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Canada's Founding Ideas

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Confederation and Individual Liberty

Janet Aizenstat





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CONFEDERATION AND INDIVIDUAL LIBERTY

By Janet Ajzenstat

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Who's Who On the Cover

These eight portraits depict statesmen and thinkers discussed in the text who played an important role in the development of Canada's Constitutional guarantee of responsible liberty under law. The first reader who correctly identifies all eight in an email to john.robson@macdonaldlaurier.ca (listed from smallest to largest on the cover) wins a copy of the Institute's first book, *The Canadian Century: Moving Out of America's Shadow*, an autographed copy of Managing Director Brian Lee Crowley's *Fearful Symmetry: The Fall and Rise of Canada's Founding Values* and a \$50 gift certificate at Chapters. The first five readers to get at least seven right, other than our grand prize winner, will get copies of *The Canadian Century*, *Fearful Symmetry* and our first two policy papers *Free to Learn* and *Citizen of One*, and the first five to respond with six or fewer correct answers will receive a copy of *The Canadian Century*. Our decision as to the winners is final.

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CONFEDERATION AND INDIVIDUAL LIBERTY

Too many people believe that the Fathers of Confederation were not learned or philosophical; shrewd enough to do a “deal,” the story goes, they were political operators not political thinkers. We are told not to seek in their words a principled defence of parliamentary government or federalism, let alone an argument that our British constitutional heritage was well designed to preserve our individual liberties. We are certainly not encouraged to consult them for insight into contemporary problems the way Americans still ponder the *Federalist Papers*. This conventional wisdom misrepresents Canada’s founders and the political system they created.

In fact, the 33 men who drafted Canada’s constitution at the Quebec Conference of 1864, and the hundreds who then debated the Quebec scheme in colonial parliaments, whom we may call collectively our *founders*, are an eloquent source of information on Canada’s founding and an excellent measure of British North American opinion. And reading the ratifying debates leaves no doubt that Canada’s founders were well versed in the arguments of the British Enlightenment, understood the idea of the social contract, and were determined to secure the rights and liberties of British North Americans on a permanent basis.

Their conception of “rights” corresponds most closely with the contemporary term “civil liberties.” Uninterested in present-day positive rights, our founders were determined to limit government interference and protect individual freedom and responsibility. When they spoke of rights they had in mind freedom from arbitrary arrest or detention, freedom of speech and thought, freedom of worship, free elections, and above all, freedom from oppression by any authority, even if democratically elected.

They had ample differences within this framework, and their words remain interesting and important to this day. They read and cited John Locke, William Blackstone, Thomas Hobbes, Edward Coke, Edmund Burke, John Stuart Mill and even Jean-Louis de Lolme’s now sadly neglected defence

of Parliamentary government, *The Constitution of England*. They studied political theory and political history, and many were familiar with the *Federalist Papers* and the American constitution, New Zealand’s early federal experiment, European political arrangements, and the dramatic history of the struggle between Stuart monarchs, Commonwealth Puritan radicals and Parliament that culminated in the “Glorious Revolution” and the full restoration of the English Parliament in 1688.

They also knew their own history and discussed it with depth and intelligence. Canadians told of the 1837-38 rebellions, revisited debates over the 1840 legislative Union of Upper and Lower Canada, and the subsequent history of that union. Lower Canadians drew lessons from life under British rule before and after the granting of a representative assembly in 1791. George-Etienne Cartier was just one speaker to wax eloquent on the virtues of British political institutions and their protection of individual freedom. And many debaters cited Lord Durham’s *Report* of 1839 on responsible government, including his thoughts on the political executive, the second chamber, and the individual legislator.

Somehow this story was forgotten, or misrepresented, especially in the 1970s and 1980s. In the name of national pride we were told we had nothing to be proud of, that neither the process nor the outcome of the Confederation debates bore comparison with the sorts of elevated political arguments that have taken place over the years in other countries from the United States to England to France. In the end we got a story that was as sad as it was inaccurate.

When we reject received wisdom and take the time to review this debate, we have every reason to take pride in our true founders: well-read, intelligent, clear and forceful speakers. And we have every reason to take pride in their work. For we find that Canada stands on stronger and more philosophical foundations, far more steeped in a concern with liberty, than academic and popular tradition now suggests. We have every reason to be proud of those whose minds and energies gave us Canada, and of the system of Parliamentary self-government at its political core. •

LA CONFÉDÉRATION ET LES LIBERTÉS INDIVIDUELLES

Les Pères de la Confédération sont communément perçus comme de simples opérateurs politiques ; ni instruits ni philosophes. On nous conseille souvent de ne pas chercher dans leurs paroles une défense des principes du régime parlementaire ou du fédéralisme, et encore moins une argumentation voulant que l'héritage constitutionnel britannique soit l'instrument idéal pour préserver nos libertés individuelles. On ne nous encourage certainement pas à trouver dans leurs discours des solutions à nos difficultés présentes comme le font si bien nos voisins américains en se référant pieusement aux Federalist Papers. Cette croyance populaire concernant nos Pères fondateurs canadiens et le système politique qu'ils ont créé est on ne peut plus fausse.

En fait les trente-trois hommes qui ont rédigé la Constitution canadienne lors de la Conférence de Québec en 1864, et les centaines d'autres qui ont ensuite débattu les résolutions de Québec dans leurs parlements coloniaux, ces hommes que nous désignons comme nos Fondateurs, sont une source éloquente d'information sur ce qui constitue les fondations du Canada ainsi qu'une excellente indication de l'opinion publique nord-américaine britannique à ce sujet. La lecture de ces débats ne laisse aucun doute: les Pères fondateurs canadiens étaient bien au fait des arguments des Lumières britanniques, comprenaient l'idéal du contrat social et étaient déterminés à garantir les droits et libertés des citoyens de l'Amérique du Nord britannique de façon permanente.

Ce qui se rapproche le plus de leur conception des « droits » est le terme contemporain de « libertés civiles ». Nos Pères fondateurs ne s'intéressaient pas aux droits positifs modernes; ils étaient déterminés à limiter l'interférence gouvernementale et à protéger les droits et libertés individuels. Quand ces hommes discutaient de droits, ils avaient en tête la protection du citoyen contre la détention ou l'emprisonnement arbitraires, la liberté d'expression et de conscience, la liberté de religion, les élections libres et, par-dessus tout, la protection contre toute forme d'oppression, même venant d'une autorité démocratiquement élue.

Bien entendu, les Pères fondateurs avaient leurs différences, c'est pourquoi leurs paroles et discours demeureront intéressants et importants. Nos fondateurs avaient lu et se référaient fréquemment à John Locke, William Blackstone,

Thomas Hobbes, Edward Coke, Edmund Burke, John Stuart Mill, ainsi qu'à Jean-Louis de Lolme et sa défense du régime parlementaire, *The Constitution of England*, aujourd'hui malheureusement négligée. Ils avaient étudié la philosophie politique, et nombre d'entre eux étaient familiers avec les *Federalist Papers* et la Constitution américaine, l'expérience de la Nouvelle-Zélande, ainsi que les arrangements politiques européens et la lutte dramatique entre les Stuart, les puritains radicaux du Commonwealth, et le Parlement qui a culminé avec la « Glorieuse Révolution » de 1688.

Les Pères fondateurs connaissaient leur histoire et en discutaient avec intelligence. Les Canadiens s'exprimaient sur l'Acte constitutionnel de 1791 et l'attribution d'une Assemblée législative élue, les rébellions de 1837-38, les débats entourant l'union législative du Haut et du Bas-Canada, et les conséquences de cette union. George-Étienne Cartier n'était qu'un des nombreux orateurs éloquents à invoquer les vertus des institutions politiques britanniques et la protection qu'elles accordent aux libertés individuelles. Plusieurs de ces orateurs citèrent le Rapport de 1839 de Lord Durham sur le gouvernement responsable, incluant ses écrits sur le pouvoir exécutif, la chambre haute, et le législateur.

Cette histoire a été mystérieusement oubliée ou faussement représentée, surtout durant les années 1970 et 1980. Au nom de la fierté nationale, on nous a fait croire qu'il n'y avait rien dans l'histoire de la fondation du Canada dont nous devons être fiers, car ni le processus ni le résultat de ces débats sur la Confédération n'étaient comparables à ceux qui prirent place au cours des mêmes années aux États-Unis, en Angleterre, et en France. En fait, on nous enseigné une histoire aussi triste qu'inexacte.

Lorsque nous rejetons cette croyance populaire et prenons le temps d'étudier ces débats, nous avons parfaitement raison d'être fiers de nos fondateurs, qui étaient érudits, intelligents, clairs, et de grands orateurs. Nous avons raison d'être fiers de ce qu'ils ont accompli. En vérité, le Canada repose sur des fondations qui sont plus solides et philosophiques, bien plus concernées par les principes de liberté, que de nombreuses croyances académiques et populaires nous laissent croire. Nous avons parfaitement raison d'être fiers de ceux qui nous ont donné le Canada, avec son système politique et son régime parlementaire souverain. •

PREFACE

In 1992, Canada's late Chief Justice Antonio Lamer spoke rapturously about the significance of the 1982 Charter of Rights and Freedoms. It represented, he said,

a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser.

Revolutions turn things around substantially; they are hugely transformative. The invention of penicillin and pasteurization saved countless lives and reduced extensive suffering. Children who would have died – and had always died in significant numbers – now went on to live full and productive lives. Many whose health would have been permanently compromised by serious infection now recovered fully. Similarly, the laser brought us the wonders of modern eye surgery – simpler, less painful, and more successful than previous surgery and treatment. Those who would have gone blind now see! But where is the laser to cure Justice Lamer's historical myopia?

What kind of intellectual blinders made him think that the rights and freedoms of Canadians were as regularly and seriously threatened before the Charter as their health was before penicillin? Lamer appeared to believe that, with respect to rights and freedoms, Canadians lived in the “dark ages” before the advent of the Charter. In this, our former Chief Justice actually went much further than many knowledgeable observers, including enthusiastic friends of the Charter, who generally concede that Canada was actually not such a terrible place before 1982. What made it possible for the Chief Justice of Canada, obviously a learned man, so outrageously to distort our history?

Much of the answer lies in the fact that a good many other learned men and women have been distorting our history for some time. For decades now, historians and political scientists have been recycling the view that Canada's founding was not liberal democratic in character. Our founders were not democrats because they allegedly dismissed the idea of popular sovereignty and government by consent; they were not liberals because they had little concern for our rights and liberties. If this is true, then the liberal democratic features of present-day Canada had to be achieved in spite of (even against) our founding. In other words, revolutionary changes had to occur.

Within this perspective, the Charter can appear to be one of those revolutionary changes. Lamer's remarkable statement builds on a well-established historical orthodoxy. But this orthodoxy turns out to be a cloud cuckoo land of historical amnesia. Those who began the orthodoxy – Donald Creighton, most prominently – showed no evidence of having read

That Canada was without the full founding debates for the first 132 years of its post-Confederation history is truly remarkable.

the founding debates extensively or carefully. Nor have their successors. As a result, generations of Canadian scholars have been recycling inaccurate myths.

How do we know? Chiefly because of the indefatigable efforts of Janet Ajzenstat. The orthodoxy was so uninterested in the primary sources – which alone could either support or refute its premises – that only fragmentary founding debates were ever published, and when those went out of print, they were not missed. It was not until Ajzenstat and her colleagues published *Canada's Founding Debates* in 1999 that we had ready access to a broad sampling of the full debates. That Canada was without such a volume for the first 132 years of its post-Confederation history is truly remarkable.

Not only did Ajzenstat provide us with the necessary documents. She actually read them in detail and with great care, paying close attention to context. What she discovered was that our historical orthodoxy was simply wrong, typically by 180 degrees. Our founders, it turns out, were almost without exception devoted to popular sovereignty. Moreover, they could hardly stop talking about rights and liberties and how parliamentary government best protected them. They knew they were considering a bold and innovative combination of parliamentary government and federalism (the world's first such combination!) and they acted, spoke, and wrote accordingly.

Thankfully, we now have a national think tank in Ottawa that understands and appreciates the role of history in national policy debates. By featuring Ajzenstat's pioneering work in the essay below, the Macdonald-Laurier Institute is performing a great public service. This MLI essay represents an *hors d'oeuvre* of Ajzenstat's work about the founding period. The full meal is available in the following works:

- *The Political Thought of Lord Durham* (McGill-Queen's University Press, 1988)
- *Canada's Origins: Liberal, Tory, or Republican* (Carleton University Press, 1995), edited with Peter J. Smith
- *Canada's Founding Debates* (Stoddart, 1999; University of Toronto Press, 2003), edited with Paul Romney, Ian Gentles, and William D. Gairdner.

- *The Once and Future Canadian Democracy: An Essay in Political Thought* (McGill-Queen's University Press, 2003)
- *The Canadian Founding: John Locke and Parliament* (McGill-Queen's University Press, 2007)

Readers might also enjoy Ajzenstat's blog: <http://janetajzenstat.wordpress.com/>

Whether Janet Ajzenstat is correct in her presentation of the founders, and, if so, whether those founders were right or wrong in their institutional views and prescriptions are important questions. But it simply will not do to ignore her work, as our orthodox scholars continue to do. Peter Russell, for example, in his otherwise valuable work, continues to quote a single founding statement that denies popular sovereignty, while ignoring the fact that it is the proverbial exception to a much more substantial and extensive rule.¹ David Smith, in his important and prizewinning *The People's House of Commons*,² similarly repeats the orthodoxy, as do many others. Perhaps these scholars think Ajzenstat is wrong – perhaps she is – but those who think so should do her the courtesy of refuting her. Scandalously, they ignore her instead. Do they fear debate with someone who so obviously knows the founding period and its debates better than anyone else?

What laser exists to cure the historical myopia exhibited by Justice Lamer? Her name is Janet Ajzenstat.



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1 See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Second edition. (Toronto, University of Toronto Press, 1993), 3; and Peter H. Russell et al., eds., *Essential Readings in Canadian Government and Politics*. (Toronto: Emond Montgomery, 2010), 76-7.

2 *The People's House of Commons: Theories of Democracy in Contention* (Toronto: University of Toronto Press, 2007).

CONFEDERATION AND INDIVIDUAL LIBERTY

The now-conventional account has it that the Fathers of Confederation were not particularly well educated. They were practical men, shrewd enough to do a “deal,” but not political thinkers. We cannot hope to find in what they said or wrote a thoughtful defence of parliamentary government or federalism; still less can we find an argument to show that these institutions preserve our individual liberties. This view is as mistaken as it is prevalent.

Consider these statements: “It is well known that the Fathers of Confederation were pragmatic lawyers for the most part, more given to fine tuning the details of a constitutional act than to waxing philosophical about human rights or national goals” (Ramsay Cook, history professor and general editor of the *Dictionary of Canadian Biography*). “The lack of a philosophical mind to give guidance to the thinking of ordinary citizens has been a great weakness of our Canadian national experience throughout our history” (F. H. Underhill, history professor, co-author of the CCF’s Regina Manifesto and later a leading liberal thinker and close friend of Lester Pearson). “Confederation was born in pragmatism without the attendance of a readily definable philosophic rationale” (E. R. Black).¹

Another noted Canadian historian, Donald Creighton, describes the Fathers as “mid-Victorian British colonials who had grown up in a political system which they valued, and which they had not the slightest intention of trying to change by revolution. For them the favourite myths of the Enlightenment did not possess even a quaintly antiquarian interest...[T]hey would have been sceptical about both the utility and the validity of abstract notions such as the social contract and inalienable rights of man.”² But on a plain reading of the historical record, this view gives too little credit to the enduring appeal of those “abstract notions,” those “myths” about inalienable rights. It gives too little credit to the history of English constitutionalism.

The “Victorian gentlemen” who made Canada believed it their task, first and last, to secure the blessings of British liberty for their fellows and their descendants. It is more than time to restore to them the dignity

When they spoke of rights, the founders were thinking of freedom from arbitrary arrest or detention, freedom of speech and thought, freedom of worship, freedom to choose one’s government in free elections, and above all, freedom from oppression by authority.

¹ Ramsay Cook, Canada 2000: “Towards a Post-National Canada,” *Cité Libre* (Fall, 2000), 82; F. H. Underhill, *The Image of Confederation* (Toronto: Canadian Broadcasting Publications, 1962), 3; E. R. Black, *Divided Loyalties: Canadian Concepts of Federalism* (Montreal and Kingston: McGill-Queen’s University Press, 1974), 4.

² Donald Creighton, *The Road to Confederation: The Emergence of Canada, 1863-1867* (Toronto: Macmillan, 1964), 142-3.

and honour that is their due and to transform them from simple-minded Victorian forerunners to intelligent and thoughtful men who designed a great and innovative political constitution.

The Fathers of Confederation are the 33 men who drafted Canada's constitution at the Quebec Conference of 1864. Once drafted, the Quebec scheme went to the colonial parliaments for ratification. The debates between the Fathers — most of them on the front benches, all of them strongly in favour of Confederation — and the backbenchers, whose “yea” vote was required if Confederation was to proceed,

are our best source of the Fathers' intentions and our best source of British North American opinion. We may call the Fathers and the ratifying legislators, collectively, *founders*. In those ratifying debates we discover beyond doubt that Canada's founders were informed about the arguments of the British Enlightenment, that they understood the idea of the social contract, and that they did their best to secure for all time the rights and liberties of British North Americans.

What the founders meant by “rights” is today perhaps better captured by the term “civil liberties.” Certainly the rights they cherished were not our present-day positive rights, which so often resemble nothing more than political pleas for the government's interference on behalf of this or that policy. Rights as our founders conceived them — “civil liberties” — describe limits on the government's interference; they mark out the areas of individual freedom and responsibility. When they spoke of rights they were thinking, for example, of freedom from arbitrary arrest or detention, freedom of speech and thought, freedom of worship, freedom to choose one's government in free elections. They were thinking, above all, of freedom from oppression by



Parliament buildings from Major's Hill Park in Laurier's time.

authority, even democratically elected authority.

There were differences among them and, unsurprisingly given the centrality they accorded individual rights and freedom, one difference predominated, becoming in fact the *leitmotif* of the entire process that gave birth to Canada. Some of the founders were content to argue that individual rights would be preserved in the proposed union under the twin protections of parliamentary government and federalism. But others, among them the most vociferous opponents of Confederation, believed that union would impair the colonists' rights, and that the new country would be a poorer bulwark against tyranny and authoritarianism than the colonies it would subsume.

It is when we review this debate on means to preserve individual liberties that we find our true founders: men who were well read, intellectually vigorous, and rhetorically accomplished. Canada indeed stands on stronger and more philosophical foundations, foundations more steeped in a concern with liberty, than Creighton supposed. We have every reason to be proud of those whose minds and energies gave us Canada.



Edmund Burke

What They Read

In the debates on Confederation in the provincial parliaments, the ratifying debates, as I have called them, we find appeals to John Locke, the most prominent thinker of the British Enlightenment, and to William Blackstone, whose writings on the British parliamentary and legal tradition derive from Locke. Speakers referred to Thomas Hobbes and Sir Edward Coke. They drew arguments from Edmund Burke, especially on the issue of

parliamentary representation and the duties of legislators. Some had read Jean-Louis De Lolme’s invaluable tome, *The Constitution of England*, which argues for the superiority of the English Constitution to European constitutions in securing the rights of the people; it was available in the colonies from early in the nineteenth century. Many were familiar with John Stuart Mill’s *Representative Government*, which was published in 1861. They paid attention especially to Mill’s argument for an effective second chamber.

They studied ancient “confederations” and political alliances. Thomas D’Arcy McGee and Joseph Cauchon were moved to publish general books on the nature of federalism. Some referred to the *Federalist Papers* by the American Fathers, Alexander Hamilton, James Madison, and John Jay; all knew of them. Many referred to aspects of the American Constitution and some to clauses in the constitutions of individual American states. All took an interest in the secessionist constitution of the American South.

Some cited the example of New Zealand, which had experimented with a form of federal union in the previous decade. They read European constitutions. They were familiar with British history. They knew, if only in outline, the story of the English Civil War and the arguments for the restoration of the English Parliament in 1688.

In each province legislators drew lessons from local history. The Canadians rehearsed the story of the 1837-38 rebellions, the arguments for and against the 1840 legislative Union of Upper and Lower Canada, and the story of the union’s aftermath. Lower Canadians reeled off facts about life under British rule before and after 1791, the date at which Lower Canada was given a representative assembly. George-Etienne Cartier was lavish in his praise of British political institutions and the security provided for individual freedoms; he was not the only one to speak in that vein. All recalled the “struggle for responsible government” in their province. Speakers cited Lord Durham’s *Report* of 1839 on the subject of responsible government, and on the role of the political executive, the second chamber, and the individual legislator.

They read British newspapers of the 1860s. (Recall that in those days the British were contemplating an extension of the franchise, continuing the process of incremental electoral reform, one notable milestone of which had been The great Reform Act of 1832.) They routinely read records of debates in the British Parliament.

In short, it is impossible to read the debates on Confederation in the British North American parliaments without coming to the conclusion that the Fathers and the local legislators understood the history and merits of parliamentary government and thought deeply about the consequences of retaining parliamentary institutions in a federal regime. Canada was

the first country to “marry” parliamentary institutions and federalism. We forget how novel the proposition was; today most free countries have found their way to a version of the Canadian formula. Canada’s founders were not merely nation-builders; they were innovators on a grand scale.

Canada was the first country to “marry” parliamentary institutions and federalism. We forget how novel the proposition was.

How We Lost Our History

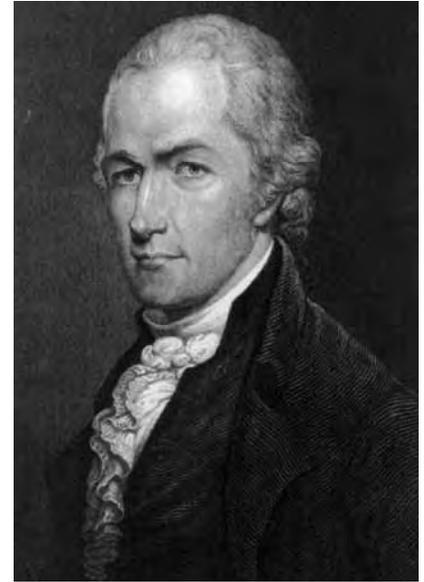
In the 1970s and 1980s historians turned from the study of constitutions and regimes to local, gender, ethnic, and economic history. It has to be said that these fields had been neglected. And who would want to restrain the scholarly penchant for diving into exciting new areas of research? But the unfortunate consequence of the “new social history,” as it is called, was that historians neglected Canada’s national story; they had less inclination to think about Confederation and less reason to examine, teach, or preserve the primary documents on Canada’s making. The notion that there was little of theoretical interest in the documents no doubt made the change of focus easier.

Political scientists, too, gave up the examination of primary texts. But they did not give up the idea of national history. They wrote a new one that had little to do with the historical record. Throwing aside the documentary evidence, they gave Canadians a new account of Confederation and Canada’s first decades. The seminal teaching is found in University of Toronto political scientist Gad Horowitz’s famous essay, “Conservatism, Liberalism and Socialism in Canada: An Interpretation.” Published in the *Canadian Journal of Economics and Political Science* in 1966, it has been reprinted many times and is still required reading in political science and Canadian studies programs across the country.

Horowitz argued that John Locke’s influence in British North America was profoundly modified by a communitarian philosophy antithetical to Locke’s robust idea of individual freedom; this communitarian philosophy supposedly originated with the United Empire Loyalists and was later developed by Canada’s Fabian socialists. But Horowitz advanced no study of Loyalist statements or Fabian writings to support this contention. He said very

little about what the British North Americans might have been reading on any subject and almost nothing about the debates at Confederation. His argument relied on the idea — drawn from Hegel and Marx — that the modern world exhibits a steady progression toward socialism. Europe had developed

sturdy forms of socialism — so Horowitz contended — and Canada with its vaunted Loyalist inheritance could be expected to follow course. (Remember that Horowitz was writing in the 1960s.) The United States,



Alexander Hamilton

Europe had developed sturdy forms of socialism — so University of Toronto political scientist Gad Horowitz contended — and Canada with its vaunted Loyalist inheritance could be expected to follow course.

however, the country from which the Loyalists had fled, was almost entirely devoid of communitarian philosophy, and for this reason was doomed to fall behind. In short, Horowitz argued that Canada had the potential to progress beyond the teachings of John Locke and the British Enlightenment; the United States did not. In the

United States, scholars have challenged every aspect of Horowitz’s argument but in Canada it retains much of its original force.

How often it is asserted in introductory Canadian political science textbooks that Americans hew to “life, liberty, and the pursuit of happiness,” while Canadians prefer “peace, order, and good government.” How often is “peace, order, and good government” interpreted to mean that Canadians *qua* Canadians favour gun control at home and



Sir John A. Macdonald

peace-keeping measures abroad, and are generally more ready than Americans to sacrifice a degree of individual liberty in aid of communal interests. Undoubtedly the popularity of Horowitz's teaching owes something to its anti-American thrust; it inculcates the idea that Canadians are superior to Americans because, in contrast to our individualist, rights-obsessed neighbours, we have a generous sense of community and understand as Americans do not that a good country must develop a hearty sense of communal good.

As the study of primary sources declined, textbook authors came more often to draw their materials from other textbooks. For information about John A. Macdonald, historians turned to Creighton; on Confederation, political scientists consulted Horowitz. Versions of what we might call the Creighton-Horowitz paradigm proliferated, but without recourse to the documents no one was in a position to query its assumptions. And thus mistakes multiplied.

The Battle for Inalienable Rights

A mistake of signal importance — one still widely accepted in academe — is the idea that Confederation pitted Tories against Liberals, with the Tories favouring colonial union and the Liberals opposing. Thus it is often said that Canada is a “Tory party invention,” a country made by Sir John A. and his colleagues. The facts prove otherwise.

Almost all who participated in the constitution-making process in the 1860s were strongly of the view that Confederation was not a matter for expression of ideological and partisan interests. Liberals and independents, as well as Tories, took part in drafting the Quebec Resolutions. All the Fathers knew that the national legislature they were designing — soon to become the Parliament of Canada — should allow the contestation of political parties for office; all knew that parliaments should welcome the admission of ideologies and arguments on a footing of equality. They knew that to assign priority to one ideology — to assume a preference for Toryism, for example — would have the effect of entrenching oligarchy.

In the ratifying debates the crucial division was not between the Liberal and Tory parties, but between those favouring the federation of the colonies and those opposing. And on the issue of federation there were Liberals and Tories (and independents) on both sides. The great question was this: would Confederation undermine the colonists' rights? Those favouring Confederation (we may call them Confederates) argued that there would be no diminution of liberty under the new constitution because it would entrench the familiar features of parliamentary government that secure it, to wit, the right of political dissent within the legislature and “outside,” that is, among the general population.

The opponents of Confederation (the anti-Confederates) were not convinced. They agreed that parliamentary government secures liberty. But the Quebec Resolutions proposed to harness

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parliamentary institutions to a variant of American-style federalism. The colonists would be obliged to obey two levels of government.

Thus, the typical anti-Confederate argument took this form: we in New Brunswick (let us say) do very well with our provincial legislature. All domestic matters are settled by our own government after due deliberation. All matters can be reviewed and amended. We are free to debate all political issues in the public arena, to argue for repeal of unsatisfactory political measures, and to vote out an unsatisfactory government. But if Confederation wins the day, some matters affecting New Brunswickers will be settled by a national legislature, in which New Brunswickers will be in a minority. We may have to live with laws that we cannot countenance and that we cannot see any prospect of changing. We will be giving up our present, perfect freedom to live by laws of our own making.

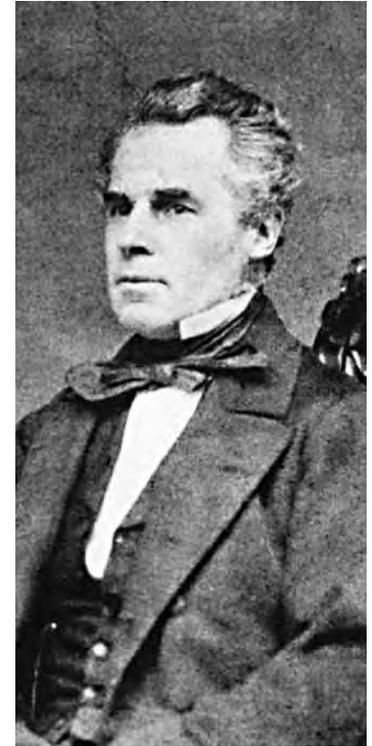
Confederates such as George Brown said repeatedly that the federation's general government would legislate only on general matters, that is, on matters affecting equally every individual in the federation as a whole. Matters affecting particular regions, or particular traditions and religions, could fall to the provinces. George-Etienne Cartier agreed. Reading the debates today it is apparent that the Confederates were thinking in terms of what would come to be called "watertight compartments." We forget today that the parliamentary government with which the colonists were familiar was designed for a unitary state. We forget too how novel was the idea of federalism. Americans with good reason like to think of themselves as the First New Nation. But Canada can be called the second.³

Let me amplify the idea that in the decade before Confederation most of Britain's North American

³ On the novelty of American federalism, and the apparent difficulties of reconciling it with British parliamentary institutions, see Donald Smiley, *Canada in Question: Federalism in the Eighties* (Toronto: McGraw-Hill Ryerson, 1980), 9-16. Note the comment on page 16: "Federalism as the term is now used was an American invention, one of the most important and original inventions in the history of the art of government."

colonies or provinces (the terms were used interchangeably) had come to enjoy considerable political independence.

In 1848, or shortly thereafter, the province of Canada, the Maritime provinces and Newfoundland had been granted "responsible government," the constitutional principle or practice requiring the government of the day to maintain the confidence of the majority of representatives in



George-Etienne Cartier

the parliament's elective chamber. Why the British government granted this measure is to me something

of a mystery. Lord Durham had recommended it and the colonial constitutionalists had ardently campaigned for it; it is correct to speak of a colonial "struggle for responsible government." I understand that much. But the fact is that with the adoption of responsible government, each province or colony came to resemble a unitary state. Nominally, they were still British dependencies, but for all practical purposes — on domestic matters, at any rate — Britain's

powers of interference were severely curtailed. The colonies had the character of small sovereign nations. And they were stiff with pride; they boasted of their parliamentary institutions and their ability to secure their people's freedoms.

Listen to Stewart Campbell in Nova Scotia: "I am a free man. I claim the rights and attributes of a free

The colonies had the character of small sovereign nations. They were stiff with pride; they boasted of their parliamentary institutions and their ability to secure their people's freedoms.



George Brown

man, speaking in the presence of a British free assembly. I have the right to criticize the judgement they [the Confederates] formed and an equal right to give expression to my own.” William Lawrence, another Nova Scotian, boasted: “We are a free people, prosperous beyond

doubt, advancing cautiously in wealth... Under the British Constitution we have far more freedom than any other people on the face of the earth.” More freedom than any other people on the face of the earth! That is some boast!

Newfoundland’s George Hogsett made a similar contention: “We have here a constitution for which the people nobly fought, and which was reluctantly wrung from the British government. We had the right of taxing ourselves, or legislating for ourselves, and were we then...to give up all the rights we possess, rights which, if properly worked and administered, would secure us all the advantages and prosperity a people can want or require?”

At Confederation, then, the question was this: would a province’s population suffer a diminution of rights and freedoms? Would the rights of Nova Scotians, say, be less secure in the federal system contemplated by the Fathers in the Quebec Resolutions? Would the rights of Lower Canadians be less secure? The advocates of Confederation had to prove to the satisfaction of the anti-Confederates that the union of the colonies and the constitutional division of legislative powers contemplated at the Quebec Conference would not impair the freedoms to which British North Americans had become accustomed.

The Canadian “Imaginary”

It is surprising how little sympathy Creighton had for arguments about “the inalienable rights of man.” He resembled Gad Horowitz in this one respect: both wanted a more communal country, a less individualistic Canada. Creighton’s vision is “conservative,” or “Tory,” or “British.” Horowitz’s is “socialist.” But both had at heart the idea that Canadians should be more united in outlook; less fragmented, more certain about national purpose. Creighton is now gone and Horowitz has turned to other areas of academic inquiry. But their students remain, and their students’ students. And among these “grand-students” there is today a pervasive sense of failure. Canada is not more united. Our socialist parties are languishing. It is becoming more difficult to distinguish the Canadian and American political ways of life.

In *The European Roots of Canadian Identity*, University of British Columbia political scientist Philip Resnick describes Canada as a country plagued by a “persistent sense of doubt” about Canadian values.⁴ We do not know who we are, he says; we do not know whether the nation will endure. In 2009, Rudyard Griffiths of the Dominion Institute published a small volume with the promising title: *Who We Are*.⁵ As the reader quickly discovers, however, Griffiths is urging us to *reinvent* Canada, to remake our idea of this country.

Griffiths and Resnick use a term now fashionable in the social sciences, but nonetheless puzzling: “imaginary,” employed as a noun. One speaks of the Canadian “imaginary.” Both authors argue that Canadians must develop a *new* imaginary. Griffiths does not attempt the task; he wants to see it done but cannot do it himself. It should be, ideally, a collective project. Resnick boldly suggests that we take revolutionary France as our model; we should develop an imaginative appreciation of our

At Confederation, the question was this: would a province’s population suffer a diminution of rights and freedoms?

⁴ Philip Resnick, *The European Roots of Canadian Identity* (Peterborough, Ont.: Broadview Press, 2005).

⁵ Rudyard Griffiths, *Who We Are, A Citizen’s Manifesto* (Vancouver: Douglas and McIntyre, 2009).

European roots. In neither book does Confederation get more than a passing mention.

Even the famous McGill University philosopher and social commentator Charles Taylor has succumbed to the current fad; in his 2004 book, *The Modern Social Imaginaries*, he appears to be suggesting that Canadians no longer live with the “imaginary” of the British Enlightenment.⁶ We have moved beyond it. Something else lies ahead — something unknown.

Canadians are up a creek without a paddle! That seems to be the message. After more than 140 years of life together we are still without a common purpose and still uncertain about our goals. We cannot get our “imaginary” together. The instruction book issued in 1867 was inadequate in its day and is now hopelessly outdated. Something like this teaching appears in most introductory textbooks. It is rehearsed in lectures. Almost every first-year student in political science absorbs it, and reproduces it in essays and on examinations.

In the debates on the Meech Lake and Charlottetown Accords, when Canadians were attempting to overhaul their founding institutions, no one, to the best of my knowledge, asked how the Canadian Constitution had been made in the first place. No one entertained the idea that in the records of our first making we would find information about how to draft and ratify a constitutional document; no one supposed that the Fathers of Confederation could tell us anything about the principles of parliamentary government, or the grounds of liberal democracy. And no one supposed that what is required in a liberal democracy above all is not a national consensus about national purposes but institutions that allow free and continuing deliberation on all measures that come to the public’s attention.

⁶ Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004).

The Consent of the Governed

On Feb. 15, 1865, Legislative Councillor David Christie said in the Province of Canada debates on the Quebec Resolutions that:

life, liberty and the pursuit of happiness are the unalienable rights of man, and... to secure these rights, government are instituted among men, deriving their just powers from the consent of the governed. This is the secret strength of the British Constitution, and without a full and free recognition of it no government can be strong and permanent.

The secret strength of the *British Constitution*? Did the parliamentary reporter slip up? Did Christie really describe the *British Constitution* in the famous words of the *American Declaration of Independence*? But there was no mistake in reporting. Speeches in the Canadian debates

on Confederation were prepared for publication; legislators had the opportunity to revise. Not everyone crashed into the deliberations with Christie’s flamboyance but all knew they were participating in a momentous decision. They were proud of what they said and they wanted to leave an accurate record.

Let me sum up Christie’s statement in more sober language. He argued that British North Americans, no less than citizens of the United States, were beneficiaries of the 17th-century natural-

law argument for the equality of man. British North Americans, like their neighbours to the south, were John Locke’s heirs. Most participants in the Confederation debates agreed with Christie on this matter (though not a few thought that British institutions offered a superior guarantee). In the Province of Canada debates, John A. Macdonald argued that the constitution of the United States was “one of the most skilful works which human intelligence ever created... one of the most perfect organizations that ever governed a free people.” Of

In 1865, did Legislative Councillor David Christie really describe the British Constitution in the famous words of the American Declaration of Independence?

course, he and Cartier and George Brown had thought of a few improvements.

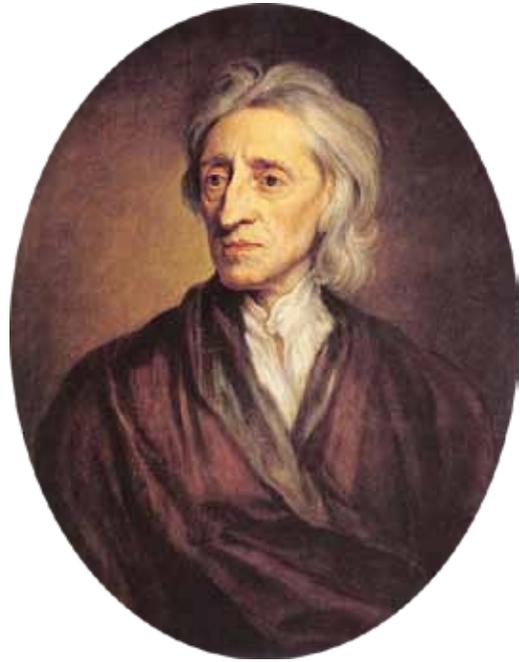
Christie claimed as part of the British heritage the two most notable features of the political tradition that originated in the British Enlightenment: the “unalienable rights of man,” and the principle of popular sovereignty, which he defined, borrowing Jefferson’s language, as the requirement that governments derive their just powers from the consent of the governed. As Jefferson’s formulation indicates, the propositions are intimately related. And yet, curiously, Canadian historians and political scientists seldom acknowledge the connection, and do not explore it.

It is commonly said that some sort of security for individual rights obtained before the introduction in 1982 of Canada’s constitutional bill of rights, the Canadian Charter of Rights and Freedoms. But the character of that security is not spelled out. It is also said that at Confederation there was no explicit provision for consulting “the people.” Popular sovereignty — the acknowledgement that legitimate government rests on the consent of the governed — is described as a feature of the American constitution but not the Canadian.

Thus in his book *Constitutional Odyssey*, University of Toronto political scientist Peter Russell asserts that the Fathers of Confederation regarded popular sovereignty as a “dreadful heresy.” He continues: “[At] Canada’s founding its people were not sovereign and there was not even a sense that a constituent sovereign people would have to be invented.”⁷ But on this subject Russell is wrong. He did not have the documents before him. He was betrayed by the failure of two generations of scholars to consult and discuss our founding debates. We were all betrayed.

The overwhelming majority of Fathers and ratifying legislators — Confederates and anti-Confederates,

⁷ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1992), 3, 33.



John Locke

Liberals, Tories, and independents, frontbenchers and backbenchers — argued that the new constitution had to be ratified by an appeal to “the people.” Indeed, there was virtually no dissent on this topic. A new constitution requires the “consent of the governed.”

Locke’s formulation runs as follows: “For no government can have a right to obedience from a people who have not freely consented to it.” In the Canadian Legislative Assembly, James O’Halloran said, “The people are the only rightful source of all political power.” In the Nova Scotia Assembly, William Lawrence — that firebrand again — said, “The principle which lies at the foundation of our constitution is that which declares the people to be the source of political power.” In 1870, in the Legislative Council of British Columbia, which was considering

whether to join Confederation, E.G. Alston stated: “I am not disposed to regret the occurrence of the difficulties in Red River, for it will teach the Canadian government, and all governments, that though you may buy and sell territories, you cannot transfer the human beings therein, like so many serfs and chattels, to a fresh

“The principle which lies at the foundation of our constitution is that which declares the people to be the source of political power.”

allegiance with impunity; that the consent of the people must be first obtained; and that though the soil may be sold, the soul is free.”

“The soil may be sold, the soul is free.” Is that a grand statement? Yes! Is it a Lockean statement? Yes!

Think again about Christie holding forth on the rights of man. What was the occasion? Was the Parliament of the Province of Canada merely passing the time of day, discussing in an offhand way the union document that had been drawn up at Quebec the previous fall? No; as early as 1858, the matter of obtaining “the people’s consent” to the union of the colonies had been discussed between colonial leaders and the British Colonial Office. And at that time it had been decided that the principle of popular consent would be satisfied by a majority vote in favour of union in each colonial parliament.

In due course (1864), the colonial elites met at Quebec to draft the union document; they were then required to return to their provincial parliaments to put the necessary ratifying resolution. No province could be yanked into Confederation without that yeas vote. But in each province, as soon as the ratifying resolution was tabled, fierce debates broke out. Not all members could be persuaded that a parliamentary vote would suffice. In every province, there were some — and in Nova Scotia many — who held out for ratification by referendum, that is, by household vote.

Space does not permit me to discuss the fascinating quarrels in those provincial parliaments. The important point is that all participating were convinced that the Lockean principle should be followed: “the people” had to be consulted. The quarrels were about how to consult them.

Readers may object that a majority vote in the provincial parliament would fall short of ensuring that everyone who was to be subject to the laws of the new constitution had been consulted. If you are such a reader, I will say only that you have John Locke on

your side, and Locke sets the bar high: “No one can be governed without his consent.” (And with Locke’s permission, I will now amend the statement to include women: “no one can be governed without her consent.”) In practice, however, it is almost impossible to imagine means to secure every last person’s consent. Legislators asked whether it would suffice to put the parliamentary resolution immediately after a general election. They asked whether the raw majority that results from a referendum is preferable to the deliberative majority produced by a parliament. To repeat: there was perhaps no topic more hotly debated at Confederation than this question of means to put flesh on Locke’s requirement that each and all consent.

What Do Canadians Have in Common?

The question is not easy to answer. Twenty-first-century Canadians are enmeshed in a web of law, policy, and governmental practices. Some think we have too many laws; others are deeply involved in projects to expand the regulatory state. We change our minds about policy and politics as we age; we change our minds by the season. We quarrel among ourselves about the positive rights defined by our superior courts and human rights tribunals. We quarrel about our responsibilities.

Indeed, we quarrel about whether as private citizens we can or should have beliefs and attitudes in common. Sometimes we say that what we have

in common is our tolerance of differences.

Let me suggest that what we have in common is our citizenship in a country made by the Fathers of Confederation and the ratifying legislators. Many things have changed in this country since Confederation, but Canada is still a federal regime governed by parliamentary institutions. Its foundations are rooted in the political philosophy of the European Enlightenment, and Locke’s philosophy of liberty. What we have in common is that precious heritage of equal liberty and consent. •

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WHERE TO FIND THE DOCUMENTS

For excerpts from debates on Confederation in the provincial parliaments see: Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, eds. *Canada's Founding Debates* (University of Toronto Press, 2003). It is available in French. *Débats sur la fondation du Canada*, Édition français préparée par Stéphane Kelly et Guy Laforest (Les Presses de l'Université Laval, 2003).

For records of the Quebec Conference of 1864, see: G. P. Browne, ed., *Documents on the Confederation of British North America* (Carleton Library Series 215, McGill-Queen's University Press, 2009).

Two helpful books are: Christopher Moore, *1867: How the Fathers Made a Deal* (McClelland & Stewart, 1997); and Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (McGill-Queen's University Press, 2007).

Jean-Louis De Lolme's *Constitution of England* (1771) has been reissued by The Liberty Fund in a scholarly format (2007). To my great chagrin, there is no mention of De Lolme's influence in British North America. His importance for the development of political freedom in Britain and in the United States is noted. About Canada, nothing is said.



About the Author

Janet Ajzenstat is professor emerita of political science at McMaster University in Hamilton. Her latest book, *The Canadian Founding: John Locke and Parliament* (2007), won the Osgoode Society for Canadian Legal History's 2009 John T. Saywell Prize for the best book on Canadian legal and constitutional history. Her current research interests include comparative constitutional law, Canadian democracy and the Canadian political tradition.

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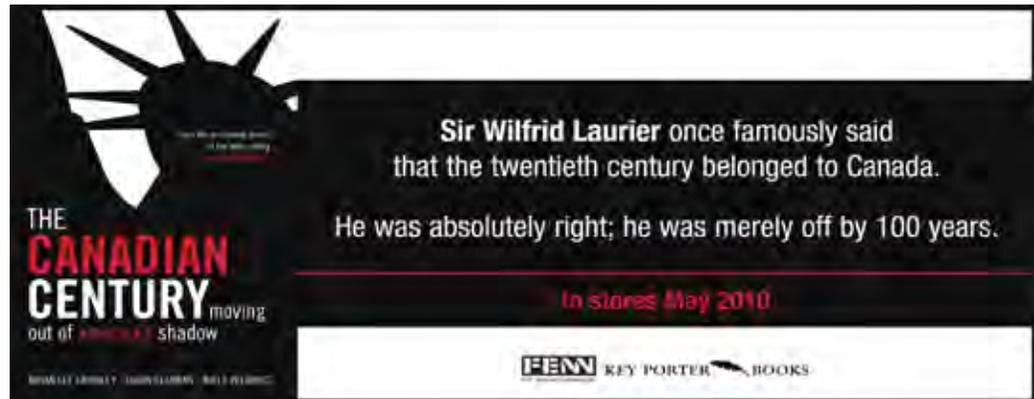
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