

---

# *Celebrating 1791: Two Hundred Years of Representative Government*

---

by Janet Ajzenstat

Upper and Lower Canada were not the first of the British North American colonies to obtain representative institutions. Nova Scotia had enjoyed a popularly elected assembly from 1758, Prince Edward Island from 1773, and New Brunswick from 1784. The importance of the *Constitutional Act, 1791* stems from the fact that the new regime in the Canadas required an act of the British Parliament. In the Maritime provinces the British government had been able to establish representative institutions by the simple means of issuing instructions to the provincial Governors. In the case of the Canadas it was necessary to repeal sections of the *Quebec Act* and pass new legislation.

The bill was introduced in the House of Commons by William Pitt in March of 1791, secured approval in May, and came into effect in the Canadas on December 26, 1791.<sup>1</sup> No parliamentarian will be surprised to learn that few changes were made to the bill during its passage through the Commons. What makes the 1791 debate significant is the character of the arguments advanced. As they examined what was in effect a new political constitution for a new society, the Members of the British Commons described and justified British parliamentary institutions. The real subject of the debate was the institutions and political conventions grounding British parliamentary practice.

The legislators were intensely conscious of the work of the American and French constitutionalists of the period. They treated the Canada bill as an opportunity to make a British statement about liberal government that would rival those of the revolutionary nations. The institutions they prescribed for the Canadas were meant to prove to the world that the British form of government could offer all the rights and benefits that free men could desire.<sup>2</sup> As Charles James Fox argued, the subjects of the British North American colonies would be able to compare their institutions with those of other nations, and see the

superiority of the parliamentary form.<sup>3</sup> He urged his colleagues to "keep in mind those enlightened principles of freedom, which had already made rapid progress over the considerable portion of the globe, and were becoming every day more and more universal."<sup>4</sup> A constitution agreeable to the colonists' own wishes said Pitt, would be "a free constitution, in the English sense of the word."<sup>5</sup>

In short the legislators of 1791 went at their task in the spirit of men engaged in a great act of constitution making. What we have in the 1791 Act is the British Constitution, the famous unwritten constitution itself, in legislative form. The *Constitutional Act, 1791* was to be a declaration about liberal freedoms that would compare well with the American Constitution and the French Declaration of the Rights of Man and Citizen.

*The grant of parliamentary institutions to the colonies of British North America became a matter for debate in the Mother of Parliaments.*

While there is much to celebrate with the 1791 bicentennial, Canadians can expect little of the kind of fanfare that has surrounded the French and American bicentennials. Undoubtedly one reason our admiration for 1791 has been tarnished is that the new constitution proved unworkable. Within a very few years the proud new legislative assemblies of the Canadas were involved in hopeless quarrels with the upper legislative chambers and political executive, and by 1837 strife on political and constitutional issues had become so intransigent that a sizeable proportion of the populace believed that war against the government was the only remedy. What had happened to dash the great hopes of the British legislators? Some explanation must be given of the failure of the new regime in the Canadas before we can turn to an analysis of the 1791 debate. Was the 1791 prescription, the constitution of Grenville, Pitt, and Fox, hopelessly flawed? When the story of the years immediately after 1791 is told we may find that there is still reason to think

---

Janet Ajzenstat is Research Associate at McMaster University, Hamilton (Ontario).

well of the constitution intended by the legislators of 1791.

Pierre Bédard, by all accounts the best student of constitutional law in the colonies during this early period, described the constitution of 1791 in terms as laudatory as any used by Pitt and Fox. It was a "rare treasure," he said, a form of government that would bring the inhabitants of the province freedom of a kind they had never known before.<sup>6</sup>

No one was more aware of the difficulties of the new regime than Bédard. As leader of the majority party in the Assembly, a party consisting mainly of French Canadians, he was constantly at war with the "English" in the Executive and Legislative Councils. Nevertheless he did not believe that war between the branches of government was what the British had intended with the 1791 Act. His study of British constitutional authorities – among them Charles James Fox and Edmund Burke – satisfied him that the legislators of 1791 had intended the colonies to follow the British parliamentary practice of appointing to the political executive men who could command a majority vote on money bills in the lower house.<sup>7</sup> There should have been no quarrel between the executive and lower house because the Governors should have had to appoint Executive Councillors sympathetic to the Assembly. The whole difficulty in Lower Canada, Bédard decided, had come about because the Governors had been allowed to spend British money on provincial affairs.<sup>8</sup> They could pay their Executive Councillors with British funds, ignoring the Assembly.

Bédard remained convinced that there was no flaw in the *Constitutional Act, 1791*. The prescription had been magnificent; only corrupt practice had destroyed it. If he was correct in his analysis of the problems facing the colonies under the 1791 regime, was he also right in describing the 1791 Act as a "rare treasure"? Was there a great formula for political freedom in the 1791 Act, as he supposed?

Two aspects of the Act pose special difficulties for the twentieth century reader. There is first the fact that it appears to express marked distrust of democratic institutions. During the debate on the Canada bill, members argued for measures to strengthen the "aristocratic" principle in the new constitution. They talked of curbing democratic tendencies in the colonies. The Act provides for an upper legislative chamber (referred to in the debate as the "aristocratic" house), and more than this, contains measures that would have encouraged establishment of a landed aristocratic class in the Canadas. Secondly, everything in the Act appears to take for granted French Canadian satisfaction with life under British institutions and British laws. It would be

easy to see in both aspects of 1791 mere class interest and British chauvinism.

*The legislators of 1791 were indeed prescribing the British parliamentary system for the colonies, and it was the parliamentary system that they believed to be the sure guarantee against democratic tyranny.*

Closer examination of the 1791 debate reveals a different picture: What the legislators feared in "democracy" was not the democratic form of government as we know it today. They were alarmed by the idea of democratic tyranny, democratic absolutism, the kind of rule that brings to power political leaders who profess to speak for the whole people, and consequently allow no opposition. Rightly or wrongly, they believed that democratic tyranny was a threat in Europe and North America at that time. The language of the debate has an old-fashioned ring: members referred to the political executive in the colonies – the Governor and Executive Council – as embodying the "monarchic" principle. The upper legislative house was said to be the "aristocratic" branch of government, and the lower house the "democratic," or "republican" body. Nevertheless the institutions they describe are clearly those of the British parliamentary system, in form not utterly unlike today's.

Moreover it was because they believed that the parliamentary system guaranteed political and individual freedoms that they could suppose that the French Canadians would welcome the new institutions. The *Constitutional Act, 1791* was considered good not because it was British, but because it granted the freedoms that all men in all societies value.

The debate on the Canada Bill is well known to scholars, indeed it is famous, but curiously enough not as a discussion of the grant of political freedoms to the colonies. Its fame derives from the fact that it was the occasion on which Fox and Burke quarrelled about the French Revolution, splitting the Whig party and ending twenty-five years of friendship. Historians usually suggest that the quarrel was more or less irrelevant to the bill before the House when it broke out. Those who write about Whig party fortunes barely mention the Canada bill, while those who treat the 1791 Act usually do little more than hint at the broader issues suggested by the discussion of the French crisis.<sup>9</sup>

The key to the Act lies in seeing the relationship between the legislators' reluctance to countenance

measures to strengthen the democratic branch of government in the Canadas, and Burke's rhetorical outbursts about the evils of the revolution and popular government in France. Burke entered the debate charging that the republican principles springing up in revolutionary France would soon prove a threat to political freedom everywhere, even in England. He reminded his listeners of his arguments in *Reflections on the Revolution in France*.<sup>10</sup> He told of terrifying events in France. At one point he called the regime in France an "anomaly in government," more terrible even than republican government. It was "'A shapeless monster, born of hell and chaos.'"<sup>11</sup>

The central thesis of eighteenth-century constitutionalists was that the British Constitution balanced "monarchic," "aristocratic" and "democratic" institutions in order to protect against the development of "simple" forms of monarchy, democracy and aristocracy. In the eighteenth century description, the "simple" forms have one characteristic in common. All involve claims by individuals, cliques, a hierarchy or party, to an absolute and necessary title to rule. "Simple" democracy was democratic absolutism. Burke sees the seeds of autocratic rule in the French Revolution. Indeed he was one of the first in Britain to become disenchanted with the revolution that had begun with such great promise.

His argument was that if Britain, with all its weight of tradition, might not be able to withstand the onslaught of republicanism, the new societies of British North America would surely prove vulnerable. In the clause by clause reading of the Canada Bill he supported all measures that would restrain and balance the powers of the colonial legislative assembly, and strengthen the "aristocratic" chamber. Indeed Burke was one of the members prepared to entertain the idea of fostering a landed aristocracy in the colonies. It is worth noting that nowhere does he argue that a stronger colonial upper house and executive would be effective in maintaining the imperial connection. His point was always that strengthening the aristocratic and monarchic elements in the colonies is necessary to protect freedoms within the colonies.

Fox attempted to avoid discussion of his position on the French Revolution. Nevertheless he was known to have expressed admiration for the Declaration of the Rights of Man. If disenchantment had set in he was reluctant to admit it in these debates. He was still thinking of a future in which freedom broadened out from age to age. He ridiculed the idea of an hereditary aristocracy in Canada. Were "those red and blue ribbons which had lost their lustre in the old world ... to shine forth again in the new?"<sup>12</sup> He maintained that Britain did

not need to create a titled class to act as Legislative Councillors. Under the new constitution men of "commerce and wealth" would soon gain the kind of respect that would make them eligible for appointment to an upper chamber.<sup>13</sup>

He proposed measures to strengthen the Legislative Assemblies of the Canadas, and was instrumental in persuading the government to increase the number of seats in the Assembly of Lower Canada from the 30 proposed by Pitt to 50.<sup>14</sup> Against Pitt's suggestion that colonial elections be held every seven years, Fox argued for elections held yearly or every three years.<sup>15</sup> In the end it was agreed that the assemblies would be called yearly and continue no longer than four years.

Burke depicted Fox as a "republican" and "democrat," a friend of revolution and threat to the British constitution.<sup>16</sup> The quarrel was memorable, "Burke ... giving way to frenzied temper and Fox ... wiping eyes tear-stained over a broken friendship."<sup>17</sup> What is interesting is that Fox did not defend himself by arguing the merits of the democratic or republican position. In fact he roundly denied republican and democratic leanings. He claimed that he valued the "monarchic" and "aristocratic" principles in the British Constitution as much as any man in the House. He argued over and over that he believed, just as Burke did, that the fullest safeguards for political freedom lay in a constitution balancing monarchic, aristocratic and democratic or republican institutions. In proposing a larger assembly for the colonies he meant to give the "democratic" branch as much weight as the "aristocratic" and "monarchic" elements, but not more. "It would be indispensably necessary that an aristocracy should make a branch of the constitution for Canada," he argued; "it was equally important with either the popular or monarchic."<sup>18</sup>

Burke claimed that the differences between himself and Fox were of great importance. Fox argued that they were minor and from the twentieth century perspective there appears a large measure of agreement. To understand the 1791 Act it will help to fix our attention on the fact that they were both proponents of the constitution that mixed "monarchic," "aristocratic" and "democratic" elements. It is too simple to take Fox as the friend of democracy and Burke the advocate of aristocracy. Fox is not prescribing "simple" democracy any more than Burke is, and he does not think, any more than Burke, that the popular house should be the chief locus of power in the parliamentary system. Both believe that the tendency toward democratic rule must be checked in some degree.

Fox stresses measures to dignify the "democratic" branch because he is alert to dangers associated with the aggrandizement of the political executive. His nightmare

is a Britain returned to the evil rule of Stuart days. Translating into our own terms we would say that what he fears above all is right-wing authoritarianism. For Burke, in contrast, the greater threat is likely to come from political figures or parties who profess absolute authority to speak for popular interests, the kind of political leaders who emerge through revolution. In short, he fears authoritarianism of the left. Their quarrel about the "balance" of the elements in the mixed constitution was enough to split the whig party, and enough to bring them out on different sides of the Canadian question, but both are foes of absolutism, and both see parliamentary institutions as the form of government supremely guaranteeing protection against all forms of absolutism.

What characteristics of the parliamentary system provide this protection? From the 1791 debate we learn that dividing legislative power among the three branches of government is important. A fuller picture of what is involved emerges from Bédard's analysis of the political strife in Lower Canada in the years immediately following the 1791 Act. Bédard on the British Constitution is as helpful as the British legislators, often more helpful. Bédard was addressing a populace new to the parliamentary system; he had to explain at length principles and practices that the 1791 legislators took for granted.

Like Fox and Burke, he casts his arguments in the language of the mixed or balanced constitution. The Governor and the provincial Executive Council is the "monarchic" branch; the Legislative Council, the "aristocratic"; and the Legislative Assembly, the "democratic" branch. Echoing Fox's perspective, he argued that the "monarchic" branch in Lower Canada and not the "democratic," was the threat to political order and freedom. Indeed he depicts the Governor as high-handedly attempting to establish a form of absolute rule in the name of the British imperial interest.<sup>19</sup> Bédard does all he can to assert the Assembly's right to powers comparable to those exercised by the British House of Commons. In particular he insisted on the Assembly's right to exercise the power of the purse.

Nevertheless he too is no champion of "simple" democracy. Like his mentors he argues that each constituent part of the parliamentary system must have its proper constitutional powers. While he endeavoured to strengthen the lower branch by arguing that that house should vote all taxing and spending legislation, he did not propose to deprive the Governor of constitutional prerogatives, in particular, the right to recommend money bills.

Bédard's reforms would have made the colonial Assembly a more dignified and effective body, but would not have deprived the executive of the power to

govern. In fact his reforms would have had the result of giving the colonial executive legitimacy, thus enabling it to govern effectively. The "monarchic" branch would govern; the "democratic" branch would legitimate.

*At the root of the debate was one of the principal issues in modern political thought. Is the character of a society determined by the political institutions or are those political institutions in fact the product of social influences?*

This is exactly the vision of the eighteenth century constitutionalists. The executive branch is to have the support of the majority in the popular house and thus the scope and power to govern. But it is important that the executive can claim the support of only the majority. The ministers of the Crown in any one government do not represent the political views of the entire people, the whole nation, and consequently can claim no absolute title to rule in the name of the *demos*. In the eighteenth century argument the fact that the executive did not speak for the *demos* was the constitutional guarantee against monarchic and aristocratic absolutism. By the same token the constitutional body that can truly claim to represent the whole people confers legitimacy on governing branch and checks the ambitions of the "monarchic" body, but does not itself govern. Here is the guarantee against "simple" democracy.

For the legislators of 1791 there remained a question: could a constitution designed originally to serve the classes and estates of England be reproduced in the relatively egalitarian social conditions of North America? Was it feasible to recommend an "aristocratic" house for a population without an aristocracy? Fox argued that an upper legislative chamber could be maintained through the appointment of able and wealthy individuals. Burke feared that wealth alone would not guarantee the upper house the kind of respect necessary to balance the importance of the popular chamber.<sup>20</sup>

Does society shape politics, or politics, society? In the end the legislators of 1791 tended to come down on the side of the modern, small-"l"-liberal conclusion: politics is prior. Good political institutions can be established in any society. This is the argument that in our own time give confidence to those who believe that there are institutional remedies for social and economic ills. In the eighteenth century debate it meant that it was not necessary to reproduce in British North America the special historical and social environment that had given

rise to the "King, Lords and Commons" of the English form of government. The British Constitution was exportable. The institutions of the parliamentary system would thrive in an egalitarian society, guaranteeing political and individual rights to all regardless of social class.

The same tendency of thought led to the conclusion that the French would welcome the new regime. The new Canadian institutions had the form of the British, but their importance did not lie in the fact that they had originated in England. The *Constitutional Act, 1791* was important and admirable because it would ensure, in Bédard's words, the "free exercise of rights and liberties."<sup>21</sup> The new constitution enshrined universal aspirations. It was not suited to one people one race or nationality alone.

Despite the changes of two centuries these principles of the eighteenth century constitution are still valued. Indeed the bones of the eighteenth century constitution can still be seen in the Canadian political system. This surely gives us something to celebrate with the 1791 bicentennial. ♦

## Notes

1. William Grenville, secretary for the home department, was the author of the bill. See his correspondence with Lord Dorchester, Governor of Quebec, in W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929* (Toronto: Oxford University Press, 1930), 184-190. The new provincial parliament of Lower Canada met on December 17, 1792, and the first parliament in Upper Canada, on September 17.
2. "Grenville had virtually conceded the principle so vigorously advanced in the Thirteen colonies, and as vigorously opposed in Britain, that the constitution of the colonies was meant to duplicate that of the home country." Phillip A. Buckner, *The Transition to Responsible Government* (Westport, Connecticut: Greenwood Press, 1985), 48, 49. Addressing the new legislative assembly of Upper Canada in 1792, Governor John Graves Simcoe said that it was his intent to render the province as nearly as possible "a perfect image and transcript" of the British Constitution. See Simcoe's dispatch to Portland, W.P.M. Kennedy, *Statutes*, 215. The Act was in part a response to demands from United Empire Loyalists coming into Quebec for the political freedoms they had enjoyed in the Thirteen Colonies.
3. "Canada must be preserved to Great Britain by the choice of its inhabitants," argued Fox. *Parliamentary History*, 29, (April 8, 1791), 110. The deficiencies of political practice in eighteenth century Britain are well known. This is not the place to tell the story of England's rotten boroughs, the restricted franchise, and ministerial attempts to manipulate elections and bribe Members of the Commons. The Constitution that was so highly praised by the 1791 legislators was the British Constitution in the best sense, the Constitution as it ought to have been. It was the Constitution as it ought to have been that was prescribed for the colonies.
4. *Parliamentary History*, 29, (April 8, 1791), 105.
5. *Ibid.*, (May 11, 1990), 404.
6. See the Prospectus for Bédard's journal of political opinion, *Le Canadien*, published in November, 1806. The death of Fox was commemorated in the first issue *Le Canadien*. For excerpts from Fox and Burke in the 1791 debate on the Canada bill, see *Le Canadien* I, 3 (December 6, 1806). Bédard's constitutional views are discussed more fully in Janet Aizenstat, "Canada's First Constitution: Pierre Bédard on Tolerance and Dissent," *Canadian Journal of Political Science* XXIII:1 (March, 1990), 39-57.
7. For Bédard on the constitutional principle we now refer to as "responsible government," see *Le Canadien*, 1, 10 (January 24, 1807). See also Fernand Ouellet's comments on Bédard's perception of this principle. *Lower Canada, 1791-1840, Social Change and Nationalism* (Toronto: McClelland and Stewart, 1980), 63.
8. "As long as the Crown enjoyed ... financial independence there was a farcical element in representative institutions." W.P.M. Kennedy, *Statutes*, 209. Was the independence of the Crown intended by the legislators of 1791? Perhaps not. However it was often favoured by colonial administrators. See for example, Sir Robert Shore Milnes' dispatch of November 1, 1800, in Kennedy, *Statutes*, 217-222. The fact remained that all attempts to ensure the imperial connection by strengthening the Governor's role in colonial affairs prevented the full flowering of British constitutional principles in the colonies. The logic of 1791 tended in one direction, the logic of empire in another.
9. "The final bill...was little affected by its passage through parliament and the debate on it was chiefly notable for the irrelevant clash of Burke and Fox on the French Revolution." Mason Wade, *The French Canadians, 1760-1967*, Vol I (Toronto: Macmillan, 1968), 87.
10. See *Parliamentary History*, 19 (May 11, 1990), 417-8, and generally the arguments of May 6 and 11. *Reflections on the Revolution in France* was published in November, 1790.
11. *Parliamentary History*, 29 (May 11, 1791), 421.
12. *Ibid.*, (April 8, 1791), 107.
13. A question for Fox as for other members was whether the seigneurial class in Lower Canada formed an effective aristocratic class. Most members doubted whether they did. Fox argued that whatever respect accrued to the seigneurs under the new regime would result from wealth and not inherited position: "The extension of commerce and wealth in the province, which there was every reason to imagine would follow the introduction of the new constitution, would make them hold a fair weight in that constitution, and imperceptibly clothe them with that respect and influence that ought to belong to the aristocratical branch of a free government." *Parliamentary History*, 29 (May 11, 1791), 415.
14. Pitt gave Lower Canada's population as 100,000, Upper Canada's as 10,000. The number of seats for Upper Canada was set at 16. Fox argued unsuccessfully for an increase.
15. See *Parliamentary History*, 29 (April 8, 1791), 106.
16. *Ibid.*, (May 11, 1791), 417-8. See the note on page 417 of this volume giving a paragraph from the Morning Chronicle of the following day: "The great and firm body of the whigs of England, true to their principles, have decided on the dispute between Mr. Fox and Mr. Burke, and the former is declared to have maintained the pure doctrines by which they are bound together, and upon which they have invariably acted. The consequence is, that Mr. Burke retires from parliament."
17. W.P.M. Kennedy, *The Constitution of Canada, An Introduction to its Development and Law* (London, Oxford University Press, 1922), 86.
18. *Parliamentary History*, 29 (May 11, 1791), 410, 411-416.
19. There are two sides to the story of the quarrel between the popular leaders in the provinces and the Governors. The Governors complained that despite their special sources of funds they were able to exercise little political discretion. See the account in Phillip Buckner, *The Transition to Responsible Government*, 50ff. But if Bédard's argument is overstated, it is right in essence.
20. *Parliamentary History*, 29 (May 11, 1791), 420.
21. See Pitt's argument that the French Canadians would adopt British institutions from conviction. *Parliamentary History*, 29, (April 8, 1791), 113.