

Were the Loyalists Right? Arguing for a Renewed Loyalist Politics in Canada

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“Freedom has been better preserved in countries where no revolution ever broke out, no matter how outrageous the circumstances of the powers that be, and that there exist more civil liberties even in countries where the revolution was defeated than in those where revolutions have been victorious.” - Hannah Arendt¹

Introduction

Were the Loyalists right? When the American Revolution was launched by mob riots, American Tories feared a tyranny of the masses and the loss of the British system, which was widely recognized as the freest in the world, offering not only the greatest political and religious freedoms but also the prosperity and stability that results from a reliable justice system. Where the traditional authority of the Crown represented stability and good government, the arbitrary power of the mob threatened to give rise to a Cromwellian dictatorship.

The outcome of the American Revolution was neither a dictatorship nor a Jacobin Terror, in part because British systems were already in place at the state level and the drafters of the constitution did their utmost to emulate the British system on the federal level minus the hereditary monarch; however, as Robert Dahl has argued in *How Democratic is the American Constitution?* (2002), their mistakes were many, and those errors continue to plague the United States.

Looking at historical debates and the constitutions of Canada and the United States, I argue that the Loyalists were right; freedom and equality were better served by a constitutional monarchy than a republic, and in the long run the Canadian colonies enjoyed greater advancements in political freedom than those who joined the United States. The intention here is to develop an alternative perspective on current political differences between Canada and the US and to argue that a modernized Loyalist stance offers a persuasive argument for maintaining Canadian sovereignty and the Crown.

The American Revolution

The American Revolution did not end with the Paris Peace Treaty because it was never reducible to the fight with the British. It was and remains still an idea that America would spearhead the advance of human history toward the pinnacle of fully realized freedom, first by creating a modern liberal country in North America, and in time replace Britain as the world's dominant empire. It was an idea to create a truly rational society that would consistently reflect and give form to the natural rights of universal freedom and equality. Americans would not waver in their divine purpose to spread across the globe the truth of the Enlightenment. The fight would persist, first in Ohio, then further west, north, and south, then on till its most recent action in Pakistan. John Adams anticipated that in time the United States would “form the greatest empire in the world.”² Thomas Jefferson asserted, “The spirit of resistance to government is so

¹ *On Revolution* (London: Faber and Faber, 1963), 111.

² David McCullough, *John Adams* (New York: Simon & Schuster, 2001) 395.

valuable on certain occasions, that I wish it to be always kept alive... I like a little rebellion now and then. It is like a storm in the atmosphere.” Jefferson, who made slaves of his own illegitimate children, added, “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is a natural manure.”³

As Hannah Arendt reminds us, the American constitution does not limit its claim for rights and freedoms to citizens, but to all men.⁴ As the country’s founding myth,⁵ from which power derives its legitimacy, the revolution lives still and will continue as long as the country does, and even then it may persist. To be a loyal citizen of the United States is to believe in the justice of the American Revolution and its constitution, and to believe in the revolution is to want other countries to bask in its radiant truth, even if it must first be drenched in blood.

Of course, the American Revolution does not own exclusively the notion of history as the progress of freedom, but it does uniquely hold that the US will lead, along with its particular conception of freedom that is affirmed in its constitution. In this sense it combines particularity with universality: the American political culture should be received by everyone. And there are many non-Americans who agree. They agree because the American foundation myth has been widely conflated with the universal myth of the social contract.⁶ Hence, one need not be the citizen of the US to be a modern Patriot, the Fourth of July can become the world’s Independence Day.

Revolution continued: Patriots at work in Canada

Canada has had a long history of fending off the efforts of local Patriots to allow Canada to be annexed by the United States. Though a minority, hence their lack of success, from the early days of the revolution till today they have persistently worked to blur the lines between Canada and the United States. In the 1770s, Nova Scotians who had moved from New England sought to raise a militia against the British. During the War of 1812, which Robert Bothwell correctly describes as an extension of the revolutionary war,⁷ the American “war hawks” were counting on the support of recent American immigrants to Upper Canada, and may have received it were not for the poor diplomacy of American commander at Detroit, William Hull.⁸ Indeed, the few who did join the American

³ Ibid., 371.

⁴ Ibid., 147.

⁵ Margaret Canovan, “Why are “The People” the Ultimate Political Authority?” *Oxford Handbook of Political Theory*, Eds. John S. Dryzek, Bonnie Honig, Anne Phillips (Oxford: Oxford University Press, 2008), 357-8.

⁶ Canovan, 358.

⁷ “War began in North America long before it was officially declared. In a manner of speaking it had never stopped.” Bothwell, *The Penguin History of Canada* (Toronto: Penguin Canada, 2006), 138.

⁸ Ibid., 142.

guerrilla militia plundered the homes and destroying the property of their former neighbours, thus further undermining Upper Canadian sympathy for the Americans.⁹ In the 1830s, William Lyon Mackenzie's radical reform rebellion was inspired by the American Revolution and the Declaration of Independence, and it garnered support from Americans who saw it as an opportunity to annex Upper Canada.¹⁰ In the 1850s the Toronto Annexation Association was formed and comprised some of the most respected business leaders of Upper Canada. In the 1860s, the premier of Upper Canada, John A. Macdonald, was confronting in the legislature an opposition leader, William McDougall, who threatened to turn to Washington for support in a bid for representation by population.¹¹

Although prominent gadfly Goldwin Smith made the case for annexation in the 1880s, Confederation put an end to any serious explicit efforts to join the US. Efforts by Canadians to integrate with the US have been generally confined to trade policies and resource management, though of course foreign policy and cultural influences through various media have also been routes to lost sovereignty. Lawrence Martin captures this effort at economic integration in his account of the *Pledge of Allegiance: Americanization of Canada in the Mulroney Years*. Martin quotes Ontario Tory David McFadden who believed Canadian dream was over: "We no longer have a national psyche. It's globalization. Let's get on with it."¹²

The view that Canada does not have a national psyche or national identity, and never really did, is the current manifestation of the annexation movement, or American Patriots continuing the revolution. There is the growing choir of scholars who argue that contrary to the traditional view that Canada's early Toryism and the influence of the Loyalists resulted in a more collectivist, organic view of society that prefers peace, order and good government to the capricious form of the freedom that dominates the US. Janet Azjenstat following Bernard Bailyn argues that Canada is as grounded in Lockean liberalism as the United States, and any sense of communitarianism is the result of republicanism, not Toryism¹³. She argues therefore that Canada's political culture is not at all different from America's. In effect, she is suggesting that Canadian sovereignty is unnecessary.

Those who have understood the implication of her suggestion have made it more explicit. For instance, Robert Sibley's recent book on Canadian political culture, *Northern Spirits*,

⁹ Ibid., 144.

¹⁰ Ibid., 182. Janet Ajzenstat and Peter J. Smith, eds. *Canada's Origins: Liberal, Tory, or Republican?* (Ottawa: Carleton University Press, 1995), 236-240.

¹¹ Richard Gwyn, *John A: The Man Who Made Us* (Toronto: Random House Canada, 2007), 241.

¹² Lawrence Martin, *Pledge of Allegiance: The Americanization of Canada in the Mulroney Years* (Toronto: McClelland & Stewart Inc., 1993), 143.

¹³ *Origins*. More recently Azjenstat has argued that romanticism rather than republicanism is the source of any collective spirit in Canada, and again contends that it is not in that way different from the US. *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal: McGill-Queen's University Press, 2003).

argues that there is no longer anything substantively distinct about Canada¹⁴ and the country's future "is open to question,"¹⁵ though there is little doubt when reading this book that the author favours joining the American empire which he believes will uphold the principles of freedom and democracy. The case is put still more vividly by Barry Cooper.¹⁶ Cooper is an Alberta separatist who admires the political culture of the United States as well as its violent origins. He calls the claim that Canada differs from the US "drivel," other than being a culture of "losers" (Loyalist myth is the construct of those who lost their fight against the Patriots) who are feeding a corrupt bureaucratic "tyranny" that serves a Laurentian elite.¹⁷ He tells Canadians to get over their "infantile anti-Americanism"¹⁸ and accept the truth: "there is not now, nor has there ever been a Canadian identity."¹⁹

The argument is that the Loyalists differed from the Patriots on pragmatic grounds, and they possessed no distinctive political philosophy.²⁰ I argue that the interpretation of one's practical interests is largely informed by one's ideology or philosophy of politics, and that the Loyalists did represent a distinct political culture that resulted in a very different political system and constitution, one that not only reflects the Loyalist political philosophy, but also has proven to be a greater protector and facilitator of individual freedom.

A Loyalist political philosophy?

It is true that as British subjects the Loyalists shared with the Patriots a basic commitment to the liberal principles of equality, freedom and limited government. It is also true that there were some who had very practical reasons for not joining the rebellion. For instance, the Pennsylvania tenant farmers who rejected the call of the landowner to join the revolution out of fear that by joining the fighting they would leave their families destitute, by either getting killed and thus expelled from the farm, joining the losing side, or simply being away from the farm for extended periods. But in a sense this too is tied to a belief. They distrusted the wealthy landowner and his claim to be fighting for freedom, and put stock in the established British authority, order, and law.²¹ This trust in the established political system over the dreams and promises of impassioned

¹⁴ Robert Sibley, *Northern Spirits: John Watson, George Grant, and Charles Taylor, Appropriations of Hegelian Thought* (Montreal: McGill-Queen's University Press, 2006), 278.

¹⁵ *Ibid.*, 298.

¹⁶ Cooper is professor of political philosophy at the University of Calgary. It is worth noting that Sibley uses the work of Ajzenstat and Cooper to support his criticism of Charles Taylor's claims about Canada's identity.

¹⁷ Barry Cooper, *It's the Regime, Stupid!* (Toronto: Key Porter Books, 2009).

¹⁸ *Ibid.*, 230.

¹⁹ *Ibid.*, 228.

²⁰ *Ibid.*, 99.

²¹ Gary B. Nash, *The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America* (New York: Viking, 2005).

revolutionaries with their own sets of practical interests is arguably the first principle of the Loyalist, namely a commitment to the rule of law.

Ann Gorman Condon identifies three categories of Loyalist: those with a vested interest, because either they thought it would aid some other local political agenda, or they were employees of the imperial establishment; minorities whose rights had been protected by the British and feared the conformist mob impulse of American politics; and the articulate, activist Tory elite.²² The above mentioned Pennsylvania farmers belong to the first group, those with a vested interest, but even these must be considered to share some of the principles articulated by the Tory elite.

The first and most obvious principle of the Loyalist political philosophy is loyalty to the Crown. Granted, as children of the Enlightenment, the revolutionaries naturally balked at the irrational idea that allegiance is owed to George III, a hereditary monarch whose right to rule is no greater than any other citizen. But this is to confuse the issue. The rationality of the monarchy lies not in the individual's inherited superiority or the divine right of Kings, but rather in the Crown as an institution. The monarch is largely constrained by the will of advisors, parliament, and the law, and the temporary office holder, George, retains the powers of the Crown only as long as he abides its rules and fulfills its obligations. Loyalty is owed to the Crown, not to an individual. Just as one might dislike the manner or personality of a particular police constable, we respect her power to enforce the law and we owe it to the other members of our community to do so.

The Crown is not a despot representing George's arbitrary will and desires. As head of state, he embodies the rule of law and the common voice of the citizenry. Thus loyalty to him or her is effectively loyalty to the community. In this case, law rules, not an individual's arbitrary will. Thus, rebellion is best understood as not a challenge to the King, but a defiance of the law that has been crafted by popular representatives in parliament and a defiance of the community, as over 500,000 American citizens, one quarter of the population, believed. This is a principle Loyalist of all Condon's three categories would have understood at some level: revolution meant submitting to the mercy of an ill-defined mob's arbitrary group will led by individuals subject to the standard human failings, including greed, vanity, and ambition for power. Their choice was not between either an irrational despot whose authority was derived from an arbitrary inheritance, or a rationally selected republican government. It was a choice between either an established government, the freest and most tolerant of the day, constrained by the rule of law and answerable to citizens' representatives in parliament, or an anti-tax mob loosely controlled by an ad hoc collection of lawyers, businessmen, landholders, slave owners, and pamphleteers who had chosen to put themselves above the law, to kill, maim, plunder, tar and feather opponents, and attempt to control the world's richest British colonies. "Which is better," asked Reverence Mather Byles, "to be ruled by one

²² "The Foundations of Loyalism." In *The Loyal Americans: The Military Role of the Loyalist Provincial Corps and their Settlement in British North America, 1775-1784*. Edited by Robert S. Allen (Ottawa: Canadian War Museum, 1983), 2-3.

tyrant three thousand miles away or three thousand tyrants a mile away?”²³ Even today, knowing the outcome of the fight, it is hard to find fault in their decision.

The Loyalists believed freedom would be better preserved by the King than by the mob. For the Tory elite, American institutions were too young and crude to support the level of freedom provided by English laws and government. That said, from as early as 1754 for they had advocated a federal union of the colonies with greater autonomy within the empire, a proposal that Lord Durham cited in his 1839 report. It was not the idea of greater colonial autonomy or greater democracy and freedom the Loyalists opposed, it was the self-contradiction of toppling the laws and the government to achieve this. The rightful source of laws was the British parliament - the King, Lords and House of Commons. For the Loyalist Samuel Seabury, the mob rule of the revolution represented not rights and liberty but slavery:

They are making us the most abject slaves that ever existed. The necessity of the times justify them in violating the first principles of civil society! Who induced this necessity? Who involved the province in discord, anarchy⁷ and confusion? These very men. They created that necessity, which they now plead in their own justification.²⁴

For Seabury the revolution marked a collapse of the rule of law and with it freedom: “if *one* has a right to disregard the laws of the society to which he belongs, *all* have the *same* right; and *then* government is at an end.”²⁵ Seabury argued that the English laws and institutions had settled the colony and protected their liberties. It was England that fostered their sense of freedom and enabled their prosperity. And it was therefore English laws that commanded their loyalty. The implication here is that rights are won over time through institutions, and it is from these institutions that we get rights. This is what Seabury means when he asserts: “The right of colonists to exercise a legislative power, is no natural right. They derive it not from nature, but from the indulgence or grant of the parent state, whose subjects they were when the colony was settled, and by whose permission and assistance they made the settlement.”²⁶ This is clearly a challenge to Enlightenment contract theory.

The Loyalist case that rights are derived from the institutions of government would be made later by Hegel in his *Philosophy of Right*. Hegel argues that the sovereign represents the unity of the legislative power, “the power to determine and establish the universal” and the executive, “the subsumption of particular spheres and individual cases under the universal.”²⁷ The power of the sovereign represents a third element,

²³ Wallace Brown, *The Good Americans: The Loyalists in the American Revolution* (New York: William Morrow & Co., 1969), vi.

²⁴ G.N.D. Evans, *Allegiance in America: The Case of the Loyalists* (Reading, MASS: Addison-Wesley Publishing Company), 1969, 6.

²⁵ *Ibid.*, 7.

²⁶ *Ibid.*, 9.

²⁷ G.W. Hegel, *Elements of the Philosophy of Right*. Ed., Allen Wood, Trans., H.B. Nisbit, (Cambridge: Cambridge University Press), 1993, 308.

“subjectivity as the ultimate decision of the will.”²⁸ The modern constitutional monarchy Hegel describes is not dependent on the virtue or honour of those in power, but rather on the rationality of the law. In response to the contract theorist’s query or who is to draw up the constitution that lays out these laws, Hegel says that the question is “nonsensical.”²⁹

It presupposes that no constitution as yet exists, so that only an atomistic *aggregate* of individuals is present.... But if the above question presupposes that a constitution is already present, *to draw up* a constitution can only mean to change it, and the very fact that a constitution is presupposed at once implies that this change could take place only in a constitutional manner. - But it is at any rate utterly essential that the constitution should not be regarded as *something made*, even if it does have an origin in time.³⁰

Hegel explains that a constitution is the work of centuries and cannot possibly be drawn up by an aggregate. He argues further that any changes to the constitution must be done within the existing rules of the constitution. This is critical if the laws are to be rational. The Loyalists understood this, and they understood that instead of being a despot the King represented the rationality of the constitution that had taken centuries to devise. The Patriots failed to understand this, and threatened to eradicate the freedoms the law allowed and replace it with a military dictatorship, as Oliver Cromwell had done in 1649 with the Commonwealth of England.

The association with Cromwell’s Puritan Republic is natural considering the Puritan beginnings of the American colonies and the Mayflower Compact, which set the stage early for the notion of a social contract. Of course, in that case they retained loyalty to the King, the “dread sovereign,” and saw the agreement as an assertion of British laws in the New World. Indeed, according to Hannah Arendt, the fact that the revolution did not finally end in tyranny, as nearly all other revolutions have before and since, was due to the continual existence of state, district, county, and township governments that had been established according to English law. These were never dismantled and the society was never permitted to return to a state of nature. The constant struggle by the revolutionaries to establish a constitution was, according to Arendt, a counter-revolutionary act.³¹

Although at periods they seemed close to sinking into tyranny, the diffusion of power at the various levels of government, and the persistent effort to impose a new centre of power, steered them through. Thus they evaded the trouble that would soon after plague the French Revolution, but not without paying a price. The price paid was not only in the torture, mayhem and killing of the revolution,³² but in the alteration of the constitution

²⁸ Ibid., 308.

²⁹ Ibid., 311.

³⁰ Ibid., 311-312.

³¹ *On Revolution*, 164-5.

³² A price paid by some. For others, the rewards far outweighed the sacrifice. John Adams, for instance, went from dissatisfied small town lawyer to living in a palace and

that and its attendant assumptions about freedom and community that continue to define the political culture of the United States today.

The American Constitution reconsidered: a social contract

“Be it remembered that liberty must at all hazards be supported. We have a right to it, derived from our Maker.... Let it be known that British liberties are not the grants of princes or parliaments ... that many of our rights are inherent and essential, agreed on as maxims and established as preliminaries, *even before Parliament existed ...*” - John Adams³³

The political philosophy of the American Revolution and the Constitution was the contract theory of John Locke, with a significant influence of Montesquieu’s views on the separation of power, and anti-royalist dissent. A central premise of anti-royalism was the irrationality and hence illegitimacy of inherited rule. Thomas Paine called it government by either force or fraud.³⁴ The authority of the state was based on a social contract between the citizenry and the head of state to abide to protect each individual’s natural rights: right to life (freedom from violent death), liberty, property, and equality before the law. “A constitution,” argued Paine, “is a thing antecedent to a government, and a government is only the creature of the constitution.”³⁵ But there is here a second contract that belies the claims of Enlightenment reason and legalism. It is the contract between the head of state and God.

Natural rights are a pre-Enlightenment Christian belief that God has granted certain inalienable rights, and it is from God that citizens are given the power to rebellion. When the monarch breaks the contract by violating the rights of citizens, he breaks his contract not only with the citizens, but also with God. His legitimacy is thus lost, and the higher power of God as interpreted by the people is invoked. The social contract is thus grounded in reason and scripture, and the revolution is thus supported by the claim that the citizens know God’s will and their use of violence is an expression of God’s holy wrath. This explains, in part, why Christianity holds such prominence in US politics despite the constitutional separation of church and state. In a sense, the constitution is a sacred document written by prophets.

attending court in Versailles and St. James as a diplomat, to second president of the United States, and to eventually retire a revered historical figure, happily ensconced in an estate he had long coveted that had belonged to a Loyalist’s widow who was forced to flee to England. He did quite well for a man that both Franklin and Jefferson regarded as mentally unsound.

³³ Quoted in David McCullough, *John Adams*, (New York: Simon & Schuster, 2001), 60. My emphasis.

³⁴ Thomas Paine, *Rights of Man*, (Middlesex, England: Penguin Books), 1969, 92.

³⁵ *Ibid.*, 93.

The American constitution is distorted on at least three levels. First, it is falsely presented as something made at a particular period in time, rather than an extension of centuries of institutionally and legally constrained negotiation. In this way it is understood in a way that loses sight of the source of laws and rights, misrepresenting them as the product of enlightened genius of a select few. It loses sight of the organic formation of rights over time, and that Americans are indebted to the history preceding the revolution, and should be open to embrace and incorporate the revelations that emerge following the revolution.

Second, insofar as it is understood as a social contract made by an aggregate of atomistic individuals it has the quality of market place agreement made between self-interested individuals, and as such remains vulnerable when members of the community fail to see their self-interest being served by the contract. This is what Hegel would call the one-sidedness of abstract right, where the individual is stuck in their subjectivity. Or, as C.B. Macpherson says, it is a form of possessive individualism where one regards oneself and others as mere property, with no moral dimension, no sense of developing their own capacities, and having no duty to society.³⁶ Paine seems to confirm this assessment when he states, “Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as matter of right.”³⁷

Third, it infuses the constitution with a mystical quality. Because it is grounded in natural rights given by God, it becomes a sacred document rather than a document written by fallible human beings whose judgement is open to question. This clearly conflicts with latter point, but rather than indicating that either assessment is false, it shows the conflict and tension that is left unresolved through the misconception of the constitution. On the one hand it is a market agreement between self-interested individuals, on the other it is a sacred document that stands above question. As a contract, it is devoid of morality. As a sacred document it takes on what Hegel calls the moral point of view, another form of one-sidedness. This is the subjectivity of the Idea, or God.³⁸ It is all encompassing and does not take into consideration the subjectivity of the individual. Nor does it require me to obey state laws, which become empty words. We might think here of President Nixon’s statement that, “when a president does it it’s not illegal,” or the many variations we have seen on that theme expressed by former Vice President Dick Cheney.

For Hegel, the subjectivity of abstract right and the universality of morality is reconciled in the ethical life of the state, that is, the duties and virtues that are given concrete form in the laws and institutions of society, particularly the family, civil society, and the state. It is this notion of ethical life that is undermined by the first distortion: the constitution was made at a particular point in time. The third distortion, one-sided morality, was key to making the revolution seem just. The ethical life of the state was abandoned, as was the particular value of the individuals who would be killed in the

³⁶ C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962), 3.

³⁷ *Rights of Man*, 91.

³⁸ Hegel, *Philosophy of Right*, 157.

process. Their subjectivities, their rights in the existing social contract, were obliterated in the pure light of the absolute subjectivity of God. We see this same rationality at work in the United States' aggressive foreign policy. In 2006 Lancet estimated that 650,000 Iraqis had been killed as a consequence of the American invasion, but this is the cost of freedom. In response to the slaughter he witnessed during the French Revolution, Thomas Jefferson wrote:

The liberty of the whole earth was depending on the issue of the contest ... rather than it should have failed, I would have seen half the earth desolated. Were there but an Adam and an Eve left in every continent, and left free, it would be better than it now is.³⁹

Robert Dahl's criticism of the Constitution

The consequences of these distortions are made evident in Robert Dahl's book, *How Democratic is the Constitution?*⁴⁰ The central thesis of the book is that American must reconsider how they understand the Constitution. It must not be regarded as infallible, and its authors should be seen as just that, authors, not prophets. He points out that the Constitution has hindered the development of democracy and freedom in the US as compared with those countries whose independence from Britain was achieved organically, without violent revolution. It lacks the flexibility of an unwritten constitution, it missed the advent of responsible government and the eventual limitations on the head of state, and it could not accommodate emerging conceptions of liberty throughout the nineteenth and twentieth centuries. Connected to all of these is the problem that even knowing all these failings, the Constitution is very difficult to amend.

Dahl argument culminates in the assertion that the American political system is less accountable and less democratic than most comparable developed states with parliamentary systems. He concludes with two main suggestions for strategies to begin the process. First, "invigorate and greatly widen the critical examination of the Constitution and its shortcomings."⁴¹ Americans must cease to see it as an icon and test its performance against the standards set by other advanced democratic countries. Its legitimacy should be derived "solely from its utility as an instrument of democratic government - nothing more, nothing less."⁴² Second, "reduce the vast inequalities in the existing distribution of political *resources*."⁴³ He argues that the US suffers from the effective veto power given to privileged elites.

A central problem Dahl finds with the Constitution is the tacit assumption of the social contract, namely, that the role of a constitution is to limit government and it

³⁹ Ibid., 438.

⁴⁰ Robert A. Dahl. *How Democratic is the Constitution?* (New Haven: Yale University Press, 2002).

⁴¹ Ibid., 156.

⁴² Ibid., 39.

⁴³ Ibid., 156.

potential to abuse its power and infringe on individual liberty. It “assumes that citizens themselves will somehow possess the opportunities and resources necessary in order for them to act on their rights.”⁴⁴ This is the point that Hegel makes when he refers to abstract right. Liberty as the absence of government imposition overlooks the importance of personal development and the need for institutions to facilitate reason, discourse, and political participation. The constitution as contract misses the insights about positive liberty that were formulated by the classical German Idealists, and the systemic economic obstacles to freedom identified by Marx, or the notion of developmental freedom articulated by T.H. Green and John Stuart Mill. In Canada, for instance, with its unwritten constitution and parliamentary system, these ideas led to improved public education, minimum wage, employment insurance, welfare, and universal health care.⁴⁵ It also allowed for the more egalitarian regulation of election financing.

It is the example of campaign financing that Dahl uses to illustrate his point about equality of opportunity. He asks, “What would a right to free speech mean to you if you didn’t have any opportunity to speak freely?”⁴⁶ He then contends that the Federal Election Campaign Act effectively gives a greater political voice to those with funds to promote their candidate independently. We can consider here the swift boat campaign against John Kerry in 2004.

Of the presidency, Dahl says that the intention of Framers was undone by practice, and the result is a president who is far more powerful than intended and the selection process is flawed. In a constitutional monarchy, the head of state is mostly a ceremonial role and the power that comes with being the embodiment of the country’s unity is thus largely constrained. Furthermore, the head of government is responsible to the legislature and is consequently more accountable. In the American presidential system, the intention was that Congress would represent the popular will and the president’s power would not have the benefit of a popular mandate and thus be limited. The trouble was that they could not work out how the president should be selected, and the final decision to go with an electoral college was made out of desperation.⁴⁷ Despite the Framers’ intentions, it was not long until the electoral college effectively became a direct election, thus giving the president the power of a public mandate. The result was a presidency with the combined power of the head of state and the head of government, a monarch and a prime minister.

Dahl is also critical of the presidency and the electoral college on the grounds that too often had undemocratic outcomes. As with the 2000 presidential election, the winner often has a minority of the total votes but still wins the electoral college vote. Again, he blames the inability of the Framers to foresee how the system would work. They failed to take into account either the role of the party system, which had not materialized, nor that

⁴⁴ Ibid., 143.

⁴⁵ In one of his tables, Dahl shows that out of eighteen comparable countries, 82% have a better rich-poor ratio than the US, and as a welfare state it ranks seventeenth lowest out of eighteen. Ibid., 169.

⁴⁶ Ibid., 150.

⁴⁷ Ibid., 67.

the there would only be two candidates with a serious chance of winning. Dahl finds three problems in this. First, the Framers intentions to contain the power of the president failed. Second, the undemocratic outcome that often occurs as a result of the electoral college. Third, the amendment process makes it nearly impossible to fix the problem.

The presidency also suffers from a lack of accountability. He discusses, for instance, the question of who is to be held responsible for the final form of a law after it has made its way through Congress with many amendments and signed by the president. Often the president's party is different from the one that controls one or both houses of Congress. Who is the voter to hold accountable in the subsequent election?⁴⁸ Furthermore, when the electorate must choose one of two presidential candidates, it is impossible to discern from who wins which aspects of the election platform they supported and thus what mandate he or she was given. Finally, as head of state the president is idealized by American and is expected to be noble and exemplary. Americans are taught to worship their presidents. However, they are also expected to be tough and effective politicians. Dahl points out that these diverse traits do not transpire in the real world, and hence Americans are continually disappointed by their presidents, which does not serve health of the democracy.⁴⁹

Another issue for Dahl is the significant political inequality in the structure of the Senate. He argues that the Senate gives unequal representation to the citizens of the least populated states, and that rather than defending the interests of minorities, which is how the distribution of the Senate seats was decided, it has proved to undermine the interests of "the *least* privileged minorities."⁵⁰ To support this argument he focuses on the Senate's role in upholding the institution of slavery, and the continued failure of the Senate to protect the basic human rights of African Americans for a century after the Civil War. When compared to upper houses of twenty-two comparable democratic countries, he finds the Senate is by far the most unequal representation of minorities and women.

With respect to the Supreme Court, Dahl argues that while judicial review is an advantage, the US Supreme Court has overstepped its role by making policy. He points out that nine appointed justices violate the principle of democracy by becoming an unelected legislative body.

Some of Dahl's study covers familiar territory for those who have compared the strengths and weaknesses of parliamentary and presidential systems, but there are two

⁴⁸ Ibid., 115.

⁴⁹ Ibid., 114. H.W. Brands makes a similar point in his essay "Founder Chic." "In making fawns of the Founders, we make pygmies of ourselves; in making saints of them, we make sinners of ourselves. Sinners we may be, but no more so than they... And although humility is a virtue, when consciousness of our sins becomes an inferiority complex that causes large numbers of the present generation to turn away from politics as incomparably inept or corrupt, it does the Founders no honor." *Atlantic Monthly*, September 2003, 108.

⁵⁰ Ibid., 53.

significant departures here in terms of how he frames his analysis. First, he is trying to persuade his fellow Americans to abandon their profound reverence for the Constitution and its framers. While there are certainly strengths that should be appreciated, neither the authors nor the document should be considered above reproach or criticism. Dahl does this not to undermine the strength of constitutionalism in the US, and hence its stability and freedom, but to create a space in which work can begin to improve the constitution and make the country more stable and free. This brings us to the second way his analysis departs from the standard commentary on the presidential system, namely, he questions whether America truly is more free and equal than comparable developed democracies. And while he presents his findings cautiously, it is evident that he does not believe the comparison shows the US in a good light. In terms of accountability, democracy, protection of vulnerable minorities, equality of opportunity, freedom of speech, and democratic equality, the US falls behind comparable parliamentary systems.

Conclusion: the case for a renewed Loyalist political philosophy

How Democratic is the American Constitution? was published in 2002. What might Dahl have added after witnessing the innumerable major constitutional violations perpetrated since by the Bush administration? Undoubtedly he would have used them to illustrate his points: the Constitution is insufficiently democratic; the US is less free than most comparable modern states; and the Framers made many severe mistakes that should be addressed, if possible.

To these observations we can add that behind the weaknesses of the American Constitution lie the mistaken political philosophy that allowed it to be enacted. First, the monarchy did not represent despotism, but rather the rule of the law and unity of the people. The Crown was integral to the ethical life of the state, a source of rights and freedoms, not an arbitrary will that trampled those rights and freedoms. Moreover, it had the great advantage of creating a separation between the head of government and the head of state.

Second, the social contract theory that animated the Patriots and Framers suffered from a fatal flaw. It combined in an irreconcilable manner the conception of freedom as the absence of obstacles to one's choices with a sacred, moral duty to defy the rule of law in the name of God and natural right. The conception of freedom failed to include equality of opportunity, and laid the groundwork for a great divide between the rich and the poor, which in turn naturally lends itself to an economic and political oligarchy. It also invited what Macpherson calls possessive individualism, and with it a materialism that overshadows ethics.⁵¹ The sense of divine purpose that transcends law and allows for

⁵¹ It has become platitudinous to remark on the brash materialism and consumerism of America. And it is difficult to establish a causal relationship between Locke, the Constitution, and American materialism. Nevertheless, it was a criticism often leveled against the Patriots by the Loyalists, and it is something that was remarked upon by many shortly after America achieved independence. When John Adams returned to America in 1789 to the country changed, "the view heard in many circles that the old ideal of

selective breaks with the social contract undermines the rationally devised and procedurally formulated laws. This invites claims such as this by President George W. Bush from the deck of the U.S.S. Abraham Lincoln, May 1, 2003, following the illegal invasion of Iraq: "All of you -- all in this generation of our military -- have taken up the highest calling of history. You're defending your country, and protecting the innocent from harm. And wherever you go, you carry a message of hope -- a message that is ancient and ever new. In the words of the prophet Isaiah, "To the captives, 'come out,' -- and to those in darkness, 'be free.'"

Third, the Patriots and Framers suffered from the Enlightenment hubris that they could compose a constitution that would encapsulate the wisdom of centuries that informed the infinite subtleties of Britain's unwritten constitution. This not only reflected an excessive confidence in their own individual rationality, it ignored the invaluable flexibility of an unwritten constitution, its capacity to adapt to new understandings and needs, as was the case in Canada when it adopted responsible government.

In short, the Loyalists were right. Freedom was more assured within the British system than without it. Freedom was better served by working for change through negotiation and constitutional reform within the rule of law than by disloyalty and violent revolution. Freedom is more than limited government and the absence of obstacles. Freedom is maintaining a healthy distrust of mobs and those who lead them. Freedom is a product of history, and the intricate unfathomable wisdom within the unwritten constitution. Freedom is rationality, and the unity of market principles and morality within the ethical life of society, including but not reducible to the Crown, parliament, and the state.

Loyalists understood early what Dahl discovered with the benefit of hindsight; the US Constitution is flawed and America is not as free and democratic as other comparable countries, including Canada. Thus contrary to the persistent murmurings of Canada's annexationists, there is room for critical view of the US. Moreover, there is good reason to continue to preserve Canadian sovereignty and resist North American integration. And, finally, there is a need to recognize the rationality of Canada's mild mannered Loyalist political philosophy.

devotion to the public good had been supplanted by avarice; the love of country, by a love of luxury." McCullough, *John Adams*. 398.