-

century Canada's intellectual history, the presumption has been that it must be found in conservatism."³¹

While traditional scholarship on Canadian political thought has concentrated on a schism between liberal thinkers and their tory critics on the right, Ajzenstat and Smith present a new paradigm. They contend that the significant criticism to Canada's liberal ethos comes rather from the *left*, by way of civic humanism or republican arguments. Smith writes that Canada's founding was pervaded by a ". . . debate between, on the one hand, civic humanism, with its emphasis on civic virtue and classical citizenship (*homo politicus*), and, on the other, a commercial ideology with its emphasis on the economic (*homo mercator*)."³²

The civic humanism described by Smith is indeed a revisionist concept, not admitted of by those who have followed the work of Creighton or of Horowitz. According to Smith:

New scholarship on the Whig Revolution of 1688, the American Revolution of 1776, the Scottish Enlightenment, and the Jeffersonian era has, among other things, called into question the long-standing perception of John Locke as the fountainhead of eighteenth-century Anglophone American political culture . . . One of the puzzling omissions of this intellectual renaissance is that while it has shed new light on the Anglo-American and even French political traditions, it has had little to say about Canada.³³

³¹ Janet Ajzenstat and Peter J. Smith., "Liberal-Republicanism: The Revisionist Picture of Canada's Founding," in Canada's Origins: Liberal, Tory, or Republican? (Ottawa, Carleton University Press, 1988), p. 6.

³² Smith, "The Ideological Origins of Canadian Confederation," p. 48.

³³ Ibid.

Smith argues that this new scholarship must be of significance to Canada by arguing that Canada's ideological origins stem from Britain, France, and America. The civic humanist thought was present in the sources of Canada's political culture. Surely it makes no sense that what existed in the roots of Canadian ideology should not exist in the ideology itself. "The civic republican philosophy of the nineteenth-century Canadian radicals . . . has its origins in the philosophy of Jean-Jacques Rousseau and in the North American context is allied to Jeffersonian and Jacksonian conceptions of democracy."³⁴ The opposition to liberalism which Smith describes as coming from republican ideas manifests itself as objections to rampant commerce, elitism, and individualism. "What has captivated republican thinkers in Rousseau are the arguments suggesting that commerce and trade are contemptible, that it is morally repugnant to elevate the claims of the individual over the claims of the community, and that democracy in the true definition exists only where the sense of community is strong."³⁵

It is the fact that Smith sees a debate between liberal and republican ideas which is of significance to this thesis. Smith's review of revisionist scholarship leads him to question Locke as the dominant ideological father of North American political culture. However, his questioning does not go so far as to suggest that Locke is not present. His position is similar to that of Horowitz in that Smith sees Locke as present, but not the most important ideological influence on confederation. "In nineteenth-century Canada,

³⁴ Ajzenstat and Smith, "Liberal-Republicanism: The Revisionist Picture of Canada's Founding," p. 8.

³⁵ Ibid., p. 11.

there were two constitutional philosophies at work, both acting in the tradition of the eighteenth-century debate between wealth and virtue, land and commerce."³⁶

Ajzenstat views confederation as characterized by the same debate as Smith, but disagrees as to the relative strength of the civic humanist position. Ajzenstat considers Lockean liberalism to be the dominant influence rather than republicanism. Thinkers such as Lord Durham and John Beverly Robinson are seen as liberals by Ajzenstat. She draws attention to the fact that it is political faction which is of concern to both Durham and Robinson. "Citizens were carrying arms against their government and against fellow citizens. In liberal doctrine, there is no greater political evil."³⁷

Ajzenstat contends that Robinson and Durham favoured the civilising properties of wealth and commerce.³⁸ Additionally, she states the positions of Robinson and Durham. "Both Durham and Robinson are liberals . . . Both held that it is the purpose of government to guarantee individual rights and freedoms."³⁹

Ajzenstat makes a case for the presence of Lockean liberalism in what she terms the "constitutionalism" of Étienne Parent and Joseph Howe. She describes their ideas as deriving from Locke, and as forming the basis for Canadian politics since the 1830s. "The heart of liberal constitutionalism is the idea that for all politically relevant purposes human beings are equal . . . In the British tradition this idea, often termed equality of

³⁶ Smith, "The Ideological Origins of Canadian Confederation," p. 72.

³⁷ Janet Ajzenstat, "Durham and Robinson: Political Faction and Moderation," in Canada's Origins: Liberal, Tory, or Republican? (Ottawa, Carleton University Press, 1988), p. 144.

³⁸ Ibid., p. 145, 146.

³⁹ Ibid., p. 148.

right, stems from the teaching of Hobbes and Locke."⁴⁰ Ajzenstat describes Howe and Parent as following British constitutional tradition rather than embracing the radical ideas of the reformers in the 1830s. She finds the views of Parent and Howe influential for Canadian politics. "It is the constitutionalists' vision that shapes Canadian politics in the ensuing decades, and until well into our own time."⁴¹ Ajzenstat, then, sees a strong Lockean influence.

This should suffice for an examination of what have been identified here as the four major theoretical perspectives on confederation. It is fruitless to make an effort to reconcile all these theoretical approaches to confederation, or to provide incontrovertible evidence for choosing one rather than the others. This is certainly not the project proposed here. Nor is my project to compare and contrast the four, exploring the implications of each. Rather, what can be seen in the four perspectives is that one (if not the only) trait common to all four is the presence, in some form or another, of a Lockean strain of liberalism.

Horowitz states that Locke is dominant but not the most important influence. Smith claims that Lockean liberalism is overshadowed by a civic republicanism; nevertheless, Locke is the important "opposite" side in a two-sided debate for Smith. Ajzenstat's position is the easiest to reconcile with Locke; in no uncertain terms she explains that he is the dominant influence, and can be seen in the thought of such influential individuals as John Beverly Robinson, Lord Durham, Étienne Parent, and

⁴⁰ Janet Ajzenstat, "The Constitutionalism of Étienne Parent and Joseph Howe," in Canada's Origins: Liberal, Tory, or Republican? (Ottawa, Carleton University Press, 1988), p. 213.

Joseph Howe. Creighton's is the most difficult position to reconcile with this paper's project of exploring Lockean liberalism in Canada's confederation, for he flatly dismisses the presence of Lockean thought at Canada's founding. But what must be remembered is that Creighton does not seek to supply an account of the ideas and ideological influences of confederation. He is content to record historical events. However, the events as he records them are perfectly consistent with Lockean principles.

The significance of all the views examined above is that these are the perspectives from which confederation is viewed by scholars. Liberalism is a trait that can be seen across all four schools of thought. The literature suggests that a search for liberalism in confederation is not necessarily a futile undertaking.

Interpretation of Locke and the Constitution Act, 1867

The basis for this thesis should now be firmly established. Dissatisfaction with existing interpretations of the political thought behind confederation ensues from the diversity of explanations. Nevertheless Locke is present in all the conflicting interpretations. What is curious is that the one piece of common ground among the competing interpretations should remain unexplored; the Constitution Act, 1867 has yet to be submitted to scrutiny from a Lockean perspective. It is just such an examination that the rest of this thesis undertakes.

The thesis restricts its focus to the text of the Constitution Act, 1867. The hypothesis is that there is a Lockean influence in the Canadian founding, which translates into compatibility between the Constitution Act, 1867, and Locke's writings on

⁴¹ Ibid.

government. What is to be determined is how closely the Act conforms to Locke's thought.

The thesis is *not* concerned with questions of the influence of Locke on the founders themselves. What would be required to treat such questions would be a detailed history of the education and interests of the founders. Rather than examining the historical connections or who read what at what time, the thesis takes a more philosophical approach, by focusing on questions of logical and conceptual compatibility between Locke's ideas and the Act's principles. The project accepts the legitimacy of an approach examining historical documents from a perspective of political philosophy, and consequently accepts the limitations which accompany such an approach. It is limited to examining the compatibility of the Constitution Act, 1867 with Locke's Two Treatises of Government. It follows that even if compatibility is found, the thesis will not have incontrovertible proof that Locke was indeed the important influence, but it will have suggested the probability of that influence. This thesis seeks to assess a correlation; it does not propose to treat questions of causality. The most it will be able to say is that if there is consistency between the Constitution Act, 1867, and the writings of Locke, it is probable the Locke was indeed an influence on the founders.

For the interpretation of Locke and approach to the problem of finding Locke in historical, constitutional texts, this thesis relies on models supplied by Steven Dworetz and Thomas Pangle. There is voluminous documentation of the ideological origins of the American founding, much of which includes various interpretations of Lockean thought

and its influence in America. Steven Dworetz supplies a model of interpretation, which seems very a sensible one to emulate:

[T]he search for Locke in American Revolutionary thought should be informed by an understanding of Lockean thought that satisfies *two criteria of interpretation*. First, the interpretation must be textually sound, or available in Locke's texts . . . Second, in developing or choosing a textually sound interpretation of Lockean thought (for there could be more than one textually available Locke), we should try to be sensitive to how Lockean thought most likely would have been interpreted by contemporaries of the period under investigation.⁴²

The first of Dworetz' two criteria is worth adopting. It would not do to subscribe to a view of Locke in any other way than Locke himself wrote; Dworetz is simply suggesting a textual approach to Locke. Dworetz' second criterion is less appropriate for this project than for his own.

Dworetz examines the personal correspondence and the contents of the American founders' reading libraries. This thesis is not engaged in such a history of ideas. Thus it disregards Dworetz' second criterion of interpretation in favour of the approach described by Thomas Pangle:

The aim has been to unearth the full- and, for many and perhaps all of the Framers, the still partially hidden-

⁴² Steven M. Dworetz, The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution (Durham: Duke University Press, 1990), p. 9.

implications and presuppositions, the basic logic, of the theoretical outlook that . . . impinged on them . . .

I have therefore approached Locke's texts not by trying to guess or imagine how they might have been approached by particular Founders . . . but, as nearly as possible, have tried to read them as Locke himself indicates he intends them to be read . . .⁴³

For this thesis, Pangle's hermeneutical model is more appropriate than Dworetz' approach. Such a reading of Locke's works ". . . as Locke himself indicates he intends them to be read . . .", requires that the thesis begin with Locke's texts. Commentators on Locke are certainly useful, Pangle and Dworetz included, but ultimately, the thesis must compare the text of the Constitution Act, 1867 with Locke's own words and thoughts, rather than with the interpretive translation of one Locke scholar or another.

The avenue which suggests itself most obviously is an examination of basic Lockean constitutionalism. Locke is among the intellectual founders of constitutionalism.

Peter H. Russell contends that what is:

[c]rucial to this Lockean . . . form of constitutionalism is the perception of the written constitution as a comprehensive statement of the basic principles of government and the rights of the people. The Constitution (and the capital C is essential) expresses the will of the founding people as to the terms on which they wish to form a political community with a common government.⁴⁴

⁴³ Thomas L. Pangle, The Spirit of Modern Republicanism, The Moral Vision of the American Founders and the Philosophy of Locke (Chicago: University of Chicago Press, 1988), p. 276.

⁴⁴ Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? (Toronto: University of Toronto Press, 1993), p. 9.

Russell's understanding of what is essential to the Lockean constitution consists of two main elements. The first are the "basic principles of government." This is a vague characteristic to label definitive; a great deal of latitude can be implied by principles of government. It is reasonable to conclude, however, that Russell intends the nebulousness of his first feature of Lockean constitutionalism. Though this defining feature of constitutions is unspecific, this will have to suffice; if constitutions are unspecific in nature, it is not reasonable to demand specific characteristics of them. In constructing different governments for different societies, flexibility will be a trait required of constitutions.

The second characteristic of Lockean constitutions Russell identifies is not so ambiguous. For Russell, a Lockean constitution necessarily contains a statement of "the rights of the people." Locke writes at length of the fundamental natural rights of men; it is indeed this for which Locke is famous as a liberal theorist. Russell is correct to note an emphasis by Locke on the rights of the people.

Any explicit bill of rights of the people is conspicuous by its absence from the Constitution Act, 1867. Is this then evidence that the Constitution Act cannot properly be called a Lockean constitution? This thesis argues that the Act is Lockean. The Constitution Act, 1867 meets Russell's definition of Lockean constitutionalism as providing basic principles of government and a statement of the rights of the people. The answer to the vague question of whether basic principles of government are contained in

the Act is self-evident.⁴⁵ The question this thesis answers is whether the Act protects rights of the people, and if it does, whether the rights it protects are consistent with rights Locke advocates protecting. This thesis argues that the 1867 Constitution Act protects rights which are Lockean in nature. The argument is that the rights of the people are protected through limits to government. What is notable about the function of constitutions in circumscribing the powers and functions of government is that constitutions act as documents ultimately limiting government. Limits to government are the heart of constitutionalism.⁴⁶

The thesis examines Locke to ascertain the limits he prescribes, and why. The second chapter compares the relationship the Act establishes between the executive and legislative branches with Locke's Second Treatise of Government. The chapter examines both chapter XI of Locke's Second Treatise, where Locke discusses what he believes to be the proper limits on legislative power, and the sections of the Constitution Act, 1867 on the Legislative Power. The sections which suggest themselves as most immediately relevant are sections 17-57, on the Legislative Power of the Canadian Parliament. The examination of the 1867 Act compares the limits on legislative authority in the Act with the limits Locke suggests.

The comparison is of the 1867 Act to Locke's writings, rather than the converse. It therefore makes sense to read sections of the Act and compare them to what can be discerned from Locke's writings. The third chapter of the thesis looks at the limits to

⁴⁵ See, for example, the preamble of the Constitution Act, 1867 for just such a vague statement of the basic principles of government as Russell argues is the first characteristic of Lockean constitutionalism.

⁴⁶ Ajzenstat, "The Constitutionalism of Étienne Parent and Joseph Howe," p. 212.

government in the Constitution Act which protect rights but do not necessarily fall under the category of the relationship between the executive and legislative branches. A fourth and final chapter will contain an exploration of the contemporary implications of the thesis' findings, as they pertain to Canadian politics today and in the future.

CHAPTER 2

THE LEGISLATURE AND THE EXECUTIVE

This chapter explores the compatibility of the Constitution Act, 1867 with Locke's argument for legislative supremacy in the Second Treatise. At first reading certain sections of the Act appear inconsistent with the idea of legislative supremacy. This chapter shows that the seemingly incongruous sections of the Act are not only compatible with Locke's writing, but remarkably similar to it. First, however, the chapter briefly compares the formal description of the executive in the 1867 Constitution Act, with the *de facto* executive of everyday parliamentary politics.

Governor-General or the Cabinet: Constitution versus Convention

Sections 9 and 10 of the Constitution Act, 1867 establish the Queen as Canada's executive power, and the Governor-General as the Queen's representative in Canada. Sections 11, 12, and 13 affirm that almost all actions and powers attributed to the Queen and the Governor-General are (and have been since 1848 in British North America) to be exercised by the Queen's Privy Council in Canada. In practice, given the constitutional principle of responsible government (established in most of British North America as early as 1848), executive powers are exercised by the cabinet, which is the name given to a committee of the Privy Council made up of Councillors who can command the support of the majority in the popular house on major questions of policy.

Thus it is the Cabinet that exercises the powers, or almost all the powers, ascribed to the Queen and Governor General in the formal language of the Constitution Act. The Cabinet is the *de facto* executive, and the Queen and Governor General are relegated to the realm of ceremony. The Queen indeed has a bare minimum of contact with the administration of the Canadian State.⁴⁷ That the framers of the 1867 Act intended their formal language to be interpreted as conferring executive powers on the Cabinet is indicated by the phrase in the Preamble to the Constitution Act, 1867, which says that the Constitution of Canada is to be "similar in Principle to that of the United Kingdom."⁴⁸ In the British Constitution it was, and of course still is, the Cabinet that exercises the powers of the monarch

This thesis continues to refer to the Governor General as the Canadian executive for two related reasons. The first is that it is appropriate to conform to the language of the Constitution Act because it is the text under study. The second is that to speak of the Governor General and Queen as executive usefully reminds us that the discussion is not about a particular Cabinet, but about the Cabinet as an institution. It is true that it would be constitutionally legal (though constitutionally unconventional) for the Governor General or the Queen to exercise the formal powers of the Constitution Act.⁴⁹ While rare, such exercise is not unheard of. In 1925, Governor-General Lord Byng refused to grant a

⁴⁷ The last instance of the Queen's direct involvement in Canadian politics came in 1988, when then Prime Minister Mulroney sought Her Majesty's approval under Section 26 of the Constitution Act, 1867 to appoint eight additional Senators in order to pass the controversial Goods and Services Tax.

⁴⁸ From *The Constitution Act, 1867*, preamble. All subsequent citations from the Act will include only the section number.

dissolution of the House of Commons to Prime Minister MacKenzie King.⁵⁰ As recently as 1979, Governor-General Schreyer considered denying a dissolution to Joe Clark.⁵¹ The legitimacy of the Governor-General acting independently of the advice of his ministers or of the Prime Minister is a topic of debate in Canadian politics.⁵² Nevertheless, it would be perfectly constitutionally legal for the Governor-General to exercise powers which are now only legitimate when exercised on the advice of the privy council. This creates a fascinating paradox in Canadian politics, where what is constitutionally legal is not necessarily politically legitimate.⁵³

Apparent Legislative Subordination to the Executive

The relationship between the legislative power and the executive power described by the Constitution Act, 1867 seems to clash with the relationship described by Locke in the Second Treatise of Government. The Act and Locke's Second Treatise appear to differ notably on the question of the supremacy of the legislative. Locke writes that the legislative must be the supreme branch of government. "In all cases, whilst the government subsists, the *legislative is the supreme power*: for what can give laws to

⁴⁹ A thorough discussion of Canada's constitutional conventions may be found in Andrew Heard, Canadian Constitutional Conventions: The Marriage of Law and Politics, (Toronto: Oxford University Press, 1991).

⁵⁰ See Archer et al., Parameters of Power, pp. 225-26, and Ronald G. Landes, The Canadian Polity: A Comparative Introduction (Scarborough: Prentice-Hall Canada, Inc., 1987), p. 98.

⁵¹ See Landes, The Canadian Polity, p. 98.

⁵² For a discussion of both sides of this debate, see Heard, Canadian Constitutional Conventions: The Marriage of Law and Politics, ch. 2, "Conventions of the Governors' Powers," pp. 16-47.

⁵³ For a discussion of this paradoxical conventional legitimacy superseding constitutional law, see "The Patriation Reference," *Attorney General of Manitoba et al. v. Attorney General of Canada et al.*, in Peter Russell, Rainer Knopff, and Ted Morton, Federalism

another, must needs be superior to him . . ."⁵⁴ The Constitution Act, 1867 does not explicitly assert the supremacy of either the executive or the legislative branch, but there are certain sections of the Act which can be read to make the case that the legislative exists in a subordinate relationship to the executive.

Sections 9 and 10 of the Constitution Act, 1867 establish that the executive power of the government of Canada is vested in the Queen, and that the Governor-General is the Queen's representative in Canada. Section 17 reads "There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons."⁵⁵ What is evident immediately is that the executive also constitutes a portion of the legislative branch; its subordination to the legislative branch, then is very much in doubt. In fact, Locke writes of just such a situation, and expresses this doubt about the subservient status of such an executive:

[T]he *supreme executive power* vested in one, who having a share of the legislative, has no distinct superior legislative to be subordinate and accountable to, farther than he himself shall join and consent; so that he is not more subordinate than he himself shall think fit, which one may certainly conclude will be but very little.⁵⁶

This is far from the only obvious conflict we have in Locke's prescription of supremacy for the legislative with the Constitution Act, 1867, but it is certainly a beginning.

and the Charter: Leading Constitutional Decisions (Ottawa: Carleton University Press, 1990), pp. 706-59.

⁵⁴ Locke, Second Treatise of Government, par. 150. See also pars. 134, 149.

⁵⁵ Constitution Act, 1867, sec. 17.

⁵⁶ Locke, Second Treatise of Government, par. 152.

A discussion of the sections of the Constitution Act, 1867 which might lead one to conclude that the executive enjoys primacy over the legislative continues with sections 39 and 50 of the Act. "The Governor-General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons."⁵⁷ The power of calling the legislative branch of government to assembly is coupled with the power to dissolve it. "Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer."⁵⁸ The regular scheduling of the assembly of the House of Commons runs five years, then, or less if the Governor-General so orders. According to the Constitution Act, the House of Commons meets and dissolves at the pleasure of the executive. This would appear to be a considerable power over the legislative branch in the executive.

Section 24 of the Act also speaks to the power of the executive over the legislative. As section 17 establishes the Senate as part of the legislative branch, it is not irrelevant that section 24 grants the Governor-General the power of appointing Senators. "The Governor-General shall from Time to Time, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate."⁵⁹ Not only does the House of Commons meet and dissolve upon the command of the executive, but here, the executive is granted the power of determining who is to be a member of one of the legislative assemblies. The Governor-General appoints Senators on the request of the Prime

⁵⁷ Constitution Act, 1867, sec. 38.

⁵⁸ Ibid., sec. 50.

⁵⁹ Ibid., sec. 24. See also sec. 33, vis. filling vacancies in the Senate, and sec. 34, appointing a Speaker of the Senate.

Minister. Surely the ability to appoint Senators must be understood as giving the executive power over them.

Yet another expression of the supremacy of the executive over the legislative is to be found in section 54 of the Constitution Act.

It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor-General in the Session in which such Vote, Resolution, Address, or Bill is proposed.⁶⁰

Money bills cannot be voted by the House of Commons unless they are first recommended to the House by the executive. Again, this represents an example of the executive possessing a share in the legislative, but this provision has more significance than what is implied by "a share." This is perhaps the most obtrusive power of the executive over the legislative to be found in the Constitution yet. This is the power of Royal Recommendation. Financial legislation must originate with the executive. Only official government bills with the sanction of the cabinet may appropriate a share of the public revenue. Private members' bills may not appropriate any such share. The implications would seem to be staggering. Far from establishing the legislative as supreme, section 54 of the Constitution Act appears as incontrovertible evidence that the executive branch of parliament possesses legislative supremacy. This is to say that the executive is not only not subordinate to the legislative branch, but may dictate to the

⁶⁰ Ibid., sec. 54.

legislative branch *even in terms of legislation*, what one would think would be the purview in which the legislative enjoys primacy, if not exclusivity.

The Constitution Act is not finished establishing this ostensible tyranny yet. Section 55 of the Act limits the legislation that may be passed by the House of Commons and the Senate to whatsoever is assented to by the Governor-General on behalf of the Queen. Section 55 describes three options available to the Governor-General. First, he may grant the assent of the Queen to a bill passed by both houses. Second, he may withhold the assent. The third possible course of action for the Governor-General is that he may reserve ". . . the Bill for the Signification of the Queen's pleasure."⁶¹ No bill will have the force of law if it is not assented to by the Governor-General; however, merely withholding the assent is not the only way in which the executive can invalidate legislation according to the Canadian Constitution.

Sections 56 and 57 of the Act describe the executive powers of disallowance and reservation, respectively. According to section 56 of the Act, even where the Governor-General grants assent to a bill passed by the houses of parliament, it must be submitted to the Queen, who then has two years to rescind the legislation:

Where the Governor-General assents to a Bill, in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor-General , by Speech of Message to the Houses of

⁶¹ Ibid., sec. 55.

the Parliament or by Proclamation, shall annul the Act from and after the Day of Signification.⁶²

Disallowance enables the Queen, as the executive of Canada, to revoke assent which had previously been granted. Not only does the legislative have to fear that whatever legislation they enact might not be assented to by the Governor-General, they must fear for a further two years that the Queen might decide that the legislation displeases her and revoke that assent.

Section 57, entitled "Signification of Pleasure on Bill reserved," simply describes the course of action open to a Governor-General who, after having declined to decide whether he would grant the Queen's assent, has obtained assent from the Queen herself. Reservation and disallowance are similar in that they firmly ensconce an undeniable authority of the executive in Canada over the legislative.

In short, our Constitution Act, 1867 does not seem to conform to Locke's prescription of legislative supremacy. Several sections of the Act appear to be written almost in defiance of such an idea. Sections 17, 24, 38, 50, 54, 55, 56 and 57 all appear troublesome to anyone who would make the case that the Constitution Act, 1867 is consistent with the relationship between the legislative and the executive advocated by Locke. Nevertheless, this thesis argues that all those sections are perfectly compatible with Locke's writings.

Legislative Supremacy in the 1867 Constitution Act

The first of the compatibilities appears at section 17 of the Constitution Act, where it is established that the executive has a share of the legislative power. Both

⁶² Ibid., sec. 56.

Canada's formal and *de facto* executives have a share of the legislative branch. Section 17 includes the Queen in the constitution of the Parliament of Canada. The *de facto* executive, the cabinet, is constituted by members of the House of Commons, and occasionally the Senate. Locke indicates that where the executive is vested in one who has a share of the legislative, that one will be no more subordinate than they see fit, ". . . which one may certainly conclude will be but very little."⁶³ Locke anticipates the potential of the executive to flout the authority of the legislature. In the very same chapter of the Second Treatise of Government where Locke emphasises the supremacy of the legislative branch, Locke acknowledges a sort of parallel or analogous supremacy for the executive branch:

In some common-wealths, where the *legislative* is not always in being, and the *executive* is vested in a single person, who has also a share in the legislative; there that single person in a very tolerable sense may also be called *supreme*: not that he has in himself all the supreme power, which is that of law-making; but because he has in him the *supreme execution*, from whom all inferior magistrates derive all their several subordinate powers, or at least the greatest part of them: having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, *he* is properly enough in this sense *supreme*.⁶⁴

Locke is not describing the Canadian Constitution Act's provision for the Queen to have vested in her person the executive power as well as a share in the legislative, but rather his own English monarch. The Constitution Act derived this provision from Locke's

⁶³ Locke, Second Treatise of Government, par. 152.

⁶⁴ *Ibid.*, par. 151.

limited monarchical, parliamentary democracy. Locke was not describing the case in the Canadian Constitution, but he might as well have been. The contention that the executive of Canada contravenes Locke's provisions for legislative supremacy by holding also a share of the legislative, is refuted by Locke's direct admissions that ". . . that single person in a very tolerable sense may also be called *supreme*," and that "*he* is properly enough in this sense *supreme*."⁶⁵ The supremacy of such an executive lies in his supremacy as the executive. Locke states that this executive does not have "in himself all the supreme power, which is that of law-making."⁶⁶ According to Locke, then, simply having a share in the legislative does not violate the supremacy of the legislative branch.

Also of note is that Locke specifies this case to ". . . common-wealths, where the *legislative* is not always in being . . ."⁶⁷ At paragraph 153 of the Second Treatise Locke contends that "It is not necessary, no, nor so much as convenient, that the *legislative* should be *always in being*."⁶⁸ Locke does not advocate a constitution which provides that the legislative is always assembled, but does favour an ever-vigilant executive power "because there is not always need of new laws to be made, but always need of execution of the laws that are made."⁶⁹

This reminds us of a second apparent problem where in the Constitution Act it appears that the executive is supreme over the legislative in the ability of the executive to summon or dissolve the House of Commons. These powers are described in sections 38 and 50 of the Act. To this contention, Locke speaks again directly:

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid., par. 153.

The *power of assembling and dismissing the legislative*, placed in the executive, gives not the executive a superiority over it, but is a fiduciary trust placed in him, for the safety of the people, in a case where the uncertainty and variableness of human affairs could not bear a steady fixed rule: for it not being possible, that the first framers of the government should, by any foresight, be so much masters of future events, as to be able to prefix so just periods of return and duration to the *assemblies of the legislative*, in all times to come, that might exactly answer all the exigencies of the common-wealth; the best remedy could be found for this defect, was to trust the prudence of one who was always to be present, and whose business it was to watch over the public good.⁷⁰

Rather than perceiving the power of the executive to summon and dissolve the House of Commons as inimical to his idea of legislative supremacy, Locke strongly advocates that the executive possess these powers. "Constant *frequent meetings of the legislative*, and long continuations of their assemblies, without necessary occasion, could not but be burdensome to the people . . ."⁷¹ According to Locke, the executive should exercise his prerogative in convening or dismissing the legislative. He states explicitly that the executive power of convening or dismissing the legislature does compromise the supremacy of the legislative branch. He reiterates his argument at the end of paragraph 156 of the Second Treatise:

Whether *settled periods of their convening*, or a liberty left to the prince for *convoking the legislative*, or perhaps a mixture of both, hath the least inconvenience attending it, it is not my business here to inquire, but only to shew, that though the executive power may have the prerogative of

⁶⁹ Ibid.

⁷⁰ Ibid., par. 156. See also par. 167.

⁷¹ Ibid.

convoking and dissolving such conventions of the legislative, yet it is not thereby superior to it.⁷²

Locke felt the need to emphasise his point that executive power of assembling and adjourning the legislative did not detract from legislative supremacy. One can only conclude that his notion of legislative supremacy is nuanced and far from simple. Locke considers a continued and unchecked legislative more dangerous to the people than to allow the executive the power of convening and dissolving the legislature:

[I]n governments, where the *legislative* is in one lasting assembly always in being, or in one man, as in absolute monarchies, there is danger still, that they will think themselves to have a distinct interest from the rest of the community; and so will be apt to increase their own riches and power, by taking what they think fit from the people.⁷³

Locke fears the absolutism of an absolute monarch, but equally of a legislature that is always in session. "This is not much to be feared in governments where the legislative consists . . . in assemblies . . . whose members, upon the dissolution of the assembly, are subjects under the common laws of their country, equally with the rest."⁷⁴ For Locke, then, the executive must possess the power of dissolving the legislative in order that members of the assemblies are always aware that they may, at some point, have to return to the society and be subject to the laws they make. Locke believes that this will constrain the legislative from passing oppressive laws. Who would be so foolish as to pass an oppressive law knowing that one day he might be its victim?

⁷² Ibid.

⁷³ Ibid., par. 138.

⁷⁴ Ibid.

Despite Locke's assertion it may still appear that the executive power of convening and dismissing the House of Commons remains contrary to legislative supremacy. While the Governor-General can summon and dissolve the House, he does not get to dictate the topics or nature of the legislation it considers. He cannot set the agenda of the House of Commons. Nor does he have the authority to choose its members. Section 37 of the Constitution Act, 1867 establishes that members of the House of Commons are to be chosen by election. The Governor-General appears almost as a scheduling secretary, deciding when the House will and will not convene, but nothing further.

Circumstances are somewhat different for the Senate, however. Section 24 of the Constitution Act, 1867 grants the Governor-General the power to appoint persons to the Senate. Section 33 permits him to fill vacancies in the Senate, and section 34 gives him the power of appointing and removing the Speaker of the Senate. Section 26 gives the Queen, on the advice of the Governor-General, the power to appoint additional Senators exceeding the normal number. It is reasonable to ask whether this qualifies as a power of supremacy over the legislative, or at least one of its constituent branches.

Part of the answer to such a question involves the executive power to summon and dissolve Parliament. While the Governor-General has authority over the assembly and dissolution of the House of Commons, nowhere does the Constitution Act, 1867 grant him a similar power over the Senate. The Senate is bound by section 20 of the Constitution Act, 1867 which requires that, "There shall be a Session of the Parliament of Canada once at least in every Year, so that a Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and the first Sitting thereof in the next

Session."⁷⁵ But one must consider that while the executive has the power to select and appoint Senators, there are six qualifications a candidate for a seat in the Senate must meet before he will be permitted to become a Senator. The executive is not entitled to select anyone for a position in the Senate.

Of additional significance to determining the power of the executive over the Senate is the fact that while the Governor-General appoints Senators, he has absolutely no authority over those Senators once they are appointed.⁷⁶ The Constitution Act does not provide for the executive to assemble or dissolve the Senate, nor does it provide for the executive to remove Senators. The Senate must sit at least once every twelve months, and sits whether the House of Commons is in session or not.

While it may be conceded that a Senator is appointed at the will of the executive, subject to the general qualifications in section 23 of the Act, those same Senators are in no way accountable to the executive after their appointments. Section 29 of the Constitution Act grants Senators tenure in the Senate for seventy-five years or life. "Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life."⁷⁷ "A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years."⁷⁸ Section 31 describes specifically the instances in which a Senator will lose his seat in the Senate. Nowhere in section 31 is the

⁷⁵ Section 20 of the Constitution Act, 1867 was repealed in 1982 and replaced by section 5 of the Constitution Act, 1982, which provides that there shall be a sitting of Parliament at least once every twelve months.

⁷⁶ The *de facto* executive, in the person of the Prime Minister, also lacks the power to remove Senators.

⁷⁷ Constitution Act, 1867, sec. 29 (1).

Governor-General mentioned. Since the Senate meets annually, in spite of whatever the Governor-General wishes, and Senators cannot be removed by him, Senators are free to consider and pass what legislation they will, with the exception of money bills (which must originate in the Commons).⁷⁹ Again, the executive's authority to appoint members of one of the legislative Houses is far less formidable than it initially appears.

Section 54 forces the House of Commons to obtain the recommendation of the Governor-General before passing any ". . . Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost . . ." ⁸⁰ The executive's power has scarcely loomed larger over the legislative than in this. Section 54 must be read in conjunction with section 53, which declares that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."⁸¹ Sections 53 and 54 read together imply that any bill appropriating funds must originate in the House of Commons. However, that bill may only be voted on the recommendation of the executive.

Why the Constitution gives this power to the executive is not obvious. First, it applies only to bills for the appropriation of funds. Presumably, if a bill for the appropriation of funds did not meet with the approval of the Governor-General, he could refuse to give it Royal Assent, as described in section 55.

⁷⁸ Ibid., sec. 29 (2).

⁷⁹ It bears noting that the Senate must consider bills sent to it by the House of Commons. In this sense, the Senate is not entirely free to consider and pass what legislation it wishes. Similarly, the House of Commons must consider bills sent to it by the Senate.

⁸⁰ Ibid., sec. 54.

⁸¹ Ibid., sec. 53.

The notable feature of Section 53 is that it pertains to the passage of money bills. Locke writes that the legislative cannot be an arbitrary power. "*First, It is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people.*"⁸² This contention seems to prohibit appropriating property without the consent of the property owners; for to do so would be arbitrary. But Locke considers the issue of property to be of such importance that he specifies a limit on the legislative that it ". . . *cannot take* from any man any part of his *property* without his own consent."⁸³

Locke warns against the arbitrary appropriation of property, even after he has accounted for such a possibility in prohibiting the legislative from governing arbitrarily on any matter. This raises the question as to why Locke felt the need to emphasise property with such specificity. He feared arbitrary rule as regards property more than he feared it in other areas of legislation. The temptation to remove property from the people without their consent exceeds the temptation to rule arbitrarily in other laws. "[T]he prince, or senate, however it may have power to make laws . . . yet can never have a power to take to themselves the whole, or any part of the subjects *property*, without their own consent."⁸⁴

The apparently redundant power prohibiting the legislative from passing bills for the appropriation of funds without executive recommendation is consistent with Locke's heightened concern over arbitrary rule concerning property. Section 54 only applies to money bills. Locke feared arbitrariness in the area of property appropriation more than in any other legislative area. It is therefore consistent with Lockean thought to provide a

⁸² Locke, Second Treatise of Government, par. 135.

⁸³ *Ibid.*, par. 138.

check on arbitrary rule over property that is separate from and independent of the general check on arbitrariness in government.

Further refutation that section 54 of the Act is contrary to Lockean legislative supremacy is provided as above, noting that Locke wrote of the executive "having a share in the legislative" as being "very tolerable."⁸⁵ Section 17 of the Constitution Act, 1867 establishes the Queen as a member of the legislative branch of government, and section 10 declares that the Governor-General is her representative. As the Queen's representative, the Governor-General exercises her formal share of the legislative authority. Section 54 is one explicit statement of that formal share.

These answers are not completely satisfying. The executive is still meddling in the legislative branch. Section 55 of the Constitution Act empowers the Governor-General to grant, withhold, or reserve the Queen's assent to legislation passed by both assemblies. The Governor-General may reserve legislation for the Queen's inspection, after which the Queen may decide to grant or withhold assent. Even where the Governor-General has granted Royal Assent, the Queen has two years in which she may revoke it. This is a more general expression of the share of the Queen's legislative authority. All laws are subject to the approval of the executive.

Locke advocates just such a powerful executive:

Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall

⁸⁴ Ibid., par. 139.

⁸⁵ Ibid., par. 151.

require: nay, it is fit that the laws themselves should in some cases give way to the executive power . . .⁸⁶

The laws will have to give way to the executive power in instances where the executive deems necessary. Provisions for Royal Assent and reservation are formulated in such a way that the executive must review each law to determine whether the law is acceptable. Disallowance enables the executive to strike down a law that is determined to be unacceptable after assent has been granted.

"This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, *is* that which is called *prerogative*."⁸⁷ Locke establishes a power of prerogative, which he installs in the executive. He does not place the power to act according to discretion in the legislative, although he maintains that the legislative is supreme. "[P]rerogative can be nothing but the people's permitting their rulers to do several things, of their own free choice, where the law was silent, and sometimes too against the direct letter of the law, for the public good."⁸⁸ Discretion is not, therefore, always subject to the rule of law, or law made by Parliament. The executive has the right "to do several things" not only where the law is silent, but also ". . . against the direct letter of the law." A Governor-General would be exercising a Lockean prerogative if, for the good of Canada, he refused to grant assent to a bill, or reserved it for the consideration of Her Majesty. The Queen would be exercising the same power if, for the good of Canada, she disallowed a bill to which the Governor-General had previously granted assent. These are clearly acts "against the direct letter of

⁸⁶ Ibid., par. 159.

⁸⁷ Ibid., par. 160.

the law" performed by the formal constitutional executive. They are only legitimate, however, if performed "to provide for the public good."⁸⁹ Reservation, disallowance, and Royal Assent are the formal constitutional expression of a Lockean executive power of prerogative. Prerogative may only be employed for the good of the people. This elaboration of prerogative is important. Locke makes clear that prerogative is a power left to be exercised only for the public good. "[P]rerogative is nothing but the power of doing public good without a rule."⁹⁰ When the executive exercises the prerogative power against the interests of the people, he has over-stepped his bounds, and will find his power limited by the people themselves.⁹¹

Locke never abandons his notion of legislative supremacy, but does temper it with a powerful executive. The limits to government implicit in Lockean constitutionalism will necessarily include a strong executive to check democratic excesses of the legislative. Harvey Mansfield argues it is out of recognition of the ultimate end of government that "Locke stresses the versatile, emergency character of executive power and leaves the fixing of intent to the supreme legislature."⁹² In Mansfield's view, the preservation of men is the purpose of society, and is the reason that Locke conceived of the expansive power of the executive. "Political power confines itself to the preservation of one society, one Body Politick, and it consists partly in making laws for this society.

⁸⁸ Ibid., par. 164.

⁸⁹ Ibid., par. 158.

⁹⁰ Ibid., par. 166.

⁹¹ Ibid., par. 164.

⁹² Harvey C. Mansfield, Jr., Taming the Prince: The Ambivalence of Modern Executive Power (Baltimore: The Johns Hopkins University Press, 1993), p. 211.

But its end is the preservation of men, not the laws. So the executive must be very powerful, if need be overriding the laws or the legislature."⁹³

Locke advocates both a strong executive and legislative supremacy. It is difficult to reconcile the considerable power of the executive with Locke's claims of legislative supremacy. If Locke's argument is inconsistent, then Locke either knowingly makes an inconsistent argument or is unaware of the inconsistency. A third possibility exists. Locke may not be inconsistent at all. The executive which Locke conceives certainly possesses a great deal of power. But it is one thing to recognize that the executive is powerful and quite another to conclude that being powerful means being supreme. The Constitution Act, 1867 grants Parliament, comprising the Queen, the House of Commons and the Senate the authority to legislate. Locke is unequivocal that this renders Parliament superior to the executive:

[F]or what can give laws to another, must needs be superior to him; and since the legislative is no otherwise legislative of the society, but by the right it has to make laws for all the parts, and for every member of the society, prescribing rules to their actions, and giving power of execution, where they are transgressed, the *legislative* must needs be the *supreme*, and all other powers, in any members or parts of the society, derived from and subordinate to it.⁹⁴

Locke indicates that the legislative gives the power of execution. The power of the executive, which must sometimes be used to override the legislative nevertheless is given

⁹³ Ibid., p. 203.

⁹⁴ Locke, Second Treatise of Government, par. 150.

to the executive by the legislative. This is what Mansfield refers to as "the ambivalence of modern executive power,"⁹⁵ and is indeed somewhat paradoxical.

Further Legislative Similarities Between the Constitution Act, 1867 and Locke's Second Treatise

The similarities between Locke's prescription and the Constitution Act's delineation of the legislative and executive are not the only similarities between the Act and the Second Treatise. Section 50 limits the House of Commons from continuing beyond five years:

Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General), and no longer.⁹⁶

Locke writes of the need to dissolve legislative assemblies in order that their members be subject to the laws they have made:

[I]n well-ordered commonwealths, where the good of the whole is so considered, as it ought, the *legislative* power is put into the hands of divers persons, who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them, to take care, that they make them for the public good.⁹⁷

Locke nowhere supports a term of five years, but the idea that legislative assemblies cannot be permitted to sit indefinitely is surely clear from his writing. "Constant *frequent*

⁹⁵ Mansfield, Taming the Prince. The phrase "the ambivalence of modern executive power," is the sub-title of the book.

⁹⁶ Constitution Act, 1867, sec. 50.

meetings of the legislative, and long continuations of their assemblies, without necessary occasion, could not but be burdensome to the people, and must necessarily in time produce more dangerous inconveniencies . . ."⁹⁸ The Constitution Act decrees that a term of no more than five years is the way such "long continuations" will be avoided in the Canadian House of Commons. The measure is consistent with Locke's opinions of what is necessary to good government.

Section 96 of the Act installs control of judicial appointments in the executive. "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."⁹⁹ Locke writes of the authority of judges as deriving from the supreme executive power. "[N]ot that he has in himself all the supreme power, which is that of law-making; but because he has in him the *supreme execution*, from whom all inferior magistrates derive all their subordinate powers . . ."¹⁰⁰ It is logical that the authority of the judges flows to them from the Governor-General if he appoints them. Locke writes of the need for judges in paragraph 136 of the Second Treatise. "The *legislative*, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but *is bound to dispense justice*, and decide the rights of the subject *by promulgated standing laws, and known authorized judges*."¹⁰¹ Judges are authorized by appointment by the Governor-General, according to section 96 of the Constitution Act.

⁹⁷ Locke, Second Treatise of Government, par. 143.

⁹⁸ *Ibid.*, par. 156.

⁹⁹ Constitution Act, 1867, sec. 96.

¹⁰⁰ Locke, Second Treatise of Government, par. 151.

¹⁰¹ *Ibid.*, par. 136.

Conclusion

This chapter began by briefly discussing the conventional executive as opposed to the constitutional executive. The conventional executive, while clearly the more important for the everyday workings of Canadian government, is not found in the Constitution Act, 1867. This thesis cannot directly discuss the conventional executive without abandoning its methodology of textual comparison. The remainder of the chapter discussed the formal executive established by the Act. The significance of the formal executive lies in the fact that the *de facto* executive wields the powers that the Constitution Act, 1867 grants to the Governor-General. The chapter examined the constitutional relationship between the executive branch and the legislature. What was found was a constitution limiting government, not necessarily by entrenching the rights of the people in a specific, supra-legal bill of rights, but by establishing a supreme legislative, based on the consent of the governed, held in check by a powerful executive. Insofar as the relationship between the legislative and the executive is described by the Constitution Act, 1867, it is consistent with the limits and proper roles Locke describes. Compatibility with Lockean prescription is also found between sections of the Constitution Act relating to the exercise of power by the legislative and executive.

CHAPTER 3

RIGHTS IN THE CONSTITUTION ACT, 1867

This chapter of the thesis examines the protection of rights and the limits to government which secure rights in the Constitution Act, 1867, but do not necessarily form any part of the relationship between the executive and the legislative. The chapter begins by looking at the protection of denominational schools in the 1867 Constitution Act. A discussion of the right not to be taxed without representation follows. Finally, this chapter of the thesis compares the residual clause in the Act with what Locke advocates as the ultimate limit to government.

Religious Education and Lockean Toleration

Section 93 of the Constitution Act, 1867 establishes education as an exclusively provincial legislative jurisdiction. The Act places limits on the laws provincial legislatures may make pertaining to religious or denominational schools. Section 93 (1) prohibits any laws made by a province from "prejudicially" removing rights which had been provided or protected by law at the time of confederation. "Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."¹⁰² The wording of the sub-section is significant. Laws may be made which affect the rights and privileges of denominational schools, but no law may "prejudicially" affect those rights and privileges. The provincial legislation could not be directed at one particular denomination, or be designed to affect the rights or privileges of one denomination more than another.

¹⁰² Constitution Act, 1867, sec. 93 (1).

Section 93 (2) provides a specific limit that enjoins the legislatures of Quebec and Ontario to a minimum standard of uniformity of protection of religious education:

All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.¹⁰³

The uniformity comes in the "Powers, Privileges, and Duties" of denominational school trustees. Whatever the role of the separate school trustees in Ontario will also be, at minimum, the role of denominational trustees in Quebec.

The third limit on the laws provinces may make concerning education specifically refers to *minority* rights. Section 93 (3) is also the first reference in the act to the special power the federal government has in ensuring that the provinces do not abridge rights to religious education:

Where in any Province a system of separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education.¹⁰⁴

While section 93 (1) refers to "Denominational Schools," sub-section (3) refers to "Separate or Dissident Schools," and "the Protestant or Roman Catholic Subjects,"

¹⁰³ Ibid., sec. 93 (2). See sec. 6 vis. renaming Upper Canada and Lower Canada as Ontario and Quebec, respectively.

¹⁰⁴ Ibid., sec. 93 (3).

whichever is the minority of the population in the province. An appeal to the Governor-General in Council exists only where provincial legislation has affected the minority religion, where the minority is either Protestant or Roman Catholic.

Section 93 (4) grants the Parliament of Canada the power to make remedial laws for the protection of denominational schools:

In case any such Provincial Law as from Time to Time seems to the Governor-General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General in Council under this Section.¹⁰⁵

The purpose of section 93 (4) is clear. When a province does not comply with the provisions in section 93, subsections (1), (2), or (3), the federal Parliament may step in with legislation which protects denominational schools.

In his Letter Concerning Toleration, Locke propounds a strong argument against state-enforced religion. An examination of Locke's position reveals its consistency with the provisions in section 93 of the 1867 Constitution Act. Locke advances three major contentions as to why the government should not dictate religion to the people. He writes, however, that it is acceptable for the "civil magistrate" to persuade, but not to command.¹⁰⁶ This chapter of the thesis outlines Locke's three major contentions, then

¹⁰⁵ Ibid., sec. 93 (4).

¹⁰⁶ Locke, Letter Concerning Toleration, p. 19.

compares portions of his Letter Concerning Toleration with the four subsections of section 93 of the Constitution Act, 1867.

Locke argues that the government cannot choose a particular religion to force upon its people. His first contention is that God did not confer authority on the government to make such a choice, and that consent is an inadequate basis on which to confer such authority, "because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace."¹⁰⁷ Just as Locke believes that no man can forfeit his right to life, liberty, or possessions, he believes that no man can leave the decision of his religion to another.

Locke's second contention in support of freedom of religion is that the nature of governmental authority and religious authority are fundamentally different. "The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind."¹⁰⁸ Even if the government were to force a particular religion on the people, the people would never come to truly believe in the religion they were forced to outwardly profess. "Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things."¹⁰⁹

Third, Locke argues that even if laws could change minds as well as behaviour, this would not lead to a people's salvation, because resigning yourself to your ruler's religion assumes that his is the one, true religion:

¹⁰⁷ Ibid., p. 17.

¹⁰⁸ Ibid., p. 19.

For there being but one truth, one way to heaven, what hope is there that more men would be led into it if they had no other rule to follow but the religion of the court, and were put under the necessity to quit the light of their own reason, to oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors, and to the religion which their ignorance, ambition, or superstition had chanced to establish in the countries where they were born? In the variety and contradiction of opinions in religion, wherein the princes of the world are as much divided as in their secular interests, the narrow way would be much straitened; one country alone would be in the right, and all the rest of the world put under an obligation of following their princes in the ways that lead to destruction; and that which heights the absurdity, and very ill suits the notion of a Deity, men would owe their eternal happiness or misery to the places of their nativity.¹¹⁰

Briefly put, since Locke considers there to be only one true saving religion, and since different countries tend to follow different religions, forcing the people in each country to follow that country's dominant religion would lead all people in one nation to eternal salvation, and all the other peoples of the world to damnation. Locke argues that this is too ridiculous a notion to suit a deity.

While section 93 of the 1867 Constitution Act establishes education as a provincial legislative jurisdiction, subsections 1 through 4 are limits on the legislation a province may enact. Subsection 1 prohibits a province from prejudicially affecting the rights or privileges of denominational schools. The province may not, therefore, remove the privileges of a religious school unless it removes the same privileges from other religious schools. Section 93 (1) prevents a province from favouring the schools of one

¹⁰⁹ Ibid.

¹¹⁰ Ibid., p. 21.

denomination over the schools of another. Put conversely, section 93 (1) prevents a province from denying access to denominational schools.

Locke writes that it would be wrong to deny any person "civil enjoyments" on the basis of religion. "[N]o . . . person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be preserved to him."¹¹¹ Locke also contends that government has over-stepped proper bounds when it legislates rites or ceremonies in a church. "As the magistrate has no power to impose by his laws the use of any rites and ceremonies in any church, so neither has he any power to forbid the use of such rites and ceremonies as are already received, approved, and practised by any church."¹¹² Compare this prohibition of Locke to the wording in section 93 (1) of the 1867 Constitution Act. "Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."¹¹³ The provinces are prevented by section 93 (1) from removing the rights and privileges afforded to denominational schools at the time of union, whereas Locke argues that the magistrate cannot "forbid the use of rites and ceremonies as are already received, approved, and practised by any church."¹¹⁴

¹¹¹ Ibid., pp. 31-33. On the same page, Locke writes that when he discusses "persons," he expects the same toleration between churches. "When I say concerning the mutual toleration of private persons differing from one another in religion, I understand also of particular churches which stand, as it were, in the same relation to each other as private persons among themselves: nor has any one of them any manner of jurisdiction over any other; no, not even when the civil magistrate (as it sometimes happens) comes to be of this or the other communion."

¹¹² Ibid., p. 65.

¹¹³ Constitution Act, 1867, sec. 93 (1).

¹¹⁴ Locke, Letter Concerning Toleration, p. 65.

Locke does not want the government to enjoin or forbid religious practices. Section 93 (1) of the Constitution Act, 1867 prevents provincial governments from enacting such legislation as pertains to religious education.

Section 93 (2) of the Act extends the protections which existed for Roman Catholic schools in Ontario to the Protestant and Roman Catholic schools in Quebec. Locke writes that no church or sect may be deemed to have the "true" faith, and that even if the "correct" faith could be determined, it would still lend that church no authority to subjugate others on earth. Section 93 (2) of the 1867 Constitution Act explicitly forbids both the federal and the provincial governments from expressing a legislative preference for one church over another. While section 93 (1) prohibits the province from abridging rights and privileges to denominational schools which existed at the time of union, section 93 (2) establishes that the religious schools in both Ontario and Quebec, and specifically the Protestant and Roman Catholic schools, are to hold the same minimum "Powers, Privileges, and Duties" as the Roman Catholic schools held in Ontario at the time of the union. Section 93 (2) establishes a minimum standard of uniformity for protection of religious education in Ontario and Quebec.

On Locke's view, the preference of the state for one faith over another carries with it the danger of faction. Since Plato, faction has been considered the greatest peril to a political community.¹¹⁵ Locke develops a three step argument against government favouritism for one religion over another. His argument is based on the danger of faction which results from such governmental favour. Locke writes that if there is one church which deserves government favour, there is no way to determine which:

But if one of these churches hath this power of treating the other ill, I ask which of them it is to whom that power belongs, and by what right? It will be answered, undoubtedly, that it is the orthodox church which has the right of authority over the erroneous or heretical. This is, in great and specious words, to say just nothing at all. For every church is orthodox to itself; to others, erroneous or heretical.¹¹⁶

This constitutes the first of the three steps of Locke's argument. The second step is a contention that even if we could discern the truly orthodox from the heretical, no church would be justified to have authority over any other because the power of churches belongs not in this world, but in the next. "Nay, further: if it could be manifest which of these two dissenting churches were in the right way, there would not accrue thereby unto the orthodox any right of destroying the other. For churches have neither any jurisdiction in worldly matters . . ."¹¹⁷

Locke's first two contentions rest more on what we know or do not know about religion than they do on politics. The knowledge of which church is the "truly orthodox" is not accessible, therefore it is unwise to base a political regime on any church. Even if we knew which faith were the correct one (assuming, of course, as Locke does, that there is only one saving faith), no political authority would derive from that knowledge, according to Locke, because the authority of the church is inherently apolitical. Locke develops a politically practical justification for withholding political authority from a

¹¹⁵ Plato, *Republic*, translated by Allan Bloom, (Basic Books, 1968), at 462b (p. 141).

¹¹⁶ Locke, *Letter Concerning Toleration*, p. 35.

¹¹⁷ Ibid. Locke argues that there is little or no difference between the civil magistrate improperly exercising authority over people in the name of a church, and the civil

church only in the third contention of his argument. Locke makes the classic argument that governmental preference for one religion over another leads to intolerant faction:

Nevertheless, it is worthy to be observed and lamented that the most violent of those defenders of the truth, the opposers of errors, the exclaimers against schism, do hardly ever let loose this their zeal for God, with which they are so warmed and inflamed, unless where they have the civil magistrate on their side. But so soon as ever court favour has given them the better end of the staff, and they begin to feel themselves the stronger, then presently peace and charity are to be laid aside. Otherwise they are religiously to be observed. When they have not the power to carry on persecution and to become masters, there they desire to live upon fair terms, and preach up toleration.¹¹⁸

Locke argues that when favour is not shown to any church over another, churches tend to be tolerant of one another, to co-exist in peace. Where the government does favour one religion over another, the preferred church tends to use that favour to oppress dissentient churches. A government can best avoid religious strife and faction by withholding favour from any particular religion. More specifically, and more relevant to the case of the 1867 Constitution Act, a government can avoid religious confrontation by ensuring equal protections for different religious faiths.¹¹⁹

magistrate improperly granting a church authority over other churches and people. See pp. 33, 37, and 51-53.

¹¹⁸ Ibid., p. 37.

¹¹⁹ The logic of Locke's argument is also found in Madison, The Federalist Papers, 10. Madison sets the argument in the context of comparing small republics to large republics, and argues succinctly: "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable

Section 93, subsections 1 through 4, of the Constitution Act, 1867 guard against any one religion being granted political favour over another. The provisions for protection of denominational schools, minimum standards of equal protection, and the explicit protection of minority religious education provide a constitutional bulwark against religious faction in the Canadian polity. The religious protections in section 93 of the Act are consistent with Locke's argument on toleration. They are Lockean protections. The provisions have their limits. Section 93 (2) limits the uniformity of minimum religious protections to the provinces of Ontario and Quebec. Section 93 (2) is also limited in that it refers only to powers, privileges, and duties belonging to the "Separate Schools and School Trustees of the Queen's Roman Catholic Subjects" being extended "to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Lower Canada."¹²⁰

Locke's writings would seem to support even more inclusive religious protections. Locke variously refers to toleration of the religious observances of Jews,¹²¹ Pagans,¹²² and American Indians.¹²³ There are limits to Locke's tolerance, however, and the Constitution Act, 1867 may seem at first glance to contravene them. His religious

that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other." Madison, The Federalist Papers, Max Beloff, ed., (Oxford: Basil Blackwell, 1948), 10, (pp. 46-47). Withholding the favour of the state, as Locke advocates, is a way of making it "difficult for all who feel [a common motive to invade the rights of others] to discover their own strength." It is through pluralism and diversity of interests that tyranny of faction is avoided, for both Locke and Madison.

¹²⁰ Constitution Act, 1867, sec. 93 (2).

¹²¹ Locke, Letter Concerning Toleration, pp. 51, 59, 63-65.

¹²² *Ibid.*, p. 71.

¹²³ *Ibid.*, p.69.

tolerance does not extend to atheists or to religions which deny the authority of the state. "Though he will tolerate 'pagans' and 'idolators,' . . . Locke believed that Catholics tied to the political pretensions of the Pope and Moslems tied to the Caliphate were beyond the pale."¹²⁴ Locke writes in condemnation of sects "dangerous to the commonwealth," that threaten its political stability:

What else do they mean, who teach *that faith is not to be kept with heretics*? Their meaning, forsooth, is that the privilege of breaking faith belongs unto themselves; for they declare all that are not of their communion to be heretics, or at least may declare them so whensoever they think fit. What can be the meaning of asserting that *kings excommunicated forfeit their crowns and kingdoms*? It is evident that they thereby arrogate unto themselves the power of deposing kings, because they challenge the power of excommunication, as the peculiar right of their hierarchy.¹²⁵

There can be little doubt that Locke is writing of the Roman Catholic church here. He is referring to the excommunication of Henry VIII, after which the Pope issued a declaration stating that faithful Catholics need not recognize the authority of Henry.¹²⁶ It would seem that the Constitution Act's protections for Roman Catholic schools in Section 93, (2) and (3) are at odds with Locke's intolerance of Catholicism. This is not the case, however, for Locke objects to Catholics on very narrow grounds:

¹²⁴ Leslie Armour, "John Locke and American Constitutionalism," in Alan S. Rosenbaum, ed., Constitutionalism: The Philosophical Dimension, (New York: Greenwood Press, 1988), p. 25.

¹²⁵ Locke, Letter Concerning Toleration, pp. 89-91.

¹²⁶ For a complete discussion of Locke and Catholicism, see Maurice Cranston, John Locke, (London: Oxford University Press, 1957).

The objection to the Catholics had nothing to do with religion. Locke believed that men could be trusted to behave reasonably and be granted very great liberties, but these liberties could not be tolerated in the face of divided allegiances. The ordinary citizen will behave patriotically because he prefers orderly society to the anarchy of the state of nature. But if he has to choose between two orderly societies to which he is committed, no one can predict how he will behave. Catholics, he thought, owed allegiance both to their own country and to the papal states.¹²⁷

Roman Catholicism is intolerable for Locke only in a form which requires of its followers political fealty to the Pope. Allegiance to the Pope causes the very problem for a civil society Locke sought to avoid by refusing to grant any religion the favour of the state: namely faction. The divided allegiance of Roman Catholics poses the problem of sedition as faction:

That church can have no right to be tolerated by the magistrate which is constituted upon such a bottom that all those who enter into it do thereby *ipso facto* deliver themselves up to the protection and service of another prince. For by this means the magistrate would give way to the settling of a foreign jurisdiction in his own country, and suffer his own people to be listed, as it were, for soldiers against his own government.¹²⁸

Leslie Armour writes that Locke's contention was quite reasonable at the time of his writing, although it may not appear obviously so to the modern reader:

This may seem quite absurd to us, but we should remember that the political pretensions of the Popes have declined in modern times to almost nothing and that, in Locke's time, the disputes over the English and Scottish crowns had much

¹²⁷ Armour, "John Locke and American Constitutionalism," p. 25.

¹²⁸ Locke, Letter Concerning Toleration, p. 91.

to do with the rivalry between Catholics and Protestants. In England there were still Catholics who marched to a different drummer, and they were still capable of stirring up a good deal of trouble.¹²⁹

It is undeniable that Locke advocated tolerance of the religious doctrine (as separate from any political doctrine) of Roman Catholicism. Locke uses the Roman Catholics as his prime example of opinions the magistrate should not forbid being taught:

[T]he magistrate ought not to forbid the preaching or professing of any speculative opinions in any church, because they have no manner of relation to the civil rights of the subjects. If a *Roman Catholic* believe that to be really the body of Christ, which another man calls bread, he does no injury thereby to his neighbour.¹³⁰

Locke's intolerance of Roman Catholicism stems from requirements of political allegiance to the Pope. By confederation, the argument that Roman Catholics owed political loyalty to the Pope was no longer cause for serious concern. There was little danger of Roman Catholics refusing to recognize the political authority of a political leader on the grounds that he was not Catholic, or had been excommunicated.¹³¹

It is arguable that Catholicism did not pose a political threat at the time of confederation. There was a devout and politically active wing of the Catholic church in Québec at the time. "The ultramontanes were theocrats who believed that the secular and political realms were properly subject to the super-intendence of the church, and who thus

¹²⁹ Ibid.

¹³⁰ Locke, *Letter Concerning Toleration*, p. 79.

¹³¹ Recognition of his *religious* authority is an entirely different matter. There is nothing inconsistent in recognizing the political authority of a governing figure while believing that he is damned.

vigorously rejected modern notions of popular sovereignty and separation of church and state . . ."¹³² The ultramontanes advocated political action by their parishioners, thus appearing to contravene what is generally accepted as a tenet of Lockean liberalism, the separation of church and state:

[T]his theocratic opposition to liberalism was formalized in the so-called 'Catholic Programme,' a document inspired by the ultramontane Bishop Laflèche, which argued that Quebec Catholics should make opposition to the heresy of liberalism their first political priority. Calling the separation of church and state 'an absurd and impious idea,' the Programme advised the faithful always to vote against Liberals. This generally meant voting for the Conservatives, though only if the latter accepted the theocratic principles spelled out in the Programme.¹³³

The ultramontane Catholics appear intolerant. A message from Lockean liberalism seems to be that we can tolerate all but the intolerant. It seems, then, that tolerance of the ultramontane Catholics is not consistent with Locke. This thesis will demonstrate the contrary. Tolerance of the ultramontanes is compatible with Locke.

For Locke, the Catholics were politically intolerant not just of one party or point of view, but the entire political system in England. The Pope issued an edict declaring that the faithful need not recognize Henry VIII as king any longer. The papal edict was extremely seditious. Treason against the state is not tolerable.

¹³² Rainer Knopff, "The Triumph of Liberalism in Canada: Laurier on Representation and Party Government," in Ajzenstat and Smith, eds., Canada's Origins: Liberal, Tory, or Republican?, p. 160.

¹³³ Ibid.

The ultramontanes did nothing so drastic. They instructed their parishioners to vote for the Conservatives, or, not to vote at all.¹³⁴ There is nothing illiberal in this. According to Locke, the government is wrong to forbid the church from doing what is lawful in the commonwealth. "Whatsoever is lawful in the commonwealth cannot be prohibited by the magistrate in the church."¹³⁵ If ordinary individuals may advise their friends and acquaintances to vote for a particular party, or not to vote at all, why is that privilege forbidden to the church? "As the magistrate has no power to impose by his laws the use of any rites and ceremonies in any church, so neither has he any power to forbid the use of such rites and ceremonies as are already received, approved, and practised by any church . . ."¹³⁶

The ultramontanes espoused a belief that separation of church and state was absurd. They advised their parishioners to therefore vote for a particular party, or not to vote at all. This is itself a validation of the political system. Voting represents a recognition of the legitimacy of the political system through participation. Instructing parishioners not to vote indicates that the ultramontanes were at least thinking within the established political system, and accepted its legitimacy. It is certainly a far cry from instructing parishioners to cease paying taxes and recognizing the sovereignty of the government.

Locke espouses religious toleration on the basis that toleration provides the best defense against political faction. The 1867 Constitution Act protects denominational schools in order not to favour Protestants over Catholics, or vice versa. The protections

¹³⁴ Ibid.

¹³⁵ Locke, Letter Concerning Toleration, p. 67.

for religious education in the Act are Lockean insofar that they protect against faction in the way Locke advocates.

No Taxation without Representation

The Constitution Act, 1867 provides another Lockean protection of rights in section 53. "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."¹³⁷ This provision serves an important Lockean purpose. It is section 53 of the Act which protects the right of the Canadian people not to be taxed without their consent. The battle cry of the American revolution was "no taxation without representation," and section 53 secures this same principle in Canada. Money bills, as specified in section 53, are the only type of bills that may not originate in the Senate. Section 53 is a vital element in the Constitution Act, 1867 because it is an explicit guarantee that the people's elected representatives will vote taxing and spending legislation. The principle protected in section 53 is clearly a Lockean limit of government to protect the rights of the people.

Locke writes that the legislative cannot appropriate property of any sort without the consent of the property owners. "The *supreme power cannot take* from any man any part of his *property* without his own consent."¹³⁸ This does not mean that every property owner must consent individually to a tax. "[S]till it must be with his own consent, *i.e.* the consent of the majority, giving it either by themselves, or their representatives chosen by

¹³⁶ Ibid., p. 65.

¹³⁷ Constitution Act, 1867, sec. 53.

¹³⁸ Locke, Second Treatise of Government, par. 138.

them."¹³⁹ Locke accepts that the consent of the majority must be accepted to act on behalf of the entire society:

For if *the consent of the majority* shall not, in reason, be received as *the act of the whole*, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: but such a consent is next to impossible ever to be had, if we consider the infirmities of health, and avocations of business . . . the variety of opinions, and contrariety of interests, which unavoidably happen in all collections of men . . . [W]here the *majority* cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.¹⁴⁰

For Locke, majority consent must qualify as the consent of the governed. Otherwise, government becomes impossible. While men may not be taxed without their consent, that consent is granted by the majority. Only where the majority of elected representatives consents can the government impose taxes on the people.

For Locke, the right not to be taxed without consent is indeed one of the most important limits to government. Locke understands securing the possession of property as *the* reason to enter into civil society:

[F]or the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should *have property*, without which they must be supposed to lose that, by entering into society, which was the end for which they entered into it; too gross an absurdity for any man to own.¹⁴¹

¹³⁹ Ibid., par. 140.

¹⁴⁰ Ibid., par. 98.

¹⁴¹ Ibid., par. 138.

For Locke, if the government had the authority to remove property without the consent of the governed, this would obviate the very reason for having government. Locke considers a society where the government has such a power tantamount to a society in which there is no private property at all:

[F]or a man's property is not at all secure, tho' there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power to take from any private man, what part he pleases of his *property*, and use and dispose of it as he thinks good . . . [F]or I have truly no *property* in that, which another can by right take from me, when he pleases, against my consent.¹⁴²

Section 53 of the Constitution Act, 1867 provides the necessary protection from a government that would arbitrarily remove property from its citizens. Only the House of Commons may introduce bills which appropriate the property of Canadians. The House of Commons must be elected by a majority of eligible voters. By requiring that money bills originate only in the elective assembly, the Constitution Act, 1867 ensures that Canadians are not subject to taxation without representation. Locke himself writes that such representation is an adequate measure of the consent of the majority. "[S]till it must be with his own consent, *i.e.* the consent of the majority, giving it either by themselves, or their representatives chosen by them."¹⁴³ Section 53 of the 1867 Constitution Act limits the government to enact tax legislation approved by the House of Commons, which secures the crucial Lockean right not to be taxed without consent.

¹⁴² Ibid., par. 138.

¹⁴³ Ibid., par. 140.

Peace, Order, and Good Government

The 1867 Constitution Act establishes Canadian federalism. Certain areas of legislation belong to the provincial legislatures, and others to the federal Parliament. Whatever is not delineated in the lists of federal or provincial purviews found in sections 91 and 92 of the Act, respectively, is considered to be a matter of federal jurisdiction. This is established by section 91 of the Act, which contains what is referred to as the residual clause:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.¹⁴⁴

Whatever is not assigned explicitly to the provincial legislatures will be the legislative domain of the Parliament of Canada.¹⁴⁵ Yet the clause goes beyond simply giving the federal Parliament legislative jurisdiction over that which does not fall to the provinces. The laws made by the federal Parliament are to be for the "Peace, Order, and good Government of the Dominion of Canada." It is here that some authors have chosen to find the "statement of basic principles" which constitutes Peter Russell's first defining characteristic of a constitution.¹⁴⁶ Peace, order, and good government seems to be the only phrase in the 1867 Constitution Act which compares, as a statement of governing

¹⁴⁴ Constitution Act, 1867, sec. 91.

¹⁴⁵ See *ibid.*, section 17, which establishes the constitution of the Parliament of Canada as the Queen, an upper house styled the Senate, and a lower house styled the House of Commons.

¹⁴⁶ Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, p. 9.

principle, to the American constitution's "life, liberty, and pursuit of happiness." Robert Martin writes that "Our society was not based on 'life, liberty and the pursuit of happiness'; we were not founded on the celebration of individual freedom. We had chosen, rather, 'peace, order and good government.'" ¹⁴⁷

The constitutional provision in the residual clause affirming the purpose of the Canadian Parliament to make laws for peace, order, and good government can be seen as a Lockean provision. Peace, order, and good government can be read as principles far closer to "life, liberty, and pursuit of happiness" than Martin would care to admit. ¹⁴⁸ Section 91's peace, order, and good government compare remarkably similarly to a passage in Locke's Second Treatise:

[W]hoever has the legislative or supreme power of any common-wealth, is bound to govern by established *standing laws*, promulgated and known to the people, and not by extemporary decrees; by *indifferent* and upright *judges*, who are to decide controversies by those laws; and to employ the force of the community at home, *only in the execution of such laws*, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other *end*, but the *peace, safety, and public good* of the people. ¹⁴⁹

For Locke, the good of the people is the ultimate guiding principle for government.

"*Salus populi suprema lex*, is certainly so just and fundamental a rule, that he, who

¹⁴⁷ Robert Martin, "A Lament for British North America," in Anthony A. Peacock, ed., Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory, (Don Mills: Oxford University Press, 1996), p. 6.

¹⁴⁸ Martin contends that "British North America is, itself, a uniquely Tory idea." He offers the writings of George Grant, Eugene Forsey, Frank Scott and Charles Taylor in support of this contention. Martin, "A Lament for British North America," p. 13, note 17.

¹⁴⁹ Locke, Second Treatise of Government, par. 131. Original emphasis.

sincerely follows it, cannot dangerously err."¹⁵⁰ Locke is not ambiguous about what he is referring to with "*salus populi*." The only good of the people that counts for Locke is the ability to enjoy one's life and property in peace and safety. "The great end of men's entering into society [is] the enjoyment of their properties in peace and safety, and the great instrument and means of that [are] the laws established in that society."¹⁵¹ Enjoying one's property in peace and safety is precisely to what Locke is referring when he writes of "lives, liberties and estates." Locke states plainly that "[Men] unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*."¹⁵²

The origin of the term "peace, order, and good government," has been questioned by Stephen Eggleston:

Contrary to the conventional wisdom, the origin of POgG [peace, order, and good government] is not as exotic as we have been led to believe - indeed, the explanations for how and why this phrase worked its way into the BNA Act are downright pedestrian. The phrases 'peace, welfare and good government' and 'peace, order and good government' had been used more or less interchangeably by the Imperial authorities since 1689 . . . That year also saw the appearance of John Locke's famous *Treatises on Government* . . .¹⁵³

Eggleston is skeptical that "peace, order, and good government" is an expression of conservative principles.

¹⁵⁰ Ibid., par. 158.

¹⁵¹ Ibid., par. 134.

¹⁵² Ibid., par. 123.

¹⁵³ Stephen Eggleston, "The Myth and Mystery of POgG," Journal of Canadian Studies, Vol. 31, No. 4, pp. 84-5.

Peace, order, and good government, as the stated purpose of the federal Parliament in section 91 of the Constitution Act, 1867 compares to the "peace, security, and public good of the people" Locke espouses in the Second Treatise. That peace, security, and public good is the ability to enjoy their properties in peace and safety. Property is a general name Locke calls life, liberty, and estates. The peace, order, and good government of the 1867 Constitution Act is not as far off from the American Constitution's "life, liberty, and pursuit of happiness" as Robert Martin claims.¹⁵⁴

Conclusion

The protection of religious education in section 93 of the Constitution Act, 1867 can be seen as compatible with Locke's Letter Concerning Toleration. The provision that all money bills may originate only in the House of Commons in section 53 of the Act are consistent with the Lockean right to no taxation without representation. Even the residual clause in section 91 of the Act, the famous P.O.G.G. clause, which has long been thought of as one of the major principles of Canadian constitutionalism which sets us apart from the United States, is not nearly so far from a Lockean right to life, liberty, and estates as a casual reading of the Constitution Act, 1867 might lead one to think.

¹⁵⁴ Martin, "A Lament for British North America," p. 6.

CHAPTER 4

CANADIAN CONSTITUTIONALISM

The final chapter of the thesis examines the contemporary relevance of the first three chapters. First, definitions of constitutionalism are considered. The chapter seeks an answer to where the Constitution Act, 1867 fits in those definitions of constitutionalism. The chapter then considers the question of whether the absence of an entrenched bill of rights from the Act detracts from its status as a Lockean constitution. This introduces a discussion of the 1982 Charter of Rights and Freedoms, and the way it relates to the Constitution Act as considered in the thesis. The chapter discusses the contention that the Charter has derogated from Parliamentary supremacy in Canada. Finally, the thesis concludes by situating the findings of the previous three chapters in the contemporary Canadian constitutional landscape.

Constitutionalism

In chapter one, the thesis supplied Peter Russell's definition of Lockean constitutionalism, where "the written constitution [is] a comprehensive statement of the basic principles of government and the rights of the people."¹⁵⁵ Chapter one then went on to identify limits to government as a crucial characteristic of any constitution, and of constitutionalism itself. The thesis now returns to the notion of a constitution limiting government and thus protecting the rights of the people.

There is substantial support for the contention that constitutionalism is primarily concerned with limits to government. "Constitutionalism has evolved to mean the legal limitations placed upon the rightful power of government in its relationship to

citizens."¹⁵⁶ "[A constitution] defines the authority which the people commits to its government, and in so doing thereby limits it . . . any exercise of authority beyond these limits by any government is an exercise of 'power without right.'"¹⁵⁷ The limits to government are no trivial matter. A constitution which limits government meets only the most meager of definitions. The limits placed on government must have a particular function, namely the protection of rights as Russell's reading of Locke suggests.

There are various ways of expressing those limits to government. The most familiar constitutional method for limiting government in order to protect rights is an entrenched bill of rights, such as the first through the fourteenth amendments to the U.S. Constitution, or Canada's Charter of Rights and Freedoms. The question this thesis examines is whether the limits to government in the 1867 Constitution Act are more consistent with Locke than an entrenched bill of rights.

This thesis argues that the limits which appear in the Act are indeed more characteristic of Locke than an entrenched bill of rights. The consistency of a bill of rights with Lockean constitutionalism is examined below. It may be that a constitution containing a bill of rights is consistent with Locke's writings; however, consistency of an entrenched bill of rights with Lockean constitutionalism cannot be taken to preclude the

¹⁵⁵ Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People?, p. 9.

¹⁵⁶ Allen S. Rosenbaum, Constitutionalism: The Philosophical Dimension, (New York: Greenwood Press, 1988), p. 4.

¹⁵⁷ Charles Howard McIlwain, Constitutionalism: Ancient and Modern, (Ithaca: Cornell University Press, 1947), p. 9. See also Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatly, eds., Constitutionalism and Democracy: Transitions in the Contemporary World, (New York: Oxford University Press, 1993), esp. Walter F. Murphy, "Constitutions, Constitutionalism, and Democracy," pp. 3-25, and Gary C. Bryner, "Constitutionalism and the Politics of Rights," in Gary C. Bryner and Noel B. Reynolds, eds., Constitutionalism and Rights, (Provo: Brigham Young University, 1987).

compatibility of a constitution lacking a bill of rights with Lockean constitutionalism. Simply because Locke denounces as illegitimate any government which does not respect rights, the absence of explicit recognition of rights in a country's constitution does not constitute proof positive that that country does not respect rights. Chapter two of the thesis explores the nature of the relationship between the legislative and the executive Locke advocates and finds in it substantial limits to government which protect rights of the people. Chapter three finds that the limits on the laws the government may enact similarly protect rights. Legislation concerning religious education is one area where such limits are found. Chapter three also finds that limits in the way governments may enact legislation protect rights. The fact that only the elected assembly may introduce money bills protects a right of the people not to be taxed without representation, or their consent.¹⁵⁸

Locke argues that the ultimate limit on government is *salus populi suprema lex esto*.¹⁵⁹ "[It] is certainly so just and fundamental a rule, that he, who sincerely follows it, cannot dangerously err."¹⁶⁰ Locke argues in favour of executive prerogative so that civil

¹⁵⁸ Hamilton makes a similar argument in The Federalist Papers, 84, which is devoted entirely to a delineation of the way in which the provisions for separation of powers constitutes a better protection of rights than a bill of rights ever could. According to the Publius, the American Constitution was itself a bill of rights. Hamilton, The Federalist Papers, 84, pp. 436-445. See also Walter Berns, "The Constitution as Bill of Rights," in Robert A. Goldwin and William A. Schambra, eds., How Does the Constitution Secure Rights?, (Washington: American Enterprise Institute for Public Policy Research, 1985).

¹⁵⁹ This famous governmental guideline occurs in the text of the Second Treatise of Government at paragraph 158. However, it also occurs as the sub-title to the Two Treatises of Government in the 1764 sixth edition. That Locke considers this principle of government of such paramount significance to include it as the sub-title to his work may be taken as an indication that it constitutes for him, the most fundamental "basic principle of government,".

¹⁶⁰ Locke, Second Treatise of Government, par. 158.

societies rely on flexibility in applying judgment to unforeseeable circumstances rather than on rigid and fixed laws which may not prove adaptive to all situations:

The power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called *prerogative*: for since . . . it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that come in their way; therefore there is a latitude left to the executive power, to do many things which the laws do not prescribe.¹⁶¹

An entrenched bill of rights excessively hinders the constitutional executive as Locke conceives it.¹⁶² Locke writes that it is impossible to "make such laws as will do no harm." Entrenching bills of rights which bind the executive to act or not to act removes a vital ability to make judgment calls. Locke recognized that the protection of rights would require the exercise of executive power.¹⁶³

The case can be made that constitutionally entrenched bills of rights are not compatible with Lockean constitutionalism. Locke explicitly argues that it is the function of the legislative to "dispense justice and decide the rights of the subject."¹⁶⁴ The implication is that the rights of the subjects are a matter for debate by the legislative

¹⁶¹ Ibid., par. 160.

¹⁶² See Mansfield, Taming the Prince: The Ambivalence of Modern Executive Power, esp. ch. 8, "Constitutionalizing the Executive," pp. 181-211.

¹⁶³ For a discussion of this point, see Nathan Tarcov, who argues that, "Civil society exists to protect life, liberty, and property, but it does so precisely by wielding the power to deprive its members of life, liberty, and property." Nathan Tarcov, "American Constitutionalism and Individual Rights," in Goldwin and Schambra, eds., How Does the Constitution Secure Rights?, p. 102.

¹⁶⁴ Locke, Second Treatise of Government, par. 136.

power rather than unalterable elements of a country's founding. Rights may be expanded, or limited, as the legislative decides given the relevant circumstances at any given time.

The implicit protections of rights in the 1867 Constitution Act are more consistent with the flexibility and latitude Locke espouses than an entrenched bill of rights. As chapter two of the thesis argues, the executive described by the Act could well have been lifted from the pages of Locke's Second Treatise. The absence of a constitutionally entrenched bill of rights from the 1867 Constitution Act enhances the consistency of the Act with Lockean thought, rather than detracting from it.

The 1982 Charter of Rights and Freedoms

The purpose of this chapter is to examine the contemporary relevance of the findings of the first three chapters. As one of the findings is that a procedural constitution such as the Constitution Act, 1867 protects rights in a fashion more consistent with Locke's thought than an entrenched bill of rights does, it is incumbent on the thesis to discuss Canada's own bill of rights, the 1982 Charter of Rights and Freedoms. An exploration of the impact the Charter has had is an enormous task, and not one this thesis undertakes. However, an exploration of the impact of the Charter on the limits to government expressed in the Constitution Act, 1867 is appropriate.

A common misperception has pervaded and continues to pervade Canadian society. There has been a sense that Canadians did not have any constitutional protection of rights until 1982. The myth runs perhaps even deeper: Many Canadians believe they did not have any rights until 1982. "Law students are unshakeably convinced of two things about the Canada that existed before the Charter. First, Canadians simply had no rights until we adopted the Charter and, second, until it got a constitutional guarantee of

rights, Canada was just not a proper, respectable country."¹⁶⁵ This is a myth which has been both fostered and used by politicians. "With the charter in place, we can now say that Canada is a society where all people are equal and where they share some fundamental values based on freedom."¹⁶⁶ Trudeau's implication in this statement is that people in Canada were not equal prior to the Charter. Freedom was not a basis for fundamental values in this country. Two possibilities exist. The first is that Trudeau was aware that there were constitutional provisions ensuring equality and freedom in the 1867 Act, and that his statement in his memoirs is merely an effort to conceal this fact. The second possibility is that Trudeau himself did not know that the Charter was not the first constitutional protection of rights for Canadians. If the latter is the case, one can scarcely fault Trudeau. The Constitution Act, 1867 has not been examined as a document that protects rights. The important question to answer is *why* it has not been examined as a protection of rights. Are Canadians intent on escaping or forgetting their own history?

The ignorance which surrounds the Constitution Act, 1867 has profound consequences for Canadians. The Charter of Rights and Freedoms supplanted the 1867 Constitution Act as the seat of Canadian rights. In doing so, it clashes with one of the Act's most important Lockean principles, namely that of legislative or parliamentary supremacy.

Locke argues that the legislative must be the supreme branch of government. "In all cases, whilst the government subsists, the *legislative is the supreme power*: for what

¹⁶⁵ Martin, "A Lament for British North America," p. 11.

¹⁶⁶ Pierre Elliot Trudeau, Memoirs, (Toronto: McClelland and Stewart, 1993), p. 323, cited in H.D. Forbes, "Trudeau's Moral Vision," in Peacock, Rethinking the Constitution, p. 23.

can give laws to another, must needs be superior to him . . ."¹⁶⁷ In parliamentary democracies, this principle is expressed through parliamentary sovereignty. Compare section 52 (1) of the 1982 Charter of Rights and Freedoms: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."¹⁶⁸ Section 52 of the Charter gives the judiciary the authority to invalidate legislation if it is unconstitutional. The courts now have a power beyond that of the legislatures. Legislative supremacy, in the form of parliamentary sovereignty, is no longer a characteristic of the Canadian constitution.

Jennifer Smith argues that "While the courts' power of judicial review has undoubtedly surmounted the rather narrow, partisan function envisaged for the new Supreme Court in 1875 by Macdonald, the principle of parliamentary supremacy persists."¹⁶⁹ Her basis for this argument is section 33 of the Charter, the famous (or infamous) notwithstanding clause. "[T]he Charter itself, to the disappointment of its partisans, contains a provision enabling the legislative bodies of both levels of government to override some of its guarantees, namely, those dealing with fundamental freedoms, legal rights and equality rights."¹⁷⁰ Section 33 reads: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate

¹⁶⁷ Locke, Second Treatise of Government, par. 150. See also pars. 134, 149.

¹⁶⁸ Constitution Act, 1982, sec. 52, in Rainer Knopff and F.L. Morton, Charter Politics, (Toronto: Nelson, 1992) p. 398-99.

¹⁶⁹ Jennifer Smith, "The Origins of Judicial Review in Canada," in F.L. Morton, ed., Law, Politics, and the Judicial Process in Canada, (Calgary: University of Calgary Press, 1992), p. 357.

notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."¹⁷¹

This is an insubstantial basis for parliamentary supremacy indeed.

Section 33 applies only to sections 2 and 7 through 15 of the Charter. Section 2 pertains to freedom of religion, freedom of assembly, and freedom of expression. Sections 7 through 14 are the seat of legal rights, and section 15 contains equality rights. Already, Smith's parliamentary supremacy is limited to a constitutional *nonobstante* clause which is applicable to only a handful of constitutional provisions. A further restriction is that the section 33 override lasts for five years, after which it may be renewed by a vote in the Parliament or legislature. Both provincial legislatures and the federal Parliament must dissolve and elections must take place no more than five years apart. The five year limit on the notwithstanding clause is yet another restriction to parliamentary supremacy.

Section 33 does not preserve parliamentary supremacy for one final reason. The clause itself is not legitimate, because it is not perceived as legitimate:

Section 33 of the Charter, to be sure, embodies a scepticism of judicial finality in matters of constitutional interpretation, but with the exception of Quebec (and, in one case, Saskatchewan), governments have been reluctant to use it to override judicial decisions. No doubt they do not want to be seen to be violating rights. But this perception itself attests to the strength of oracular legalism - it assumes that section 33 can be used only to override rights as defined by judges rather than to express an alternative interpretation of those rights. It assumes, in other words, that Charter rights are what the judges say they are . . . It is surely eloquent testimony to the power of legalism that the Charter provision most obviously embodying nonlegalistic

¹⁷⁰ Ibid.

¹⁷¹ Constitution Act, 1982, sec. 33.

scepticism of judicial power was phrased in legalistic language. The form and content of section 33 are mutually contradictory, and the former symbolically undermines the latter!¹⁷²

What government wants to be perceived as violating rights? Use of section 33 is not legitimate in Canada outside Quebec. "The notwithstanding clause was inserted in the Charter at the insistence of provincial premiers who were quarrelling with Prime Minister Trudeau . . . The fact that it originated as part of a political compromise has contributed to its lack of legitimacy."¹⁷³

Smith is aware of the *de facto* illegitimacy of section 33, but persists in her argument that it secures parliamentary supremacy. "[T]here has been speculation about the likely effect of these qualifications on politicians' willingness to resort to the 'override.' Nevertheless, its very appearance in the context of the Charter strikes an incongruous note and is testimony to the strength of the lingering tradition of parliamentary supremacy."¹⁷⁴ Smith's language belies her own contention. Parliamentary supremacy is not a fundamental principle of government, it is a "lingering tradition," in that it lingers and is not quite dead yet. A provision protecting parliamentary supremacy "strikes an incongruous note." Parliamentary supremacy is out of place in the Charter.

Smith turns to another section of the Charter to buttress her argument that parliamentary supremacy prevails. Section 1 is a broad limit on the entire Charter. "Finally, there is the first clause of the Charter which subjects its guarantees to 'such

¹⁷² Knopff and Morton, *Charter Politics*, pp. 179-80.

¹⁷³ Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms," in *Canadian Journal of Political Science*, XXX, no. 4, December 1997, note 8, p. 646.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁷⁵ Smith argues that section 1 gives Parliament and the legislatures appeal to these "reasonable limits as can be demonstrably justified." "[T]he initiative in this regard is secured to governments."¹⁷⁶ This is a puzzling statement, for she acknowledges that "Ultimately, it is up to the Supreme Court to stake out the 'reasonable limits.'"¹⁷⁷ Karen Selick argues that section 1 represents more of an infringement on parliamentary supremacy than perhaps any other:

The power this section gives to judges is unprecedented. Despite all the pains the drafters of the Charter may have taken to enshrine and guarantee fundamental rights in the many sections that follow, each case will boil down in the end to the opinion of one or more judges as to what is demonstrably justified in a free and democratic society.¹⁷⁸

Despite Smith's arguments to the contrary, the 1982 Charter of Rights and Freedoms has eroded Canada's parliamentary supremacy.

It is notable that the scholarly discussion of the Charter's impact on parliamentary supremacy has taken place largely after the fact of the Charter's enactment. The effects of the constitutional change of 1982 have been considered largely in hindsight. Prudence suggests that policy-makers should have considered the effects of the Charter prior to its enactment. Historical awareness is a prerequisite of such prior consideration, and is sorely lacking in most if not all popular discussions of constitutional reform.

¹⁷⁴ Smith, "The Origins of Judicial Review in Canada," p. 357.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

The absence of an understanding of the way in which (or even the fact that) the Constitution Act, 1867 protects rights is but one example of a greater problem. Canadian history in general is overlooked. The fact that history is not fashionable is no excuse for Canadians to ignore its usefulness. J. L. Granatstein points out that "Canada is not one of the world's youngest nations, but given the way we treat our past, the nation might have been formed in 1967 rather than 1867. Can there be any other country that scants its past as Canadians do?"¹⁷⁹

The approach to constitutional reform is pervaded by this almost disdainful attitude toward history. The Charter of Rights and Freedoms is not necessarily an inherently bad constitutional document. But ignorance of the reasons for parliamentary supremacy, and ignorance of the protection of rights in the 1867 Constitution Act led to the Charter's abrogation of what once was an important principle of government for Canada. At least, I would like to think that it is ignorance, rather than contempt. Robert Martin contends that the constitutional reform of 1982 and the attempts since then such as the Charlottetown and Meech Lake Accords are examples of "[A] people consciously attempting to abolish their own history and, as a result, being left with a constitution that provides them with scant intellectual or emotional tradition."¹⁸⁰

What is at work in Canadian politics (and elsewhere) is political rationalism. It is not a new phenomenon. "[A]s Voltaire remarked, the only way to have good laws is to

¹⁷⁸ Karen Selick, "Rights and Wrongs in the Canadian Charter," in Peacock, Rethinking the Constitution, p. 115.

¹⁷⁹ J.L. Granatstein, "Canada needs its historical memory back," comment in the National Post, Monday, April 19, 1999, p. A18.

¹⁸⁰ Martin, "A Lament for British North America," p. 12.

burn all existing laws and to start afresh."¹⁸¹ Even Plato cautioned explicitly against the rationalistic discard of tradition. "They would take the city and the dispositions of human beings, as though they were a tablet which, in the first place, they would wipe clean."¹⁸²

Canada has forgotten the notion of limits to government in its constitutional heritage. "The Canadian Charter of Rights and Freedoms is the most radical break ever made with a constitutional and legal order hitherto characterized by continuity and incremental development."¹⁸³ "What seems to have happened is that the Constitution Act, 1982, and in particular the Charter, has produced an alternative vision of the Constitution."¹⁸⁴ This is dangerous. While the Charter does limit government, it also acts to require action from government and from Canadians. The Charter supplants Canada's tradition of negative rights with positive rights formulations. Section 23 of the Charter not only protects but promotes minority language education:

23 (1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the

¹⁸¹ Michael Oakeshott, Rationalism in Politics and other essays, (Indianapolis: LibertyPress, 1962), p. 9.

¹⁸² Plato, Republic, translated by Allan Bloom, (Basic Books, 1968), 501a.

¹⁸³ Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," in Keith Banting and Richard Simeon, eds., And No One Cheered: Federalism, Democracy and the Constitution Act, (Toronto: Methuen Publications, 1983), p. 89.

¹⁸⁴ Canada, Debates of the Senate, February 10, 1988, 2739, Alan Cairns appearing before the Senate in Committee of the Whole, cited in J.R. Mallory, "The Courts as Arbiters of Social Values," in David P. Shugarman and Reg Whitaker, eds., Federalism and Political Community: Essays in Honour of Donald Smiley, (Peterborough: Broadview Press, 1989), p. 299.

language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.¹⁸⁵

This is a departure from the language of education rights of the 1867 Act. The Act stipulates that "Nothing in any [provincial] Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."¹⁸⁶ The language is negative. "Nothing in any such Law shall prejudicially affect . . ." Section 93 also refers to the rights and privileges which any class of persons have *by law*. Compare the positive language in section 23 of the Charter: ". . . have the right to have their children receive . . ." "[T]his section is clearly meant to be interpreted, not only as a negative right not to be interfered with, but as a positive entitlement to education in a particular language; that is, education that somebody else will have to provide."¹⁸⁷ Selick identifies further positive rights language in the Charter at sections 27 and 36.¹⁸⁸

The positive formulation of rights in the Canadian constitution represents a departure from constitutionalism as limited government. Government is not only limited by positive rights, it is required to provide something. This goes beyond traditional liberal conceptions of government. "In this understanding of politics, then, the activity of

¹⁸⁵ Constitution Act, 1982, sec. 23.

¹⁸⁶ Constitution Act, 1867, sec. 93 (1).

¹⁸⁷ Selick, "Rights and Wrongs in the Canadian Charter," p. 111.

¹⁸⁸ *Ibid.*

governing subsists not because it is good, but because it is necessary. Its chief office is to lessen the severity of human conflict by reducing the occasions of it."¹⁸⁹

The Charter imposes a new purpose on government. Constitutional, liberal, limited government is a form of government fundamentally different from the government prescribed by the Charter:

[T]he office of government is not to impose other beliefs and activities on its subjects, not to tutor or to educate them, not to make them better or happier in another way, not to direct them, to galvanize them into action, to lead them or to co-ordinate their activities so that no occasion of conflict shall occur; the office of government is merely to rule.¹⁹⁰

The government of the Charter of Rights and Freedoms breaks with this traditional idea of constitutionalism. The government is required to be the educator, and to uphold substantive beliefs beyond those required for the maintenance of liberalism. Section 27 of the Charter affirms Canada's commitment to multiculturalism. By entrenching multiculturalism, the Charter has placed it beyond debate. Canadians are not free to debate the existence or merits of multiculturalism. Their constitution tells them that they are a multicultural nation. This is an imposition of belief. It oversteps the bounds of liberal constitutionalism.

Robert Martin laments that the multiculturalism of the Charter "does little more than affirm our commitment to moral and intellectual relativism."¹⁹¹ The basis of his

¹⁸⁹ Michael Oakeshott, The Politics of Faith and the Politics of Scepticism, (New Haven: Yale University Press, 1996), p. 32.

¹⁹⁰ Oakeshott, Rationalism in Politics and other essays, p. 427.

¹⁹¹ Martin, "A Lament for British North America," p. 10.

criticism, however, is not that the constitution affirms beliefs, but that multiculturalism is a vacuous concept and does not satisfy our needs for a unifying constitutional principle. "My central purpose is to argue that, despite the vast attention lavished on it, our constitution no longer fulfils an essential - perhaps the most essential - function of a constitution. It no longer sets out a unifying national idea."¹⁹² This idea of the constitution as a social blueprint is an illiberal view of the function of a constitution,¹⁹³ and a dangerous one.

"To some people, 'government' appears as a vast reservoir of power which inspires them to dream what use might be made of it . . . In short, governing is understood to be just like any other activity - making and selling a brand of soap, exploiting the resources of a locality, or developing a housing estate."¹⁹⁴ Martin dreams of the power of a constitution to unite the country around an ideal. He slides into the illiberal activity of imposing his beliefs, or what he supposes would be the beliefs of a majority of the society, on others. Liberal constitutions are characterized by an impartiality, a refusal to make pronouncements as to what constitutes the "good." Yet both the Charter and Martin in his criticism of it hijack the liberal constitution of Canada for substantive purposes and conclusions as to what the "good" is.

This should not be taken as a condemnation of either Martin or the Charter. The purpose here is only to point out that the Charter has abrogated liberal constitutionalism. Critics such as Martin look right past that fact and seek better ways of abrogating liberal constitutionalism. It is not for this thesis to pronounce judgments as to whether the

¹⁹² Ibid., p. 3.

¹⁹³ Martin admits that his view is "profoundly Tory." See *ibid.*, note 17, p. 13.

demise of liberal constitutionalism in Canada is a good thing. The constitutionalism of the 1867 Constitution Act is gone. It seems appropriate to at least acknowledge that fact.

Such an acknowledgment is not the only purpose of this thesis. Indeed, there should be some usefulness in an understanding of Canada's past constitutionalism, usefulness which could be brought to bear in future attempts at constitutional reform:

[T]he more thoroughly we understand our own political tradition, the more readily its whole resources are available to us, the less likely we shall be to embrace the illusions which wait for the ignorant and the unwary: the illusion that in politics we can get on without a tradition of behaviour, the illusion that the abridgment of a tradition is itself a sufficient guide, and the illusion that in politics there is anywhere a safe harbour, a destination to be reached or even a detectable strand of progress.¹⁹⁵

It would be utterly inappropriate to suggest a return to the constitutionalism of the Constitution Act, 1867. It would also be utterly inappropriate not to remark that we have lost that constitutionalism.

¹⁹⁴ Oakeshott, Rationalism in Politics and other essays, p. 431-2.

¹⁹⁵ *Ibid.*, p. 66.

BIBLIOGRAPHY

- Ajzenstat, Janet. "The Constitutionalism of Étienne Parent and Joseph Howe," in Janet Ajzenstat and Peter J. Smith, eds. Canada's Origins: Liberal, Tory, or Republican? Ottawa: Carleton University Press, 1988
- , "Durham and Robinson: Political Faction and Moderation," in Canada's Origins: Liberal, Tory, or Republican? Ottawa: Carleton University Press, 1988
- , "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms," in Canadian Journal of Political Science, XXX, no. 4, December 1997
- , "Retrieving Canadian Constitutionalism," unpublished.
- , and Peter J. Smith. "Liberal-Republicanism: The Revisionist Picture of Canada's Founding," in Canada's Origins: Liberal, Tory, or Republican? Ottawa: Carleton University Press, 1988
- Archer, Keith, Roger Gibbins, Rainer Knopff, and Leslie A. Pal. Parameters of Power: Canada's Political Institutions. Toronto: Nelson Canada, 1995
- Armour, Leslie. "John Locke and American Constitutionalism," in Alan S. Rosenbaum, ed., Constitutionalism: The Philosophical Dimension. New York: Greenwood Press, 1988
- Berns, Walter. "The Constitution as Bill of Rights," in Robert A. Goldwin and William A. Schambra, eds. How Does the Constitution Secure Rights? Washington: American Enterprise Institute for Public Policy Research, 1985
- Bryner, Gary C. "Constitutionalism and the Politics of Rights," in Gary C. Bryner and Noel B. Reynolds, eds. Constitutionalism and Rights. Provo: Brigham Young University, 1987
- Cranston, Maurice. John Locke. London: Oxford University Press, 1957
- Creighton, Donald. Road to Confederation. Toronto: Macmillan of Canada, 1964
- Dicey, A.V. Introduction to the Study of the Law of the Constitution. Ninth Edition London: MacMillan and Co., Ltd., 1948
- Dworetz, Steven M. The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution. Durham: Duke University Press, 1990

- Eggleston, Stephen. "The Myth and Mystery of POgG," in Journal of Canadian Studies Vol.31, No. 4, 1996-97 Winter
- Forbes, H.D. "Trudeau's Moral Vision," in Anthony A. Peacock, ed. Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory. Don Mills: Oxford University Press, 1996
- Granatstein, J.L. "Canada needs its historical memory back," comment in the National Post. Monday, April 19, 1999
- Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatly, eds. Constitutionalism and Democracy: Transitions in the Contemporary World. New York: Oxford University Press, 1993
- The Federalist Papers. Max Beloff, ed., Oxford: Basil Blackwell, 1948
- Heard, Andrew. Canadian Constitutional Conventions: The Marriage of Law and Politics. Toronto: Oxford University Press, 1991
- Horowitz, Gad. "Conservatism, Liberalism, and Socialism in Canada: An Interpretation," in Canadian Journal of Economics and Political Science XXXII, no. 2, May 1966
- Knopff, Rainer. "The Triumph of Liberalism in Canada: Laurier on Representation and Party Government," in Canada's Origins: Liberal, Tory, or Republican?
- and F.L. Morton. Charter Politics. Toronto: Nelson, 1992
- Landes, Ronald G. The Canadian Polity: A Comparative Introduction. Scarborough: Prentice-Hall Canada, Inc., 1987
- Locke, John. Second Treatise of Government. Indianapolis: Hackett Publishing Company, Inc., 1980, C.B. Macpherson, ed.
- , Letter on Toleration. Mario Montuori, ed., The Hague: Martinus Nijhoff, 1963
- Mallory, J.R. "The Courts as Arbiters of Social Values," in David P. Shugarman and Reg Whitaker, eds. Federalism and Political Community: Essays in Honour of Donald Smiley. Peterborough: Broadview Press Ltd., 1989
- Mansfield, Harvey C. Jr. Taming the Prince: The Ambivalence of Modern Executive Power. Baltimore: The Johns Hopkins University Press, 1993
- Martin, Robert. "A Lament for British North America," in Anthony A. Peacock, ed. Rethinking the Constitution. Don Mills: Oxford University Press, 1996

- McIlwain, Charles Howard. Constitutionalism: Ancient and Modern. Ithaca: Cornell University Press, 1947
- Oakeshott, Michael. The Politics of Faith and the Politics of Scepticism. New Haven: Yale University Press, 1996
- , Rationalism in Politics and other essays. Indianapolis: LibertyPress, 1962
- Pangle, Thomas L. The Spirit of Modern Republicanism, The Moral Vision of the American Founders and the Philosophy of Locke. Chicago: University of Chicago Press, 1988
- Plato. Republic, translated by Allan Bloom, Basic Books, 1968
- Rosenbaum, Allen S. Constitutionalism: The Philosophical Dimension New York: Greenwood Press, 1988
- Russell, Peter H. Constitutional Odyssey: Can Canadians Become a Sovereign People? Toronto: University of Toronto Press, 1993
- , Rainer Knopff, and Ted Morton, Federalism and the Charter: Leading Constitutional Decisions. Ottawa: Carleton University Press, 1990
- Selick, Karen. "Rights and Wrongs in the Canadian Charter," in Peacock, Rethinking the Constitution
- Smiley, Donald. "A Dangerous Deed: The Constitution Act, 1982," in Keith Banting and Richard Simeon, eds. And No One Cheered: Federalism, Democracy and the Constitution Act. Toronto: Methuen Publications, 1983
- Smith, Jennifer. "The Origins of Judicial Review in Canada," in F.L. Morton, ed. Law, Politics, and the Judicial Process in Canada. Calgary: University of Calgary Press, 1992
- Smith, Peter. "The Ideological Origins of Canadian Confederation," in Canada's Origins: Liberal, Tory, or Republican? Ottawa: Carleton University Press, 1988
- Tarcov, Nathan. "American Constitutionalism and Individual Rights," in Goldwin and Schambra, eds. How Does the Constitution Secure Rights?
- Yolton, John W. A Locke Dictionary. Oxford: Blackwell Publishers, 1993