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Bagehot, the Crown and the Canadian Constitution*

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I intend to discuss the “other” constitution, the one that has to do with everything but federalism. A delicate consideration for time and place might suggest that this is a topic better put aside in favour of examining Canada’s faltering federal constitution. I believe, however, that there are lessons to be learned from a study of this “other” constitution, lessons which Canadians may find useful when they are forced, once again, to wrestle with reform of their governmental arrangements.

On two counts at least—Bagehot and the Crown—this choice of topic may be deemed flawed. For, on one hand, what Bagehot had to say in *The English Constitution* in 1867 is now so well known, so hackneyed, as not to bear repeating, while on the other hand, in the words of a best-selling introductory text on Canadian politics, the Crown is nothing more than the “authority . . . possessed constitutionally by the reigning monarch.”¹ On the contrary, I will argue that neither of these responses is supportable. No doubt some—but a very small part—of what Bagehot wrote is stale from familiarity, yet it is these very sections which I maintain misrepresent how our system of parliamentary government works. Similarly, it is misleading to equate the Crown with the authority of the reigning monarch, for the Crown is both more malleable and possesses a greater potential for action than that equation allows.

If the first two parts of this triptych beg refinement, what of the third? Here too there are difficulties, beginning with which practices and structures qualify for inclusion as elements of the constitution. When R. MacGregor Dawson assembled documents for his book *Con-*

* Presidential address to the Canadian Political Science Association, Université du Québec à Montréal, Montreal, Quebec, June 1995.

1 Richard Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process* (3rd ed.; Toronto: McGraw-Hill Ryerson, 1981), 171.

stitutional Issues in Canada, 1900-1931,² he organized them into chapters on the governor general, cabinet, House of Commons, Senate, civil service, judiciary, political parties and dominion-provincial relations. That was 60 years ago, and a new edition might well require additional chapters. The point remains, as the Supreme Court of Canada reminded us in the patriation reference in 1981, that what is constitutional in this country is open to dispute. Moreover, to lack of agreement on content must be added imprecision in language. Those who have taught a first-year class in Canadian politics know the problem. There are words—for example in Part III of the *Constitution Act, 1867* which provide for the executive power in the person of the Queen, the governor general and the Privy Council—and then there is reality, in the person of the prime minister and the cabinet. This particular contrast between the written word and daily practice is a dependable source of amusement in first-year classes in Canadian politics: “Of course the Queen has *no* role to play”; “*Despite* what the section says, the governor general’s contribution to public policy is less than miniscule.” But a jest can only go so far. As Harold Innis once observed in another context: “A joke is a joke, but no one wants to die laughing.”³

Nonetheless, the core of the constitution is treated if not as a joke then as a charade, albeit an elaborate one. Nor is that illusion a product of anachronism only. Political parties which have democratized the constitution’s provisions by making officials accountable contribute their own uncertainty. When after an election no party has an absolute majority in the legislature, even Canadians who have had Political Science 110 (and especially who have had 110 and now work in the media) display alarming confusion over the implication of the results. There can be few other political systems where uncertainty about operating principles is perpetual, and fewer still which spend so much time discussing reform of basic institutions but do so little to harmonize prescription and practice.

Tolerance for constitutional ambiguity may be a virtue—texts on British government and politics have made a virtue out of claiming so—but it does have consequences, the most visible of which for this discussion is the authority it awards interpreters of the constitution. Goldwin Smith sarcastically referred to such people as purveyors of “occult knowledge.”⁴ Bourinot was his *bête noire*, but he might have

2 R. MacGregor Dawson, *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933).

3 Harold A. Innis, *Changing Concepts of Time* (Toronto: University of Toronto Press, 1952), 73.

4 John T. Saywell, ed., *The Canadian Journal of Lady Aberdeen, 1893-1898* (Toronto: The Champlain Society, 1960), 316-17.

Abstract. Through his writings, Walter Bagehot gave order and meaning to the institutions of parliamentary government. *The English Constitution* (1867) acknowledges the Crown as centrepiece but relegates it to the category of symbol. Institutions, Bagehot said, were “dignified” or “efficient” according to their constitutional function, and the Crown was the apotheosis of a dignified element. By contrast, the author argues that the Crown is an integral part of a practical form of government in Canada, and advances as proof three areas of Crown influence: representation, information and participation. The discussion concludes by noting the relevance of the Crown for the study of Canadian federalism.

Résumé. Dans ses écrits, Walter Bagehot a donné de l'ordre et du sens aux institutions du gouvernement parlementaire. *The English Constitution* (1867) reconnaît la Couronne comme centre de cette forme de gouvernement tout en la reléguant au rang de symbole. Les institutions, selon Bagehot, se caractérisent soit par la « dignité » soit par l'« efficacité »; il voit dans la Couronne le comble de la dignité. Nous soutenons, au contraire, que la Couronne est partie intégrante d'une forme pratique de gouvernement. En éléments de preuve, trois sphères d'influence de la Couronne sont considérés : la représentation, l'information et la participation. La conclusion de cet article réitère toute l'importance de la Couronne pour l'étude du fédéralisme canadien.

been referring to Alpheus Todd of an earlier date or W. P. M. Kennedy, Dawson or Eugene Forsey afterward.

Illustrious as those individuals were, each was in the debt of Bagehot, the interpreter par excellence. K. C. Wheare went so far as to credit him with “inventing” the English constitution, one which people had failed to “recognize or apprehend” before he wrote about it.⁵ More to the point, says Ferdinand Mount, author of *The British Constitution Now*, Bagehot “*invented a career* for British monarchs.”⁶ More than a century later that career continues substantially unchanged from the days he conceived it. Bagehot was unusual among political theorists for not being a theorist. He wrote for periodicals, was editor of *The Economist* (1861-1877) and possessed a journalist's talent for perception along with a capacity for communicating his insights through accessible prose. It is these qualities which explain the influence and longevity of his work and which have won him a place alongside the Mills and Alfred Marshall, among others, in the Victorian pantheon of politics.⁷

As befitted the mid-Victorian passion for organizing facts, Bagehot sought to impose order on the accretion of institutions and practices that comprised Britain's constitution. For this purpose he employed categories derived from a series of dichotomies, the best known of which is the division of the constitution into dignified and efficient parts (that is, parts which hold authority and which use author-

5 K. C. Wheare, “Walter Bagehot,” *Lectures on a Master Mind, Proceedings of the British Academy*, 60 (1974) (London: Oxford University Press, 1975), 173-97, at 195.

6 Ferdinand Mount, *The British Constitution Now: Recovery or Decline?* (London: Mandarin, 1992), 94.

7 See, for instance, Stefan Collini, Donald Winch and John Burrow, *That Noble Science of Politics: A Study in Nineteenth-Century Intellectual History* (Cambridge: Cambridge University Press, 1983), 161-81.

ity). In this approach Bagehot was prompted by more than a desire for rational ordering, although his reasons are largely tangential to the concerns addressed here. Let it be said that they originated in an awareness of the British class structure and especially in the rise of an urban working class which Bagehot saw as a threat to middle-class (but minority) control of Parliament. He believed that the lower classes must be excluded from active governing, and that it was the function of the dignified parts of the constitution to legitimate that exclusion. That Bagehot was politically elitist, or more, a social snob, is immaterial to the study of the influence of his writings. Certainly it did not dissuade Prime Minister John A. Macdonald in 1884 from citing his work as an authority to guide the behaviour of lieutenant-governors, nor did it prevent another Father of Confederation, Alexander Campbell, from using the leisure that appointments as senator and, later, lieutenant-governor, gave him to turn, "naturally," he said, to Bagehot. Campbell, nonetheless, had reservations about the great work stemming in part, it would appear, from its social preoccupations. As he wrote to Macdonald: "You must have experience in a colony to enable you fully to appreciate the inapplicability of much of the book."⁸

Although convenient for his argument for an all-powerful House of Commons, Bagehot's sequestering of monarchy from practical politics is a ruse. This term is used advisedly: Bagehot knew what he was doing, and it is for this reason that Mount calls him "the inventor of the sly drool."⁹ Monarchy's impact on government is more pervasive and profound than Bagehot allows, but not for the reasons sometimes given. Every reader of *The English Constitution* is aware of the three "rights" awarded the monarch: to be consulted, to encourage and to warn. No study of the subject neglects to mention this trinity, but none offers evidence to show that their exercise determines the course of public policy or that the political executive pays anything more than polite attention to the encouragement or warnings it receives. Again, as a result of the work of Eugene Forsey, Canadians especially have reason to be aware of a further—reserve—power which the monarch (or his or her representative) possesses as guardian of the constitution. But the reserve power is just that, an extraordinary power to be used in extraordinary situations.

There is another explanation for monarchy's influence which becomes clearer when the focus shifts from the monarch (or his or her

8 Sir Joseph Pope, *Correspondence of John A. Macdonald: Selections from the Correspondence of the Rt. Hon. Sir John Alexander Macdonald, G.C.B.* (Toronto: Oxford University Press, 19[21]), 172-74; and Campbell to Macdonald, March 7, 1888, John A. Macdonald Papers, National Archives of Canada (hereafter NAC), 83495-98.

9 Mount, *The British Constitution Now*, 94.

surrogate) to the Crown as an organizing principle of government. (By the way, Bagehot was not consistent in his use of terms although he favoured the personal reference, a usage which over time has imparted to his framework a distinctly un-Canadian flavour.) The argument goes like this: because the parts of a dichotomy are interdependent, contraction of one necessitates expansion of the other. Confinement of Bagehot's Crown to the dignified sphere cleared the way for the House of Commons to occupy without hindrance the efficient sphere of government. In fact, says M. J. C. Vile, conferment of absolute authority on Parliament was Bagehot's principal purpose.¹⁰ By awarding the legislature a monopoly of power he destroyed rival claims based on the older doctrine of the separation of powers. So interpreted, Bagehot thus becomes the father of the Westminster model of government, whose distinctiveness he (and a legion of subsequent writers) attributed to the fusion of executive and legislative power. Political Science 110 teaches that under this system the executive sits in the legislature, its members come from the legislature and it is accountable to the legislature for its actions. Students are also taught that these cardinal features of parliamentary-cabinet government originate not in law but by convention. That is, there is no legal requirement that the executive sit in the legislature, or its members come from that body or that they be held responsible to it.

Convention, not law, then, is the issue, and Bagehot more than any modern authority did an admirable job of conflating the two. The legal bases of the executive derive from the Crown (see Part III of the 1867 Act), but in Bagehot's scheme of things this singular fact is ignored or treated as irrelevant. Most modern texts follow his lead.

As a result, the study of government in Canada and other countries where the Westminster model prevails is exclusively a study of politics. The reason for the bias is obvious: it does not conform to democratic theory to demonstrate the executive's autonomy from the people's representatives. On the rare occasions when government has been incautious enough to deny that its authority is "delegated by the House of Commons," criticism has been swift and sharp. Reflecting on one of these occasions, Prime Minister Louis St. Laurent observed that "it is well to have the truth as one's inspiration but it is sometimes wise to express only as much of it as one's supporters can be expected to accept."¹¹ The long arm of history has had a role to play in promoting

10 M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), 224-27.

11 Louis St. Laurent to Alan Macnaughton, October 28, 1949, St. Laurent Papers, NAC, file N-10-5(a), National Status. For the incident in question, see Canada, House of Commons, *Debates*, November 12 and 13, 1945, 2020 and 2075-78.

the study of politics over law as well. In the Whig view, the struggle for responsible government was but an early stage of a journey along the road from colony to nation. In the course of this progress the Crown had to be vanquished twice: first, when executive power succumbed to legislative control and, second, when imperial power receded as local self-government grew. For Prime Minister Mackenzie King, Canada's chief Whig, Dominion autonomy was symbolized in the subservience of the monarchical Crown to the local political Crown (that is, the Canadian cabinet). Insistence on this relationship after 1926 forced the Crown's representative into "the humiliating position" of total ignorance of governmental affairs, an arrangement King defended on characteristic (if Pinteresque) grounds that "it is always important to remember the significance of the things the Governor General did not do."¹²

It is time to reclaim the Crown from the dignified limbo to which Bagehot and a succession of practising politicians have condemned it. Because of Bagehot's finesse, political scientists have invariably limited their references to the Crown to its symbolic, ceremonial or emergency (reserve power) role. By contrast, the concept of the Crown as agency, permeating the political system and empowering the political executive, receives no attention. The remainder of this discussion seeks to correct that myopia. It argues that the Crown is an integral part of a practical form of government, and advances as proof for this proposition three areas of Crown influence: representation, information and participation. Other areas, for example, administration ("the secret garden of the Crown"¹³) and law, would be discussed except for the limitation of space. The discussion concludes where Canadian political discussion usually concludes—with remarks on the relevance of the Crown for the study of Canadian federalism.

Representation

To modern ears there is a dissonance in joining the concepts of representation and the Crown. The impetus to self-government is fundamental in the Anglo-American political tradition, and in British colonies that has meant submitting the powers of the Crown to political control. Submission was not the same thing as abolition, however; and for that reason the appointment power might still encroach on and even, in some cases, supplant the mechanisms of popular representation. Ap-

12 Memoranda: "Record of Interview. Prime Minister of Canada," October 12, 1939, and "The Crown and Canada," April 12, 1939, Records of the Governor General's Office, NAC, files 1850A and 1850B. The author of the memoranda was Arthur Shuldham Redfern, KCVO (1939) and CMG (1945), who between 1936 and 1945 served as Secretary to the Governor General.

13 R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed.; London: Stevens and Sons, 1964), 170.

pointments flow from the use of the Crown's patronage power. The media and the public have long criticized patronage appointments—to the civil service before 1918 and to boards of crown corporations more recently—on the grounds that they are distributed by the governing party for partisan purposes. Dispute over these matters has tended to disguise the legal reality that appointments emanate from the Crown and not from the party in the first place.

Whether proportionately more appointments are made at the national level in Canada than in other countries has yet to be determined. In any case it is not the numbers that matter but the centrality to the political system of those who are appointed. Indeed, the preservation of the political system could be said to depend upon it, since the prevailing theory of Canadian politics—elite accommodation—could not function without the use of the power.

Because appointments are the prerogative of the Crown, their numbers may not be limited nor their determination shared. Constitutionally, the power cannot be shared, as Eugene Forsey, with characteristic vehemence, reminded Prime Minister Brian Mulroney after the McGrath Committee recommended legislative scrutiny of order-in-council appointments. That proposal was, said Forsey, “based on false constitutional premises,” “subversive of our constitutional order of responsible government” and “a travesty of constitutional principle.”¹⁴ The prerogative of choice is the political executive's alone, because it alone monopolizes access to the Crown's representative. Unrestrained by a confirmation process, the potential for action is limited only by the self-restraint of the Crown's advisers. For this reason, and because the prerogative power of the Crown itself is imprecise, it is at the very least misleading to describe the Crown as nothing more than “the authority . . . [of] the reigning monarch.”¹⁵

The federalization of the cabinet, which began with Macdonald's first government, and the labyrinth of boards and commissions created in response to the demands of the positive state, all embrace the idea of appointments being used for accommodative purposes. Appointments to take account of claims of language, religion, region, race and gender are now so familiar as not to occasion comment, but in the context of a study of the Crown they should—for they present the good (or, at least, acceptable) face of patronage. For instance, in the 1980s, when

14 Forsey to Mulroney, August 14, 1985, Forsey Papers, NAC, file 58/23, House of Commons Reform—McGrath Committee, 1985-1986.

15 Vernon Bogdanor has suggested that “it may be inherent in the notion of constitutional monarchy that these powers should remain undefined in scope” (see “The United Kingdom,” in David Butler and D. A. Low, eds., *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* [London: Macmillan, 1991], 10-40, at 19).

partisan patronage was under strong attack, the House of Commons Special Committee on Visible Minorities recommended that "the Federal Government should use Governor-in-Council appointments to increase the participation of visible minorities on federal boards and commissions as well as in the senior management of the Public Service and Crown corporations."¹⁶ The attraction of appointments is that once the principle is adopted, the object sought is easily secured. Certainly there is none of the uncertainty that comes with competitive elections. When, for instance, the plurality voting system is slow to respond in reflecting cultural pluralism, the appointment power may be looked upon favourably as a corrective to the deficiencies of free elections.¹⁷

Information

The importance of information to the conduct of government is unquestioned, or so it would appear in Canada, where, aside from the literature on copyright, social scientists pay it scant attention. And yet, if Americans are, as one US historian has labelled them, "a calculating people," then Canadians are an inquiring people.¹⁸

Canadian governments have, with great frequency in this century, made use of royal commissions to inquire into narrow and broad areas of public policy. Of the latter, some of the best known are the Royal Commission on Dominion-Provincial Relations (Rowell-Sirois, which reported in 1941), the Royal Commission on National Development in the Arts, Letters and Sciences (Massey, 1951), the Royal Commission on Bilingualism and Biculturalism (Laurendeau-Dunton, beginning in 1967) and, for a very recent example, the Royal Commission on Electoral Reform and Party Financing (Lortie, 1992). To these might be added, as examples of commissions with a more specific focus, inquiries into the automotive industry, health services and banking. Several royal commissions have dealt with the same topics more than once; grain and transportation are especially favoured subjects. These are commissions appointed at the federal level, but there is an extensive array of provincial commissions too. Between 1867 and 1982, there

16 Canada, House of Commons, *Equality Now! Minutes of Proceedings and Evidence of the Special Committee on Visible Minorities in Canadian Society* (Ottawa: Queen's Printer, 1984), 52.

17 "The Government will look at the profile of the elected members [of district health boards] and decide if deficiencies can be corrected through the appointment process. For example, if there isn't sufficient representation of women, aboriginals, seniors . . . the government will appoint people from these groups,' [the Saskatchewan health minister] said" ("Health Elections Slated for Fall," *Star Phoenix* [Saskatoon], February 8, 1995, 3).

18 Patricia Cline Cohen, *A Calculating People: The Spread of Numeracy in Early America* (Chicago: University of Chicago Press, 1982).

were 767 provincial royal commissions and commissions of inquiry with either a narrow and a broad focus.¹⁹

The number and breadth of inquiries are impressive, yet those data scarcely indicate the extent of the investigation undertaken, for many of these bodies in turn commissioned comprehensive research studies on specific topics as well (100 in the case of the Lortie Commission, to be published in 23 volumes, in addition to the three-volume report). The details of each of these endeavours is beyond the scope of this discussion, but they all share the common feature that they are "predominantly concerned with knowing."²⁰ Of course, in a free society individuals as well as governments may make inquiries. What is significant about Canadian practice is that so many public inquiries are conducted and, from the perspective of this study, that these inquiries "take [their] formal origin in the legal centre of authority, the Crown."²¹ While it is true that there is a functional distinction between royal commissions and commissions of inquiry, which is not always rigorously maintained, and while it is also true that the order-in-council that appoints these bodies cites an authorizing statute (usually an inquiries act), the relevant point to note is that they are appointed by and report to the Crown, and that their investigations are for the benefit of the executive.

Whether or not governments use the information provided or follow the proposals that are made is unimportant from the perspective of the royal commission as an instrument of executive choice. For the government of the day, the royal commission is a valuable tool of public policy; it not only defines issues, it authenticates those that are chosen for investigation over those that are ignored. The appointment of the Bilingualism and Biculturalism Commission in 1962 signified the central importance of language to Canadian politics and experience.²² That was recognized again, following the Commission's report, in the first federal statute on language, the *Official Languages Act*, but also in the stimulus the Commission gave to experiments in language teaching. Over time royal commissions have the secondary effect of focus-

19 For compilations of federal and provincial royal commissions, see George Fletcher Henderson, *Federal Royal Commissions in Canada: A Checklist* (Toronto: University of Toronto Press, 1967); and Lise Maillet, compiler, *Provincial Royal Commissions and Commissions of Inquiry, 1867-1982: A Selective Bibliography* (Ottawa: National Library of Canada, 1986).

20 R. MacGregor Dawson, *The Principle of Official Independence* (London: P. S. King and Son, 1922), 179-80. The phrase comes from Graham Wallas, *The Great Society: A Psychological Analysis* (London: Macmillan, 1932), 238.

21 Thomas J. Lockwood, "A History of Royal Commissions," *Osgoode Hall Law Journal* 5 (1967), 172-207, at 174.

22 John A. Munro and Alex I. Inglis, eds., 1957-1968, Vol. 3 of *Mike: The Right Honourable Lester B. Pearson* (Toronto: University of Toronto Press, 1975), 237.

ing interest upon their own subject matter, as witness the Rowell-Sirois Commission, most of whose recommendations in 1940 were not immediately implemented, but which, through the precedence it awarded to central rather than provincial government questions, exerted an impact on social science scholarship for a generation. Indeed, that report reinforced a bias against "parochial" provincial concerns which had largely been responsible for the Commission's creation in the first place.

As with statistics (to be discussed below), royal commissions "influence politics in subtler ways" than just through their recommendations; they "[define] issues by the categories employed, the questions asked (and not asked), and the tabulations published."²³ To a large extent, decisions on these matters are at the discretion of the inquiry, but the commission's terms of reference are set and their personnel selected by the executive. When to these powers are joined the executive's right to create (or not to create) a commission and to determine the disposition of the findings of those it does create, then the executive's discretion is clearly greater than that of its instrument. No matter how independent they may be in the conduct of their inquiry, royal commissions are agents of the executive in the larger sphere of public policy. Moreover, information is only one of their uses to government—they may also delay action, pacify dissent and confer status—but the crucial decision whether or not to use them at all rests with the executive, and that freedom of choice strengthens government.

In an unusual way it may also act as a control on social change by directing reform impulses into traditional political structures. Monique Bégin, executive secretary of the Royal Commission on the Status of Women (1967-1970), has written about the impact that body had on existing women's organizations. The Commission's public hearings, she says, allowed each established group "to be heard," as opposed to the creation of "a distinct new national feminist association such as the American NOW"; thus a "grass-roots consensus" emerged from the "discussions, committees and executive meetings" held by existing groups across the country. In the process, these associations became transformed "with a new women-oriented mission that added to, or replaced, their traditional altruistic service roles." Only after this ideological conversion, and after the Royal Commission had reported, did the National Action Committee on the Status of Women take form. To this developmental sequence, which early on promoted public debate of women's issues among established representatives, she attributes the more rapid advance in this country than in the United States of "social programs relevant to women . . . as well as . . . of women's participa-

23 William Alonso and Paul Starr, "The Political Economy of National Statistics," *Items* 36 (1982), 29-35, at 30.

tion in public affairs.”²⁴ In this recollection, the former executive secretary and also former federal Liberal cabinet minister, reveals again the long-term effect a temporary organization like a royal commission may exert.

But royal commissions are one way of knowing. For the daily business of governing, there is the civil service, one aspect of whose work—the general collection of information—needs to be emphasized. Collection of data is primarily the job of Statistics Canada, an agency of the federal bureaucracy. The only reference to statistics found in the *Constitution Act, 1867* is in s. 91(6), where “the Census and Statistics” is listed as a matter of exclusive federal legislative power. In practice, provincial executives do compile such data. Where both levels of government are active, conflict is possible and it must be presumed that in such instances “the federally compiled statistics would be regarded as definitive and conclusive.”²⁵ In fact, conflict in this field is rare; much more common is it for provincial governments to cite federally compiled statistics to bolster their case for improved treatment by the federal government.

Confederation was established to achieve national purposes, and to that end statistics were essential. But Confederation quickly became an instrument for redistribution as well. In the first Parliament, the plea for an initial “personal census” was soon heard, for “on that,” said Alexander Mackenzie, “depended the political relations of the several Provinces under the *Union Act* towards each other.”²⁶ All governments depend upon statistics but federations depend even more so; *le fédéralisme rentable* is a slogan identified with modern Quebec governments but its meaning has been understood in all provinces and long before the Quiet Revolution. Half a century ago, Ontario’s grievance that it was the country’s milch cow required corroboratory statistical evidence, but until the provinces began to modernize their civil services and, particularly, establish their own executive agencies, such as the CCF government’s innovative Budget Bureau and Planning Board in Saskatchewan in the 1940s, federal data prevailed for the reason the Dominion Statistician (as he then was) told the Rowell-Sirois Commission: “The federal government under the *British North America Act* has no powers in certain fields but it has the right to know all about these fields. That alone is a tremendous power. . . . [W]e are using sta-

24 Monique Bégin, “Debates and Silences—Reflections of a Politician,” *Daedalus* 117 (1988), 335–61, at 345–48.

25 W. H. McConnell, *Commentary on the British North America Act* (Toronto: Macmillan, 1977), 191.

26 House of Commons, *Debates*, March 1870, 283.

tistics as a regulative force in fields that the provinces hold under jurisdiction.”²⁷

If the “right to know” is a “tremendous power,” so too is government’s discretionary right to share the knowledge that it holds. This latter right is less unilateral than it once was; Freedom of Information (FOI) legislation (at the federal level and in most provinces) partially opens the door to let the public see what government does, while a federal Information Commissioner (an official of Parliament) and comparable officials in the provinces oversee compliance by government institutions with the legislative provisions. Nonetheless, in the distribution as in the acquisition of information, the advantage again rests with the executive whose authority derives in part from Crown prerogative. As the following excerpt from a publication of the Canadian Legal Information Centre notes, the extent of the prerogative is open to debate, but the executive focus to the control of information in the Canadian governmental system remains indisputable:

Crown “prerogative” describes certain powers, rights, immunities and privileges necessary to the maintenance of government. These powers are unique to the Crown. . . . Among them are the exclusive right of . . . governments to print certain types of works. The goal of Crown prerogative is to ensure the quality, accuracy and credibility of the information. The works encompassed by the royal prerogative power are not well defined and may or may not cover databases. Although the Crown prerogative copyright has been cited in many judicial opinions, it has not been judicially tested, so its nature and extent are not certain. It is known, however, that this exclusive right to certain works by prerogative amounts to a perpetual term of copyright protection.²⁸

Canadian policy differs sharply from that of the United States where copyright protection is not available for any work of the United States government. Comparisons can be invidious, and this contrast is not necessarily to Canada’s disadvantage. Openness in the United States, it has been argued, serves the “information industry” as much as it does the public. In Canada, it can be argued that “Crown copyright provides the government with an opportunity to act as a trustee on behalf of the people to ensure that the public interest in the dissemination of the ‘peoples’ works is being served.”²⁹

27 Royal Commission on Dominion-Provincial Relations, *Report of Proceedings*, 3846.

28 Kathy Kelso, Alamar Education, *Electronic Legal Information: Exploring Access Issues* (Toronto: Canadian Legal Information Centre, 1991), 23-33. See too, Barry Cleaver et al., *Handbook Exploring the Legal Context for Information Policy in Canada* (London: Faxon Canada, 1992).

29 Andrew Hubbertz, “Crown Copyright and the Privatization of Government Information in Canada with Comparisons to the United States Experience,” *Gov-*

Yet, if knowledge is power then limited knowledge is limited power. That maxim is borne out in Canada where crown corporations continue to play a major economic role, but where they are exempted from the requirements of FOI legislation and from the scrutiny of other watch-dog agencies. This removes a significant portion of public policy activity from examination at the same time that it enhances cabinet's powers. Notwithstanding government counterarguments that these are commercial enterprises which require the same confidentiality for their decisions as business in the private sector, by their actions governments refute that claim when they employ crown corporations for public policy purposes.³⁰

Attempts by the Auditor General of Canada to pierce this veil of secrecy in the case of the government's purchase of Petro-Canada ultimately failed. Though in the Federal Court he received a sympathetic judgment, on the grounds that parliamentary scrutiny is "meaningless [without] professional accounting and auditing support," in the Supreme Court his bid to examine the documents relating to Petro-Canada's acquisition was quashed. Any other finding, said the Chief Justice, would "result in a de facto shift in the constitutional balance of powers of the expenditure auditing process," for auditors must deal with the implementation not the formulation of policy. Nor was the "fusion of powers which characterizes the Westminster system of government" a justification for a break with tradition: "That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditory function is not . . . constitutionally cognizable by the judiciary."³¹

Democratic Participation

As with representation and information, so with democratic participation the Crown plays contradictory roles. For instance, it can be argued that the weakness of the concept of constituent power in Canada is a consequence of the principle that the Crown is the source of authority. This was one of the arguments Norman McL. Rogers used 60 years ago to refute the compact theory of Confederation, and it is one that has

ernment Publications Review 17 (1990), 163; and Barry Torno, *Crown Copyright in Canada: A Legacy in Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981), 46.

30 Andrew Hubbertz, "Freedom of Information and Canadian Crown Corporations," *Government Information Quarterly* 3 (1986), 63-71.

31 *Auditor General of Canada v. Minister of Energy, Mines and Resources, et al.*, [1985] 1 F.C. 746; and *Auditor General of Canada v. Canada (Minister of Energy, Mines and Resources et al.*, [1989] 97 N.R. 312, and 305-06.

frequently been repeated.³² Consider, too, the fate of direct democracy experiments in Canada as opposed to the United States: in this country assertions of popular democracy have never posed a danger to the executive.

In *Re Initiative and Referendum Act*, for instance, the Judicial Committee found *ultra vires* direct democracy proposals in Manitoba which would have compelled the lieutenant governor “to submit a proposed law to a body of voters” instead of to the legislature [that is, the initiative], and render him ‘powerless’ to prevent it, if approved by such voters, from coming into effect [that is, the referendum].”³³ The consequence of this finding, which prohibits referenda but by inference accepts consultative, nonbinding plebiscites (the distinction between the two terms is not always carefully drawn in popular discussion), is no less significant than the reasons the Judicial Committee gave for reaching it: there may be no “abrogation of any power which the Crown possesses through a person who directly represents it.”

In history and in practice, the inviolate Crown then acts as a visible check on campaigns for direct democracy. Less obvious but equally effective restraints by the Crown on the transmission of voter preferences into public policy exist as well. Arguably the best example reaches back, again, to the era of the struggle for responsible government. Lord Durham believed that “good government [was] not attainable” unless there was central control over expenditure, and no adviser to the Crown since 1839 has dissented from that judgment. The executive’s monopoly on spending is a cardinal feature of responsible government, and one with extensive ramifications: it denies to the legislative branch a policy-making function and, as a consequence, assigns to a member of parliament a very different role from that played, for example, by a member of the United States Congress. The job of the Canadian member of parliament is “to monitor, evaluate, judge and decide on the [government’s] proposals.”³⁴ It is not, contrary to the view of critics, to legislate.

And there is a lot of criticism about the ineffectualness of the system—that the public is given too little role to play in influencing policy and that MPs and provincial MLAs are no more than automatons. Most remarkable of all, criticism comes as much from legislators as it does from voters. The villain is the government and the tight control it exerts over the House and all its members. Complaints that demonize disci-

32 Norman McL. Rogers, “The Compact Theory of Confederation,” *Proceedings of the Canadian Political Science Association*, 1931, 205-30.

33 [1919] A.C. 935-46, at 944.

34 *Federal Government Reporting Study: A Joint Study by the Office of Auditor General of Canada and the United States Government Administration Office* (Ottawa: Auditor General’s Office, 1986), 6.

pline echo campaigns against patronage and official secrecy, for in each instance the source of contention is government's use of the Crown prerogative—to dissolve and convene the House, to make appointments and to acquire and dispense (or keep) information.

In fact, much of modern Canadian politics relates to issues that centre on government's use of the prerogative or on questions that arise from that use (that is, questions about privilege, knowledge and participation). Yet, significantly, the debate is seldom expressed in these terms. Instead, reforms are posited that will limit the executive, frequently through new powers being given to the upper chamber. These reforms appear to be fueled less by executive/legislative tension than they are by regional discontent, the premise being that unpopular government actions result from inadequate representation rather than from the excess of power that resides in the Crown prerogative. A good part of Canada's so-called third-party tradition originates in an unarticulated distrust of the prerogative as exercised on advice.

It is an exaggeration to say that representative government in Canada has always had more to do with government than it has with representation, but it is only an exaggeration. Even where the Crown acts to promote citizen participation (for example, the Court Challenges Program created in 1978 to assist litigants according to an official history of the Program in "matters of principle and of public interest"), its initiatives serve its own interests as much as they do those of the citizen.³⁵ For over half of its life, the Court Challenges Program, conceived by the executive, was run by it as well, and from beginning to end its central purpose was to allow the executive to intervene selectively on behalf of complainants in language-rights disputes and Charter challenges. It is not the purpose here to evaluate the Program, but to stress once again that it lay within the prerogative of the Crown to direct the Program, first, in matters of spending and, second, in the exercise of official discretion whether to lay charges in an instance of perceived law-breaking.

Conclusion

It would be remarkable in a country as obsessed as Canada is with federalism for a discussion of the Crown not to mention that topic. I will conclude by mentioning federalism and by claiming that the Canadian federation takes the form it does because of the Crown. To use the language of my opening paragraphs: the "other" constitution has

35 Richard Goreham, *Language Rights and the Court Challenges Program: A Review of Its Accomplishments and Impact of Its Abolition*, report submitted to the Commissioner of Official Languages, Ottawa, 1992.

moulded Canada's federal constitution to such an extent that Canadian federalism is in practice a system of compound monarchies.

In brief, the argument on behalf of that claim proceeds as follows. It is generally accepted that the Judicial Committee of the Privy Council perverted Macdonald's centralist constitution. Through a series of opinions, the provinces were freed from their role as handmaidens to a superordinate central power and deemed to be autonomous creations within their jurisdiction, equal in status to the government in Ottawa. That much is well known, but from this conclusion other consequences followed. Among these, and crucial for this argument, was the empowerment of the provincial *executive* that accompanied the enhancement of the constituent polities of Confederation. The provinces may have been the indisputable beneficiaries of judicial interpretation, but it was their governments and not their legislatures who reaped the harvest. Within the expanded provincial universe the executive faced no rivals. Unlike their state counterparts in Australia, who had "the strongest upper house system" among parliamentary democracies, Canada's provincial second chambers were weak or non-existent.³⁶ Moreover, by the 1890s a rigid code of discipline in both major parties contributed to the government's pre-eminence in the popularly elected chamber.³⁷ The executive was exclusively a party body whose members almost invariably came from the same party.

These considerations in no small part determined the nature and form of Canada's national political parties. Canada is a federation, and the chief characteristic of her political parties is that they, too, have been federations or, at least, congeries of provincial power centres. Thus the regionalism of Canadian politics and Canadian political parties owes something (indeed, I argue, much) to the Crown. Perhaps it would be more accurate to say that they are indebted to the Judicial Committee of the Privy Council, who in judgments such as *Liquidators*, found "the Lieutenant Governor . . . as much the representative of His Majesty for all purposes of Provincial Government as the Governor General himself is, for all purposes of Dominion Government."³⁸ Had the Macdonald version of federalism triumphed, would the dispersal of power in Canada's national political parties be as strong as it is today?

As the century progressed the provinces exploited the potential for initiative the courts had given them. However, they took advantage of the opportunity offered them in tandem rather than in concert. Therefore, Ontario governments entered early upon a policy of provincial development, while by contrast, and for distinctive reasons, Que-

36 Donald Horne, "Who Rules Australia?" *Daedalus* 114 (1985), 171-96, at 177.

37 See Norman Ward, "The Formative Years of the House of Commons 1867-91," *Canadian Journal of Economics and Political Science* 18 (1952), 431-51.

38 [1892] A.C. 437.

bec took comparable action much later.³⁹ Thus emerged the most distinctive feature of Canadian federalism—its dispersal to the periphery. Had the provinces only had legislative authority over certain matters in s. 92 of the *Constitution Act*, but not royal prerogative in those same areas, their ability to develop social policies that involved extensive administrative regulation would have been severely hampered. The Crown did not lead to province-building—for example, conservative goals in Ontario, nationalist objectives in Quebec and social redistribution in Saskatchewan—but province-building would have been almost impossible to achieve in conditions the provinces faced without it.

Here, as in those areas of public policy cited above, the reach of the Crown is greater than Bagehot's dignified categorization would allow. While it is true that for the Crown to become effective the political executive must act, it is also the case that prerogative actions of the Crown based on advice lie beyond the reach of Parliament. When this happens, the Crown causes an effect, and, from the perspective of this article, it might then be better categorized as an efficient part of the Constitution. The result is to turn Bagehot's famous dichotomy on its head and thereby destroy its usefulness to constitutional theory.

39 See H. V. Nelles, *The Politics of Development: Forests, Mines and Hydro-Electric Power in Ontario, 1849-1941* (Toronto: Macmillan, 1974), and also Jean Beetz, "Les attitudes changeantes du Québec à l'endroit de la Constitution de 1867," in P. A. Crepeau and C. B. Macpherson, eds., *The Future of Canadian Federalism/L'Avenir du fédéralisme canadien* (Toronto: University of Toronto Press; and Montreal: Les Presses de l'Université de Montréal, 1965), 113-38. Whether Quebec's governments were as passive before the Quiet Revolution as much of the standard literature suggests is now being questioned. See, for example, Ruth Dupré, "Was the Quebec Government Spending So Little? A Comparison with Ontario, 1867-1969," *Journal of Canadian Studies* 28 (1993), 45-61.