2006

Edmund Burke, John Whyte and Themes in Canadian Constitutional Culture

David Schneiderman

Georgetown University Law Center, ds349@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/207

31 Queen's L.J. 578-597 (2006)
Edmund Burke, John Whyte and Themes in Canadian Constitutional Culture

31 Queen's L.J. 578-597 (2006)

David Schneiderman
Visiting Professor of Law
Georgetown University Law Center
ds349@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/207/
SSRN: http://ssrn.com/abstract=1434674

Posted with permission of the author
Edmund Burke, John Whyte and Themes in Canadian Constitutional Culture

David Schneiderman

John Whyte, the author observes, is committed to the idea that there are moral foundations to Canada's constitutional order and that these foundations are derived from liberal principles. This paper compares Whyte's liberal and organicist constitutionalism to that of the eighteenth century British political thinker, Edmund Burke. Three themes are predominant in Whyte's work: those of liberty and security, unity and diversity, and constitutional change. Drawing out these themes in both Whyte's and Burke's constitutional thought, the author argues that Whyte has a sound historical basis for deriving Canadian constitutional practices from liberal principles ordinarily associated with Burke. The author concludes by asking this question: if Canadian constitutionalism can be reduced to liberalism, what distinguishes Canada from the United States, and more critically, what will prevent Canada from being absorbed into a larger North American political unit?

Introduction

I. Themes in John Whyte's Work
II. Themes in Burke's Constitutionalism
Conclusion

Introduction

For much of the late nineteenth and twentieth centuries, it safely can be said that English-Canadian constitutional law scholarship was not overtly concerned with the moral questions raised by the exercise of political authority. We also could say that Canada's first constitutional

* Faculty of Law and Department of Political Science, University of Toronto and Visiting Sabbatical Scholar, Georgetown University Law Center. I am grateful to Martha Bailey for having organized the welcome and long overdue tribute to John Whyte; to Jean Leclair, Rod Macdonald and John Whyte for comments; and to Pierre Asselin for research assistance. I am pleased to acknowledge research funding support from the University of Toronto Faculty of Law Summer Assistantship Programme and the Social Sciences and Humanities Research Council.
law text, A.H.F. Lefroy’s *Law of Legislative Power in Canada*,\(^1\) initiated this trend. A.V. Dicey, in a review of the book, emphasized the aridity of textual style adopted by Lefroy. Though an “excellent” work, it amounted to a mere legal “code” — an attempt to “digest a department of law into a series of articles, followed by explanatory comment.”\(^2\) It can be said, finally, that John Whyte has been the vanguard in this department of law, inspiring those of us devoted to the idea that there is a deep structure at work in Canadian constitutional law — a “deeper common conception of the basic constitutional order”\(^3\) — and that it is the task of constitutional theorists to mine it.

But constitutional theory, as Martin Loughlin has argued, is more than the moral theorizing associated with political philosophy. Rather than involving an inquiry into ideal forms, thereby being “absorbed” into philosophy, constitutional theory should be preoccupied with “actually existing constitutional arrangements.”\(^4\) It is the task of the constitutional theorist, then, to locate institutions and patterns of behaviour that make up the constitutional practices of a given polity. This neatly sums up John Whyte’s methodology. Constitutional theory, for Whyte, entails a search for the moral foundations of Canadian constitutionalism\(^5\) as derived from its practice. To speak of moral foundations is not merely to point to an ideal set of abstract principles but, following Richard Rorty, to say they have a point only “insofar as they incorporate tacit reference to a whole range of institutions, practices, and vocabularies of moral and political deliberation.”\(^6\) There are ideas, practices and

---

vocabularies embedded within Canada's constitution, Whyte insists, and they are ideas derived from liberal principles. It safely can be said that John Whyte is Canada's foremost theorist of the liberal foundations of Canada's constitutional order. In this paper, I argue that Whyte has a sound historical basis for deriving Canadian constitutional practice from liberal principles. I show this by tracing his constitutional ideas back to those of the eighteenth century thinker Edmund Burke.7

Let me explain why Burke helps to illuminate Whyte's views about the moral foundations of Canadian constitutionalism. Political theorist Sheldon Wolin has described two distinct schools of thought on the nature of what he calls "organizational life."8 The first Wolin labels "organicist." Associated with the eighteenth-century politician and writer Edmund Burke, organicists view organized society as responding to complex historical and social environments. Political society, according to organicist thought, must take account of the needs of its own members, rather than imposing upon them alien modes of thinking. In contrast are the "rationalists," who arrange society according to specific purposes. Wolin associates them with the rationality of "efficiency."9

Whyte's constitutionalism, I want to argue, is liberal and organicist. For these reasons, there are interesting parallels between Whyte and Burke. Burke's philosophy helps to illuminate Whyte's views on the moral foundations of Canadian constitutionalism. Those aspects of Burke's thinking that are liberal, pluralist and anti-imperialist in orientation join nicely with aspects of Canadian constitutionalism at its origins.

7. There is something of a tradition in drawing connections between Burke and contemporary legal theory. This essay might be viewed as yet another contribution to this literature. See e.g. Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence" (1985) 94 Yale L.J. 1567 (tracing Burke's influence on Bickel); and Peter Read Teachout, "Soul of the Fugue: An Essay on Reading Fuller" (1986) 70 Minn. L. Rev. 1073 (tracing Burke's influence on Lon Fuller).


I am emphasizing here the liberal enlightenment side of Burke — the side that Harold Laski trumpets — the Burke whose "springs of...compassion were as wide as they were deep" gives "substantial content" to the liberal political philosophy associated with Locke.\textsuperscript{10} It is not the Burke highlighted in C.B. Macpherson's little book — the "devout defender of hierarchy, prescription and inherited rights"\textsuperscript{11} — but, the one that Uday Singh Mehta draws out well in \textit{Liberalism and Empire}.\textsuperscript{12} Mehta's verdict is that Burke's attention to "local conditions"\textsuperscript{13} made his non-parochial version of liberalism favourable to conditions of pluralism and openness: "an openness to the world, to its unavoidable contingencies, surprises, and ambivalences."\textsuperscript{14} Mehta is inspired by Burke's almost violent reproach of the conduct of the British East India Company and Governor General Warren Hastings in India, and Burke's sympathetic appeal to the interests of South Asians. Mehta celebrates this Burke, for whom "difference...cannot be assimilated" and for whom the project of empire is "no more than a conversation between two strangers."\textsuperscript{15}

Much ink has been spilled on Burke's stand on India, Ireland and America.\textsuperscript{16} Much less attention has been paid to the import of his

\textsuperscript{12} Uday Singh Mehta, \textit{Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought} (Chicago: University of Chicago Press, 1999).
\textsuperscript{13} \textit{Ibid.} at 41.
\textsuperscript{14} \textit{Ibid.} at 42.
\textsuperscript{15} \textit{Ibid.} at 22 [emphasis in original].
positions in the face of Britain’s newly conquered subjects in Canada.\footnote{The last two works cited in note 16 are exceptions in a way. Both O’Brien and Lock devote a few pages to Burke’s quiet defence of Roman Catholicism in Quebec during the Quebec Act debates. Christopher Moore links up Burke’s influence on thinking at the time of Confederation, a different period than the one addressed here, particularly to Edward Whelan. For Moore, Burke’s influence on the 1867 framers lies in the realm of promoting parliamentary government in confrontations with the monarch. This is exemplified in Edmund Burke, \textit{Thoughts on the Cause of the Present Discontents}, 3d ed. (London: J. Dodsley, 1770). See Christopher Moore, 1867: How the Fathers Made a Deal (Toronto: McClelland & Stewart, 1997) c. 3.} Burke’s views on Canada, it turns out, were quite complex. This paper begins the task of situating Burke’s thought in the colonial era in Quebec, suggesting continuities between his thinking and the origins of the modern Canadian state. Much more work needs to be done to connect Burke’s ideas to the ruling ideas of British imperial policy in Canada — work that will not be done here. Rather, my modest aim is to connect Whyte’s claims about Canada’s liberal origins to liberal thinking, as represented by Burke, in the eighteenth century. This kind of study is instructive, as it is in this period that foundational decisions were made that would determine the constitutional course British North America ultimately took. It is not that imperial authority at the time invoked Burkean language and discourse; “I have always been in the Minority,” Burke is reported to have said.\footnote{Thomas W. Copeland, ed., \textit{The Correspondence of Edmund Burke, 1729-1797}, vol.1 (Cambridge: Cambridge University Press, 1958) at 285, n.1.} Burkean discourse, I would argue, emerged more clearly in the mid-nineteenth century.\footnote{See e.g. selections from the Elgin-Gray correspondence in James Bruce, Earl of Elgin & Henry George Grey, Earl of Grey, \textit{The Elgin-Grey Papers, 1846-1852}, ed. by Sir Arthur G. Doughty (Ottawa: J.O. Patenaude, 1937).} Rather, it is that colonial policy in Quebec ended up largely consistent with some of Burke’s expressed sentiments on colonial policy in India and America.

I begin by drawing out some principal themes from John Whyte’s work and then contrast these themes with Burke’s thinking. The three themes are: (1) liberty and security; (2) unity and diversity; and (3) constitutional change.

\textit{Thoughts on the Cause of the Present Discontents}, 3d ed.
I. Themes in John Whyte’s Work

Whyte has been clear about the values that constitutionalism promotes: they concern both liberty and security. In 1997 he wrote, “Political stability is the chief object in constructing the basic framework of the state.” Stability lays the foundation for harmony and social solidarity between citizens, making secure those preferences made in the private sphere:

The good society is the product of personal choices — choices of commitment, investment and sacrifice — and the condition of making these choices is that one’s social contributions will not be pirated through conditions of revolutionary changes in the political order, by those who sponsor such change.

This theme of liberty and security runs throughout much of the work that I have examined. Constitutionalism, according to this account, is about limitations on government and about providing minimum levels of security against arbitrariness and tyranny. “Legalism,” premised upon rule of law principles and judicial review, is the surest means of reconciling both popular sovereignty and the desire for security and predictability. “Law’s ideal,” Whyte writes, “is to offer liberty and development while it offers restraint and continuity.” This is why Whyte, in the controversy that has arisen over judicial review under the Charter, has weighed in on the side of the judges. The legalism associated with judicial review can both provide stability and enrich

21. Ibid.
26. Ibid. at 453.

D. Schneiderman 583
political outcomes: "a judiciously-administered Charter can point [citizens] to sound political accommodations and, perhaps, help create the peaceable society."28 Let me add, parenthetically, that Whyte continues to expect the judiciary to make valuable contributions to public policy when — and the recent Chaoulli case,29 striking down a Quebec law on privatized health care, is the best example of this — there is a lot of evidence to the contrary.

The second prominent theme in Whyte’s work concerns the value of both unity and diversity captured in Canada’s federal arrangements. The unity angle is represented by his insistence that there exists a Canadian "nation." This nation is never fully defined — his task is more modest, he says, believing that we can never be "wholly self-defining."30 One might find the source of unity in a "liberal conception of justice" premised upon the equality of persons. This might be exemplified, for Whyte, by the guarantee of rights and freedoms laid out in the Charter.31 Diversity through federalism also promotes liberal legalism by establishing competing centres of power, and so acts as a prophylactic for vulnerable communities from the tyranny of the national majority.32 Federalism “establishes the conditions of ongoing mediation . . . and it offers principles that guide the practices of accommodation.”33 If Whyte appreciates that provinces both are countervailing institutions and are

31. At the symposium where an earlier version of this paper was presented, I suggested that, based on his earlier writing, this unity for Whyte was exemplified by the judicature section (s. 96) of the 1867 Act. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Whyte commented that his views since have changed — as evidenced by his promotion of aboriginal justice systems in Saskatchewan — and so this source of unity no longer is available to him.
best suited to respond to local concerns, he is also attentive to the fact that this might lead to illiberal outcomes. This desire to balance both unity and difference is best represented in Whyte’s innovative scheme for resurrecting the federal trade and commerce power, set out in his study for the MacDonald Royal Commission. This was a proposal for a national regulatory power over trade and commerce, together with provincial paramountcy and a national legislative override—a masterful attempt at capturing the typically Canadian ambivalence between centre and periphery.

The third theme concerns constitutional change. Liberal constitutionalism, according to Whyte, does not insist on stasis, only on orderly change; not on frozen rights, but on prudence and humility in the alteration of rights. “We are born into past commitments and inherit them,” and this requires that Canadians “value what we are.” The English system of common law perhaps best represents this inheritance of orderly change, resulting in deference to the established order and ways of doing things, but not necessarily in paralysis. Whyte’s opposition to the 1997 Meech Lake Accord can be read as an expression of prudence as regards prior commitments. Whyte voiced concerns not only about the Accord’s “more general impact in terms of fundamental Canadian political values” but about its potential for hampering new cost-shared programs, precluding senate reform, impeding constitutional change, and enshrining an “enclave-based language policy.” The Accord, in Whyte’s view, placed Canada “under disability as a nation.”

35. Ibid. at 44-46.
38. One might also read Whyte’s criticism of the failure of the Prime Minister and provincial premiers to live up to the Constitution Act, 1982’s commitment to reconsider the amending formulae in a similar light. See John D. Whyte, “A Constitutional Conference . . . Shall Be Convened . . . : Living with Constitutional Promises” (1996-97) 8 Const. Forum Const. 15.
40. The latter point refers to the distinct society clause, ibid. at 285.
Political order, however, does not “imprison citizens in a fixed state.” A liberal legal regime cultivates both order and change. Whyte described federalism in 1867 as having the goal of achieving both “stability and dynamism — stability in the relations between deeply suspicious and hostile communities, and dynamism that would see a national consciousness grow and, with it, national legitimacy and national political capacity.”

Canadian constitutional law, however, plays only a modest, limited and contingent role in Whyte’s account of order and change. The source of Canadian political legitimacy and identity resides elsewhere, other than in the constitution. “[I]t is a consequence of a life lived together”— it does not originate in some foundational constitutional moment or text.

These three themes of liberty and security, unity and diversity, and constitutional change appear to converge in Whyte’s submission on behalf of the Attorney General of Saskatchewan in the Quebec Secession Reference. First, he argued that faith in the stability and predictability of the constitution, secured by legalism, required following the processes laid down for amendment to the constitution in Part V.

42. Whyte, “Review”, supra note 20 at 189.
43. Ibid. at 190. Note the centralist tilt: dynamism here is associated with the Canadian nationalist project, not the provincialist one.
45. Ibid.
46. Portions of this are reproduced in John D. Whyte, “If Quebec leaves, it must leave by the rules” The Globe and Mail (19 February 1998) A25. The preceding quotes are drawn from that verbatim transcript. Whyte’s submissions were portrayed in a positive light by the English-language press. They were described as an “impassioned argument” by Graham Fraser in “Crees demand right to stay in Canada: Quebec’s unilateral secession called violation of natives’ constitutional rights” The Globe and Mail (18 February 1998) A1. Paul Wells described Whyte as advancing the “radical theory that Canada is a nation that works”: Paul Wells, “Democracy — in action and words” The Gazette (18 February 1998) A8. The submissions formed the basis of an op-ed piece: Andrew Coyne, “Canada has right to say no to secession” The Gazette (19 February 1998) B3. Whyte, in other words, articulated a vision of Canada that was missing from many of the legal arguments before the Supreme Court in the Secession Reference. It was for this reason, I believe, that he was asked for permission to publish his remarks verbatim in the op-ed pages of The Globe and Mail the following day. See discussion in Florian Sauvageau, David Schneiderman & David Taras, The Last Word: Media Coverage of the Supreme Court of Canada (Vancouver: UBC Press, 2005) at 109.
Second, and inspired by Georges-Étienne Cartier, Whyte insisted that at Confederation a "new transcendent organic reality was created" — a new nation was formed that was exclusively neither English nor French. Federalism guided relations between the national communities, so that the "threads of a thousand acts of accommodation" will have built the fabric of the Canadian nation. Third, a desire to protect the national integrity of this political unit cannot stand in the way of orderly change. National integrity is not "eternal and certainly not absolute," as reflected in the rules for amendment in Part V. "Members of this nation," however, "are due the protection of those rules."

II. Themes in Burke’s Constitutionalism

In this part, I turn to Burke’s constitutional thought as it reflects the three principal themes of liberty and security, unity and diversity, and constitutional change. Recall that Laski credits Burke for having given substantive content to what, in Locke’s second treatise, was a metaphysical outline of the state. Burke would have welcomed this compliment, for he resented sacrificing conventions and customs in favour of abstract theorizing. It was not theorizing per se that he found problematic; rather, his ire was directed at theoretical abstractions that ignored the lessons of societal experience learned over time — this he called “weak, erroneous, fallacious, unfounded, or imperfect theory.” Societies should not be expected to conform to some fixed idea of a constitutional order. Instead, the constitution should conform to a society’s habits and customs. With an impending revolt against the British Crown, Burke, for instance, implored Parliament to

47. Laski, supra note 10 at 196.

D. Schneiderman
govern America according to [their] nature, and to [their] circumstances; and not according to our own imaginations; nor according to abstract ideas of right; by no means to mere general theories of government, the resort of which appears to me, in our present situation, no better than arrant trifling.  

The English Constitution, in this way, was well-suited to the temperament of the English people over time. The constitution, Burke famously proclaimed, was an “entailed inheritance” derived from his forefathers, much like an estate passed on through every generation. A constitutional policy “working after the pattern of nature,” he wrote, is transmitted and received in the same way as property is transmitted through inheritance. What pattern of constitutional ordering best suited the people of England? It was one of liberty and security — “the only liberty I mean, is a liberty connected with order” — centred around respect for choices made in the private sphere. Burke associated the idea of justice with liberty exercised in the private sphere. Justice included the right to the fruits of one’s industry, to the acquisitions of one’s parents, to nourishment and improvement of offspring, and “to instruction in life, and consolation in death.” It was in this partnership in the pursuit of justice that “all men have equal rights; but not to equal things.” For Burke, the constitution provided the requisite liberty and security necessary for people to thrive in the bourgeois private sphere. This classical account of liberal constitutionalism was qualified by constitutionalism’s necessity to conform to complex social and political environments — to derive constitutional principles that fit the facts.

The themes of unity and diversity help to fill out the liberalism-in-context approach preferred by Burke. The concept of empire, with its common law under a single sovereign, exemplified the most desirable sort of unity. “My only earnest wish,” he wrote in a 1779 letter, is “to

52. Burke, Reflections, supra note 50 at 36.
53. Ibid.
54. “Speech at Mr. Burke’s arrival at Bristol” (1774) in Burke, Works, supra note 52 at 441.
55. Burke, Reflections, supra note 50 at 65.
56. Ibid.
see every part of this Empire, and every denomination of men in it happy and contented, and united on one common bottom of equality and justice."

On the other hand, there was the virtue of each unit within the empire pursuing distinctive paths according to local conditions. Burke decried what he called "the state bed of uniformity." He valued, instead, diversity in the various parts that formed the empire: "an empire is the aggregate of many states under one common head . . . in such constitutions, the subordinate parts have many local privileges and immunities." Granting power to individual assemblies would not "dissolve the unity of the empire" — indeed, "the very idea of the subordination of parts" is inconsistent with a "notion of simple and undivided unity." "England is the head," he declared, "but she is not the head and the members too." The federal idea, then, was at the root of Burke's understanding of empire.

Burke, like Hegel, saw attachment to local conditions as the prerequisite to attachment to the whole. Attachment "to the subdivision, to love the little platoon," he wrote, "is the first link in the series by which we proceed towards a love to our country and to mankind." Places, with their own distinctive forms of order and attachment, partially made people. And so Burke was concerned with threats to embattled communities in places like Ireland and India, under

59. "Speech on moving the resolutions on conciliation with the colonies" (22 March 1775) in Burke, Works, supra note 51 at 476.
60. Ibid. at 501.
61. Ibid.
64. Mehta, supra note 12 at 160.
the thumb of a callous English imperialism. But the local was linked to the national and beyond, and it was the task of the legislator to maintain equipoise among the myriad interests of the city, the nation, and then the empire: "all of these widespread interests must be considered; must be compared; must be reconciled, if possible."65

Burke acted on these principles in at least one respect as it concerned Britain's "new subjects" of Canada. Francis Maseres, Quebec Attorney General in the 1780s, reported that Burke was instrumental in securing the appointment of a consecrated Roman Catholic bishop for Quebec.66 Even though the Articles of Capitulation of 1759 permitted the free exercise of the Roman Catholic religion,67 the British Crown would not consent to the appointment of a Bishop for Quebec, leaving no authorized religious authority within the province. Governor Murray, in secret instructions issued the same day as the 1763 Royal Proclamation68, was mandated not to grant any ecclesiastical jurisdiction to the Roman Catholic Church.69 Instead, he was instructed to establish the Church of England in Quebec so that the inhabitants "may by degrees be induced to embrace the Protestant religion, and their Children be brought up in the principles of it."70 As Governor Murray learned the job, and as Burke would have predicted, this was a practical impossibility, and so Murray deviated from the royal

65. "To the Electors of Bristol, on his being declared by the Sheriffs, Duly Elected One of the Representatives in Parliament for that City, On Thursday The Third November, 1774" in Burke, Works, supra note 51 at 448.
66. Burke's liberalism on matters of empire and religious toleration often are attributed to the fact that he was born of a Roman Catholic mother. See e.g. John Viscount Morley, Burke, rev. ed. (London: Macmillan and Co., 1923) at 6; O'Brien, supra note 16 at 3. The same could be said of Burke's position in the case of Quebec and Briand, in particular.
67. This was modified by the 1763 Treaty of Paris, which added "as far as the Laws of Great Britain would permit."
69. W.P.M. Kennedy, Statutes, Treaties and Documents of the Canadian Constitution 1713-1929, 2d ed. (Toronto: Oxford University Press, 1930) at 47-48 [Kennedy, Documents].
70. Ibid. The instructions represent the "hateful spirit of jealous exclusiveness" that Garneau condemns in his L'Histoire du Canada — the "embodiment of that deeply seated antipathy of race, which served Lord Durham in our own day." François-Xavier Garneau, History of Canada From the Time of its Discovery Till the Union Year 1840-41, vol. 2, trans. by Andrew Bell (Montreal: John Lovell, 1862) at 88.
instructions in many material respects. He proposed the consecration of M. Olivier Briand, who would then serve, not as Bishop, but as “Superintendent of the Roman Church in Canada.” Maseres wrote, some time after the event, that it was Burke who had secured this compromise in 1766 in his capacity as private secretary within the short-lived Rockingham Ministry. Though this was a matter of some controversy within the English-speaking merchant community in Montreal and Quebec City, through this compromise the constitution was made to fit the facts. Burke, in other words, pursued mostly an organicist approach to constitutional politics in Quebec.

There is evidence on the other side, however—that is, Burke’s opposition to the passage of the *Quebec Act* of 1774—and it deserves some mention. An examination of Cavendish’s transcript of the debates in the House of Commons reveals that Burke spoke out against the passage of the *Quebec Act* mostly on technical grounds. The *Quebec Act* recognized both civil law and the Roman Catholic religion, yet Burke reportedly had supported these proposals while in the Rockingham Ministry. His voting behaviour might be explained away by the fact that he was a paid agent for New York and, as the colony was stripped of territory bordering on Lake Champlain, he might have acted strategically, at least until the bill was amended in committee. But he

---

75. Lock, *supra* note 16 at 357.
also justified his vote with reference to prudential arguments. He could not endorse the application of local law in matters respecting property and civil rights because neither he nor les Canadiens knew the content of that local law, nor was there evidence that they were desirous of abandoning newly acquired rights under English law. In these circumstances, he could not “form any opinion” on the question of restoring the civil law.\textsuperscript{77}

Governor Murray originally was instructed to apply English law in regard to all matters civil or criminal.\textsuperscript{78} Murray’s ordinance of 1764 permitted the application of local law, based on \textit{la coutume de Paris} (French customary laws as applied by les Canadiens), in minor causes of action relating to land and civil actions arising prior to October 1764. All other matters would be determined having regard to the laws of England “as far as the Circumstances and present Situation of Things will admit.”\textsuperscript{79} The introduction of English law in regard to most legal matters necessarily resulted in “chaos” and “disorder,” with little chance of securing the allegiance of the local populace.\textsuperscript{80} André Morel reports that les Canadiens simply boycotted the civil courts of Quebec during this period,\textsuperscript{81} though there is little evidence offered to suggest that recourse to courts was common before this time.\textsuperscript{82} Both the Governor and colonial authorities in London (the Lords of Trade) recognized that the course of legal development required correction. The 1766 report of Yorke and deGray (Attorney General and Solicitor General of England, respectively), detailing sources of disorder in the administration of

\textit{Quebec Act} This silence is “pregnant,” O’Brien observes, given the state of anti-Catholic zealotry in America. O’Brien, \textit{supra} note 16 at 92-95.

77. Kennedy, \textit{Documents}, \textit{supra} note 69 at 110.
78. These instructions are underscored by the \textit{Royal Proclamation of 1763} directing that courts be established to hear civil and criminal cases applying principles of law and equity “as near as may be agreeable to the Laws of England.” See Kennedy, \textit{Documents}, \textit{supra} note 69 at 36.
82. I am grateful to Rod Macdonald for this point.
justice, helped to initiate the sort of accommodation that would come to be reflected in the *Quebec Act*. Yorke and deGray endorsed the rehabilitation of pre-conquest laws in respect of all legal matters outside of criminal ones. It is the "wise Conquerors" who "proceed gently and indulge their Conquer'd subjects in all local Customs which are in their own nature indifferent," they observed. 83 It would "occasion infinite confusion and Injustice," "to disturb without much and wise deliberation...the local Customs and Usages now prevailing there." 84

The Attorney General, Edward Thurlow, spoke to British colonial sensibilities in his report of 1773 in terms one would have associated with Burke:

> When certain forms of civil justice have long been established...[men] acquire a kind of traditional knowledge of the legal effects and consequences of their transactions, sufficient and withal absolutely necessary for the common affairs of private life. It is easy to imagine what infinite disturbance it would create to introduce new and unknown measures of justice; doubt and uncertainty in the transaction; disappointment and loss in consequence. 85

For these reasons, Thurlow concluded that it would

be the interest of the conqueror to leave his new subjects in the utmost degree of private tranquility and personal security...by leaving them in the habit of obedience to their accustomed laws than by undertaking the harsher task of compelling a new obedience to new laws unheard of before. 86

Thurlow appeared to embrace fully the Burkean angle on things. There appeared to be no reason of "actual and cogent necessity" to alter their laws and customs — and certainly no reason to pursue "that ideal

---

84. Ibid. at 67.
86. Ibid. at 309-10.
necessity which ingenious speculation may always create by possible supposition, remote inference and forced argument.”

Burke responded to the Quebec Act with the supposition that English law already was in force, and that to induce further change would be to introduce “as much an innovation, as if you had made the constitution new.” He had no “objection to [making] the constitution new, provided the necessity of doing so is set in a clear and satisfactory manner before me.” Reintroducing la coutume de Paris as the law of the land would result only in confusion. If it was tyranny to impose a law on new subjects which they did not understand, it equally was tyrannical to “impose upon them a law which we do not understand ourselves.”

Burke’s complaint was that la coutume de Paris, which would govern private relations, largely was unknown to the British and, at least in the realm of the commercial, even to les Canadiens. Moreover, it may be that Britain’s new subjects would prefer English law over their ancient practices, wishing to adopt the more “beneficial” English system. “As a friend to the people of Canada,” Burke declared, he would oppose the motion until he knew more about the facts on the ground. Given the urgency with which Parliament was proceeding, and for which there was little justification offered, it would be impossible for Burke to give an “honest vote.” He preferred that English law continue to prevail, at least until a better case could be made out for the application of local law.

87. Ibid. at 310.
88. Kennedy, Documents, supra note 69 at 109.
89. Ibid.
90. Ibid. at 108.
91. Henry Cavendish, Government Of Canada, Debates Of The House Of Commons In The Year 1774, On The Bill For Making More Effectual Provision for The Government Of The Province Of Quebec. Drawn up from the notes of The Right Honorable Sir Henry Cavendish, Bart., Member for Lostwithiel: Now first published by J. Wright, Editor of The Parliamentary History, etc. (London: Ridgeway Piccadilly, 1839) at 85-86.
92. Kennedy, Documents, supra note 69 at 109.
93. Ibid.
94. Cavendish, supra note 91.
95. Ironically, by voting against the Quebec Act, Burke’s actions could be interpreted by constituents in the upcoming Bristol election as anti-papist. He “looked like a good
On the last theme of constitutional change, it might be thought that Burke was so much in the thrall of the ancient constitution that he would brook no change. Yet, he would not defer unfailingly to tradition, and so he resisted the rigidity that resulted from the cult of foundational moments.96 “A state without means of some change,” Burke wisely wrote in his Reflections on the French Revolution, “is without the means of its conservation.”97 Correction with the aim of conservation could be endorsed, but not change for its own sake98—as he appears to have argued in the case of the 1774 Quebec Act. Experiments motivated by the desire, for instance, of leveling property could not be condoned. Reformers, he maintained, should proceed cautiously with constitutional change. It would require more understanding and experience in the practical science of government than “any person can gain in his whole life.”99

Conclusion

My object here has been to link up Whyte’s search for the deep structure of Canadian constitutional law with the eighteenth century constitutional thinking of Edmund Burke. There are, of course, important dissimilarities: for example, Burke’s adulation of the aristocracy and laissez faire, and his disinterest in aboriginal affairs,100 are strikingly dissimilar to Whyte’s participation in social democratic

96. Gibbons, supra note 16 at 169.
97. Burke, Reflections, supra note 50 at 23.
98. Bickel, in his essay on Burke, put this well: “We hold to the values of the past provisionally only, in the knowledge that they will change, but we hold to them as guides.” See Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975) at 24.
100. It would appear that more work needs to be done linking Burkean themes to aboriginal policy in North America. Among the few references I have found are the following: James Tully in Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge: Cambridge University Press, 1995) at 66 associates Burke with teleological, modernist, constitutional thinking. Anthony J. Hall, meanwhile, in The American Empire and the Fourth World: The Bowl with One Spoon, vol. 1 (Montreal and Kingston: McGill-Queen’s University Press, 2003) at 36-37 interestingly connects Burke’s emphasis on continuity and tradition to the preservation of First Nations political culture.
government initiatives in Saskatchewan. There are, nevertheless, interesting meeting points. As Whyte searches for the deeper "common conceptions" of Canada's constitutional order, it should be inevitable that he runs into constitutional values and ideals that Burke articulated at the time of Canada's origins. Though I make no grand claims about Burke's influence on British imperial practice in this early period, it came to be that British practice had to change direction to fit the facts—from accommodating the practice of Roman Catholicism to endorsing the civil law based upon la coutume de Paris. It is not that imperial authority always valued pluralism: there are periods when assimilation emerges as the primary colonial strategy vis-à-vis both aboriginal peoples and les Canadiens. Nor was imperial authority always altruistic: accommodating les Canadiens was a convenient strategic device to help ensure their loyalty to the British Crown as the war over America began to heat up. Yet it also, as officials Yorke, de Gray and Thurlow note, was the right thing to do. That Whyte has taken up some of the arguments of Britain's most notorious and brilliant Whig philosopher should come, then, as little surprise.

What do these liberal origins portend for the future of Canada (and English Canada in particular)? If John Whyte correctly has tapped into foundational values at Canada's origins—that they are largely liberal, founded upon a desire for both liberty and security—there is little to distinguish us from other operative liberal political cultures, including the United States. In that case, Whyte has described nothing distinctive about Canadian constitutional culture. These goals could just as easily be served if Canada were absorbed, for instance, into a larger North American political unit, as Robert Pastor has suggested. What about those things that make us different from the United States—even little things that matter a lot to Canadian identity, such as health care and a more activist and redistributivist state? Might these be explained with reference to liberalism or to federalism or to some other communitarian variant in

102. I recognize that, for some, these are differences that do not matter so much. See e.g. Peter Smith & Janet Ajzenstat, "Canada's Origins: The New Debate" (1997) 1 National History: A Canadian Journal of Equity and Opinion 113 at 115.
Canadian constitutional culture — the Tory touch, perhaps? Will we find the resources to defend a distinctive Canadian constitutional culture from the pressures of further integration with the United States? I have intended to remain agnostic about the answers to these questions. My worry is that, until we come to a clearer understanding about such things, the disintegration of what it is that makes us different might continue apace.

---


D. Schneiderman