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The Supreme Court of Canada's Federalism as Expressed in the Securities Reference

Gordon DiGiacomo

**Institute of Intergovernmental Relations
School of Policy Studies, Queen's University**

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I. Introduction¹

This paper is about the kind of federalism expressed in the Supreme Court of Canada's opinion in the *Securities Reference*. The justices unanimously determined that the federal government's proposed securities legislation was, in fact, a “wholesale takeover” of securities regulation, not justified by the arguments of the federal solicitors (*Reference Re Securities Act, 2011 SCC 66*). Thus, it is *ultra vires* of the government of Canada.

This opinion of the justices is important not only because of its treatment of the federal trade and commerce power but also because of its references to the nature of Canadian federalism. In a nutshell, the justices came down strongly in support of what they called “cooperative federalism.” However, they did not offer a lengthy discussion of what precisely they meant by cooperative federalism nor did they venture into a consideration of the implications of their preferred model of federalism.

Interestingly, in at least four places in the opinion, the justices noted that the federal solicitors had grounded their argument *entirely* on one head of power, i.e., the general branch of the trade and commerce power, and that the justices had not been asked to consider other powers that might justify the proposed legislation. The implication appears to be that, if other justifications had been invoked, the Court may have ruled differently.

The justices also indicated that their task is to maintain “the constitutional balance.” Aside from wondering what they mean by constitutional balance, we are impelled to wonder whether the constitutional balance is really their concern.

In what follows, I do not attempt a study of the legal argumentation but rather a critical analysis of the justices' federalism-related comments. To do this, I am guided by these three questions: first, does the kind of federalism expressed in the *Securities Reference* represent a break of some sort from the federalism-related views that the Court expressed in the *Secession Reference*? Secondly, when the justices say that the two senior levels of government are “coordinate,” what exactly is meant? And thirdly, on what is the justices' view of Canadian federalism based?

To answer these questions, I first look closely at what the justices said about Canadian federalism in the *Securities Reference*. As intimated, I am particularly interested in the justices' comment that Canadian federalism rests on the principle that the two senior levels of government are co-ordinate;² one is not subordinate to the other. I then offer a discussion of the meaning of federalism and of the nature of Canadian federalism. The next section focuses on the *Secession Reference*, the opinion in which the Court identified federalism as a fundamental organizing principle of the Canadian federation, to determine if, in that opinion, the justices spoke directly or indirectly of co-ordinate federalism.

II. The Supreme Court's Federalism as Expressed in the *Securities Reference*

The *Securities Reference* contains several comments on federalism. This fact alone reveals something of the justices' thinking. By including – within an opinion that supports provincial power – a discussion on federalism and its importance to provincial diversity, the justices convey

1 I wish to express my deep appreciation to Ms. Reem Zaia, an outstanding former student of mine, now in law school, who undertook an enormous amount of research for me.

2 Webster's Universal College Dictionary defines the adjective, “co-ordinate,” this way: “of the same order or degree”; “equal in rank or importance.” As a verb, co-ordinate may mean “to place or class in the same order, rank, or division.”

a particular interpretation of federalism. It is that protecting provincial autonomy is the primary, if not the only, goal of federalism. Such a message ignores the reality that federalism is a two-sided coin: provincial autonomy on one side and national union on the other.

The dual objectives of federalism were noted by Rocher and Gilbert. Referring to Bruno Th  ret's idea of federalism, they write: "From this perspective, if unity overrides diversity or the reverse, if diversity triumphs at the expense of unity, one cannot speak of federalism" (Rocher, Gilbert 2010: 119). Thus, a single national securities regulator is not a negation of federalism. Rather it may be seen as a recognition of the need for national cohesion, including a strong national economic union. This is as essential to authentic federalism as is provincial autonomy.

Therefore, it does not follow that judicial pronouncements supportive of provincial governments are always good for federalism while judicial pronouncements favouring the federal level of government are always bad for federalism.

The justices' opinion has eight sections. The heart of the document lies in sections six and seven. There, the justices analyze the extent to which the proposed enactment meets the five criteria, set out in *General Motors of Canada v. City National Leasing, 1989*, that would have to be met in order for a federal intrusion into intra-provincial trade to be justifiable. In brief, the Court opined that the proposed legislation did not. This came as something of a surprise since the common view appeared to be that on matters of the economy the Court would give Ottawa wide latitude. This view had credence because it was based on the work of the much-admired former Chief Justice, Brian Dickson, (referred to several times in the *Securities Reference*). In her study of the Laskin-Dickson years, Katherine Swinton concludes that, "the one area where Dickson perceived problems with the present distribution of legislative powers was the state of federal jurisdiction over economic matters and, in his years on the bench, he tried to expand this area of federal responsibility." (Swinton 1990: 295). Significantly, Swinton adds: (Ibid.: 297)

Those concerned about a broader federal role over economic regulation might also draw comfort from Dickson's indication elsewhere that he might be sympathetic to a federal securities law (although he did so in a discussion of the interprovincial and international trade doctrine, rather than the general regulation of trade doctrine).

In one case, *Black v. Law Society of Alberta, 1989*, in which the majority, including Chief Justice Dickson, struck down a rule of the Alberta Law Society prohibiting members of the Society from entering into partnerships with non-residents of Alberta, the prolific Justice La Forest wrote on behalf of the majority: (608-609)³

A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy....The attainment of economic integration occupied a place of central importance in the scheme....The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union.

The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.

3 It should not go unnoticed that Justice La Forest saw fit to point to the intentions of the founders on the issue.

Given this view and Chief Justice Dickson's support for it, one might have thought that the Court would have been more open to the federal government's proposal.

As mentioned, federal solicitors based their argument solely on one federal power, a strategy that seemed to leave the justices somewhat bewildered. At paragraph 68, they write, "As noted earlier, Canada grounds its submission in support of the Act's constitutionality entirely on this power." At paragraph 129, they repeat themselves for a fourth time: "We further note that we have not been asked for our opinion on the extent of Parliament's legislative authority over securities regulation under other heads of federal power or indeed the interprovincial or international trade branch." The reader is left to wonder if their advisory opinion would have been substantially different if the federal side had adopted a different strategy. It also appears to the reader that the federal government, in basing its case solely on one head of power, left its solicitors with one hand tied behind their backs. Could it be that the federal government was divided on the issue of a single national securities regulator for Canada? Given the Prime Minister's supportive attitude toward provincial power, it is arguable that it was.

The first reference to federalism in the opinion is at paragraph 7. It reads:

It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. Accepting Canada's interpretation of the general trade and commerce power would disrupt rather than maintain that balance. Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension.

This use of what has been termed the "judicial balancing" approach is problematic because, while federalism may demand balance, it is not the justices who are to set or define this balance. Justices Binnie and Lebel alluded to this point in a passage from another decision that the justices themselves quoted at paragraph 60 of their opinion. In the view of the two justices, constitutional doctrines "must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments..." The principal duty of justices, it would seem, is to ascertain whether or not an enactment is consistent with the constitution. It seems debatable whether the justices, as the nation's constitutional interpreters, should view each federalism case through the lens of balance, or approach each case with a determination to ensure above all that it does not disrupt their notions of balance.

In his analysis of the *Secession Reference*, Patrick Monahan criticized the Court for presuming that its role is "to balance *for itself* the four constitutional principles it has identified rather than attempting to ascertain the balance that is most consistent with the underlying logic of the existing text" (Monahan, 1999-2000: 78, emphasis in original). He continues: (Ibid.)

This ignores the possibility that, in certain circumstances, the drafters of the Constitution might well have chosen to give primacy to certain values or norms to the exclusion of others. It is not for the courts to attempt to rewrite or recalibrate that tradeoff in the name of striking a balance seen by the Court to be more appropriate. So, for example, even though granting a power of disallowance to the federal government may "trump or exclude" the value of federalism and may no longer be appropriate as a political matter in a modern federal state, this does not give the courts the right to rule, as a matter of law, that the power has been "abandoned."

Also, as Professor Wayne MacKay points out, the concept of balance is a subjective concept. What is balance to one person is imbalance to another. Thus, he dismisses the use of the balance concept as a guide for judges in their decision-making. Since he does not believe that an objective definition of balance exists, MacKay rejects “the term as an ideal to guide judicial behaviour” (McKay 2001: 254).

Further, in referring to balance, do the justices mean the existing federal-provincial balance or do they mean some future state of balance that they are aiming for?

In her analysis of the Supreme Court's federalism, Donna Greschner also talks about balance, referring to it as a metaphor. But it has become more than a metaphor; it is now a judicial strategy or method. Greschner likes the concept either way. She states that the metaphor of balance “comports well with the reality of the Canadian constitution as an on-going enterprise.” The balance metaphor “reminds judges that federations work better if the parties believe that the umpire is taking a balanced approach” (Greschner 2000: 67).

Greschner believes that “The Court's great decisions also engage in balancing.” As an example, she refers to the Quebec *Secession Reference*. And yet, in a footnote, she refers to the ruling's “shaky legal foundation” (Ibid.: 68, fn. 109). In other words, even though the judgment's legal argumentation is questionable, it is, Greschner asserts, one of the Court's great decisions because the justices attended to the matter of balance.

Greschner includes the Court's opinion in the *Patriation Reference* among the Court's “great decisions” again because of the majority's pursuit of balance. But in this case the majority's inclusion of constitutional conventions, particularly certain kinds of conventions, left some legal scholars and citizens more than a little puzzled. For them, the justices' pursuit of balance in the Reference was misguided.

Among those critical of the justices' opinion in the *Patriation Reference* was former Prime Minister, Pierre Elliott Trudeau. In an address opening the Bora Laskin Library, March 21, 1991, Trudeau criticized the majority for creating “a vague convention *ex nihilo*.” He stated bluntly that, “it is not the business of the courts to state that the convention somehow invalidates an action acknowledged to be legal.” Trudeau was supportive of the opinion of the minority, consisting of Chief Justice Laskin and Justices Estey and McIntyre, because, among other things, “the minority's ***more strictly legal approach*** lends itself far less to political manipulation of the courts than does the majority's.” [Emphasis added.]

Greschner is not unaware of the dangers of using the balance metaphor. She points to Preston King's warning that talk of balance is “a rhetorical device” and one can use it to demean a point of view different from one's own. To refer to an argument as unbalanced is akin to describing it as unsound, perhaps even absurd. Conversely, by describing one's own argument as balanced, the user gives solidity and credibility to the argument.

The second reference to federalism is contained in paragraphs 48 to 52 in which the Court reviews securities regulation in Germany, Australia and the US, the point being to show that Canada is not the only federation where the issue of balance between local and national securities regulation has emerged. It is arguable that the justices got the wrong message from their review. That is to say, a review of securities regulation in Germany and the US would show that, indeed, the subnational governments are involved, but it would also show that the field is clearly

dominated by the national governments. John Cioffi, a political scientist and legal scholar at the University of California, undertook just such a review and found that corporate governance reform, including reform of securities regulation, “substantially centralized state regulatory authority”(Cioffi 2010: 231).

In Germany, until the mid-1990s, securities regulation was the responsibility of eight self-regulating regional stock exchanges and the *länder* in which they were situated. During the 1990s not only was the role of the state expanded but the expansion was structured in “ways that broke with historically entrenched patterns of federalism and regulatory fragmentation”(Ibid.). Cioffi emphasizes that securities law reforms during the 1990s produced, first and foremost, a massive increase and centralization of regulatory authority and capacity, that is, “an unprecedented expansion of formal regulation and strengthening of *federal* regulatory capacity”(Ibid.: 151; emphasis added).

A similar centralizing process occurred in the US. The *Sarbanes-Oxley Act* of 2002 “heralded the most significant reform of American securities law since the New Deal...” (Ibid.: 97). More importantly, it intruded into an area that historically had been the province of state corporate law. Cioffi writes (Ibid.: 120):

By encroaching on the traditional subjects of state corporate law, the Sarbanes-Oxley reforms centralized and federalized key aspects of corporate governance. This unprecedented federalization⁴ departed from nearly two centuries of American federalism that had endured even through the zenith of the New Deal and the postwar expansion of the regulatory state.

To highlight - from a review of the recent histories of securities regulation in the US and Germany - the involvement of the subnational governments in such regulation, as the justices did, is to miss, or downplay, what I believe to be the more fundamental point.

The third reference to federalism occurs in section 5 of the opinion. Here, the justices make two seemingly contradictory points. First, they stress their belief in the value of cooperative federalism. For instance, at paragraph 57, they write:

The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation – an approach that can be described as the “dominant tide” of modern federalism.

In a similar vein, they write at paragraph 58:

If there was any doubt that this Court had rejected rigid formalism in favour of accommodating cooperative intergovernmental efforts, it has been dispelled by several decisions of this Court over the past decade.

They then state that doctrines like federal paramountcy require a restrained approach and that constitutional doctrine must facilitate cooperative federalism.

⁴ The word, “federalization,” in the context of this book by American authors, is synonymous with centralization. When used by Canadian scholars, the word may mean provincialization or decentralization.

But then, having emphasized cooperative federalism, they stress the importance of respecting the constitutional division of powers. “The 'dominant tide' of flexible federalism,” they write at paragraph 62, “however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.”

What these comments suggest is that in division of powers cases the role of the Courts is not to define the essence of the legislation and then assign it to either the federal or provincial governments, but rather to 'dissect' the legislation and apportion the various parts to the two levels of government. This is consistent with the general approach of Chief Justice Dickson.

However, one wonders about the effect of the Court's approach on the nature of Canadian federalism. While the founders of the country established Canada as a federation, the Court now appears to see Canada as a type of confederation, where governments meet, as equals, to establish national goals and policies. And while the Court has shown great sympathy for provincial diversity and autonomy, it seems eager to dilute the powers that would give the federal government regulatory muscle. An example here is the justices' preference, stated at paragraph 60 of the *Securities Reference*, to take a restrained approach to the federal paramountcy power. The same may be said for the peace, order and good government power.

In this context, the direct reference to federalism at paragraph 71 is of particular importance. The justices state that “The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other.” This is the most radical comment in the opinion.

The justices did not elaborate on their idea of the equality of the federal and provincial governments. So, we do not know, for instance, if they would agree with this statement of Marc-Antoine Adam: “Hence, under Canadian federalism, both orders of government are said to be sovereign in their own areas of jurisdiction, in the same manner and to the same extent as independent states” (Adam 2009: 304). Nor can we conclude that they would agree or disagree with Rocher and Smith when they describe the equality of status conception of federalism this way: (Rocher, Smith 2003: 23-24)

In this view, Canada is first and foremost the creation of the provinces...Of primary importance is the latitude of each order of government to legislate in the jurisdictions granted by the constitution. Hence, actions by the central government must be limited to the areas granted to it by the constitution. Where this is not the case, the provinces must give their explicit consent to all federal intrusions into provincial jurisdiction...In this view, the provincial premiers have as much right to represent citizens as does the Prime Minister of Canada. The total is neither more nor less than the sum of its parts. The first community of belonging is provincial. Thus, the central government is not in a position to speak for provincial interests.

What would the justices say about this comment of Gagnon and Iacovino? (Gagnon, Iacovino 2008: 345-346)

Canada continues to structure federalism around monistic conceptions of citizenship and services rather than around representative governments and constituent nations...In multinational democracies, constitutions should privilege political communities and their legitimately elected governments.

Further, when the justices speak of coordinate federalism, are they saying that,

- the federal spending power and the federal declaratory power have become illegitimate?
- the federal government's taxing powers should be weakened in order for the provinces to enlarge theirs?
- the provincial governments should be able to negotiate and sign binding international agreements and represent themselves in international fora?
- the peace, order and good government clause has no applicability?
- the paramountcy power of the federal government should be circumscribed even further?
-

The powers identified in these questions are powers that currently place the federal government of Canada in a dominant position, vis-à-vis the provinces. If the justices' responses to these questions were in the negative, it would mean that they accept federal dominance and reject coordinate federalism. If their responses were in the affirmative, it would mean that they envisage a significant change in the nature of Canadian federalism in which case certain federal enactments, such as the *Clarity Act*, as currently worded, would also appear to have no place.

The final direct reference to federalism makes up paragraph 73 which reads:

The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism – the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction. As stated in the *Secession Reference*, “[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.”

The first sentence above contains one of a number of references to provincial diversity in both the *Secession Reference* and the *Securities Reference*. A second such reference in the *Securities Reference* is at paragraph 60 where the justices, quoting former Chief Justice Dickson, mention “the legitimate diversity of regional experimentation....” In the *Secession Reference*, at paragraph 58, the justices speak of “the diversity of the component parts of Confederation....”

The country is clearly diverse, in geographic and demographic terms. But the diversity of Canada has been vastly exaggerated and the commonalities among Canadians seriously downplayed. Consider, for example, the issue of Quebec's civil law tradition. This is often cited as one of the differences that distinguish Quebec from the other provinces. But the comment of former Prime Minister Pierre Trudeau is highly instructive: (Trudeau 1996: 266-267)⁵

5 Trudeau is not alone in criticizing the seemingly endless references to the differences among Canadians. The journalist, Lysiane Gagnon, has written: (Gagnon 2007: 3)

There is also that all-too-common perception that there are fundamental differences between Quebec and the rest of Canada. That is not true....Quebec and the 'ROC' have much more in common than not....The basic values of the two societies are the same, and in fact are shared by all liberal democracies....In reality, it is social status and urbanization, not residence in one province or another, that determines the differences.

Michael Ignatieff was perceptive when he labelled the deliberate magnification of difference as “the narcissism of minor difference” and observed, “We don't dwell on what we share; our every fashion statement declares that we are singular” (Ignatieff 2007: 137). In a similar vein, the labour arbitrator and scholar, Andrew Sims, once complained that the provincialization of labour law in Canada has led to “too much inconsequential diversity” (Sims 2000: 90). This is the expression of diversity for the sake of being different, for the sake of power interests, not because the diversity has substance.

Much is made of the fact, for example, that the civil law is the law in Quebec, whereas common law applies in other provinces. Yet, however important the Civil Code may be, in reality, it occupies a very small place in the total picture of provincial laws by which we in Quebec are governed. Just like the other provinces, Quebec has enacted a vast number of statutory laws; they apply to all aspects of our collective lives and are the product of a juridical culture far more closely related to that of the other provinces than to the laws of New France or the Napoleonic Code.

With regard to securities regulation, it is debatable whether the industry differences among provinces are so great and so vital to provincial uniqueness that it is essential that the field be declared to fall under provincial jurisdiction. If the proposed securities legislation is inconsistent with the constitution, so be it. But the protection of the so-called diversity among the provinces should not be used to support the Court's rejection of the federal proposal.

The second sentence in paragraph 73 quoted above associates our federal structure with democratic participation. The argument appears to be based on the principle of subsidiarity. As a general principle, it has merit. However, associating this principle and participatory democracy with provincial control of securities regulation seems something of a stretch. The democratic processes will be available and will be taken advantage of, regardless of which level of government has jurisdiction over securities regulation. Canadian democracy would not suffer if the federal level had responsibility for securities regulation. Has Germany become less democratic because in 1994 the federal Parliament created the country's first national securities regulator (Cioffi, Höpner 2006: 476-477)? Is the US a less democratic country because in 1998 Congress passed a bill "that dramatically increased centralized federal control over securities regulation" (Ibid.: 500, fn. 85)? Is Australia less democratic because, as the opinion itself acknowledges, the Commonwealth government is the dominant regulator of securities?⁶ Of course not.

On this issue of democracy and federalism, it should be noted that a number of scholars have pointed to the ways by which federalism hinders democracy. Their concerns centre around transparency and accountability issues. In an oft-quoted passage, Donald Smiley gave this indictment of what is called executive federalism, which is the inevitable result of the kind of cooperative federalism that the justices favour (Smiley 1979: 105-106):

First, it contributes to undue secrecy in the conduct of the public's business. Second, it contributes to an unduly low level of citizen-participation in public affairs. Third, it weakens and dilutes the accountability of governments to their respective legislatures and to the wider public. Fourth, it frustrates a number of matters of crucial public concern from coming on the public agenda and being dealt with by the public authorities.

The legal scholar, Johanne Poirier, worries that federal-provincial agreements can affect citizen respect for the constitution because they enable the governments to determine "who does what" regardless of who is constitutionally competent to do what" (Poirier 2004: 453). Globally speaking, Pippa Norris' s work finds a positive relationship between federalism and democracy

6 On the 2011 edition of the The Economist's Democracy Index, the countries with the highest scores are non-federal. Among federal countries, Australia ranks higher than both Switzerland and Canada, although the differences are very small. All three rank higher than Germany, the US, Belgium, and Spain. See The Economist Intelligence Unit, *Democracy Index 2011: Democracy Under Stress*, www.eiu.com/Handlers/WhitePaperHandler.ashx?fi=Democracy_Index_Final_Dec_2011.pdf. Retrieved February 6, 2012.

(Norris 2008: ch. 7). However, Daniel Treisman suggests that the jury is still out on the question of whether federalism is associated with democracy. He quotes the eminent political scientist and democracy scholar, Juan Linz: “Although there are writers who suggest so, federal states are not necessarily more democratic. To federalize might or might not be a step in the direction of democracy” (Treisman 2007: 267).

It is important not to exaggerate or be naive about federalism's impact on democracy. The cooperative federalism that the justices are promoting will raise concerns about the democratic content of the processes traditionally used in cooperative federalism. One cannot speak only of the benefits for democracy of federalism; it is also necessary to speak of negative impacts.

Incidentally, the justices' discussion on federalism and democracy seems like a discussion that is more appropriate in a political science text than in a Supreme Court opinion.

At paragraph 75 of the Securities Reference, the justices affirm that “a leading statement of the scope of the trade and commerce power” lies in the decision of the Judicial Committee of the Privy Council (JCPC) in the *Parsons* case (*Citizens' Insurance Co. v. Parsons [1881], 7 App. Cas. 96*). However, prior to this case, there were two decisions rendered by the Supreme Court of Canada that were not appealed to the JCPC. How the Supreme Court dealt with the trade and commerce power is worth reviewing.

The first case is *Severn v. The Queen*. It is noteworthy because it represents the first time that the Supreme Court of Canada commented on s. 91(2). By a four to two majority, (with the two justices from Québec, T. Fournier and J.-T. Taschereau, among the majority), the Court held that an Ontario law requiring brewers and distillers, who were already required to obtain a federal license, to purchase for \$50 a provincial license before selling liquor by wholesale was *ultra vires* and, therefore, invalid. The law was deemed invalid because it interfered with trade and commerce and because it imposed an indirect tax, which, under the constitution, could only be levied by the federal jurisdiction.

The Court accorded s. 91(2) a very broad interpretation. Even one of the dissenting justices accepted a wide reading of the section. Justice Strong wrote: (*Severn v. The Queen, [1878], 2 S.C.R. 70 104*).

That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the British North America Act, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit.

In arriving at their decision, the justices seemed careful to refer to the intentions of the framers. Chief Justice Richards, for instance, wrote that the authority claimed under the Ontario law was “so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the British North America Act,” that he could not come to any other conclusion than that it was *ultra vires* (Ibid.: 95.)

The Supreme Court of Canada again upheld the federal trade and commerce power two years later in 1880 in *City of Fredericton v. The Queen*, and, again, the justices interpreted s. 91(2) very broadly. By a four to one majority, with the Québec judges again among the majority, the Court upheld a federal law establishing a nation-wide system for prohibiting the sale of intoxicating liquors, based upon local preference. Writing for the majority, Chief Justice Ritchie declared that “...the [federal] right to regulate trade and commerce is not to be overridden by any local

legislation in reference to any subject over which power is given to the Local Legislature” (*City of Fredericton v. The Queen*, [1880], 3 S.C.R. 505 540-541). He declared further: “I think it equally clear, that the Local Legislatures have not the power to prohibit the Dominion Parliament having, not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce...” (Ibid.: 542). Justice Henri-Elzéar Taschereau agreed: (Ibid.: 558):

It may, it is true, interfere with some of the powers of the Provincial Legislatures, but sect. 91 of the [B.N.A.] Act clearly enacts that, **notwithstanding anything** in this Act, **notwithstanding** that the control over local matters, over property and civil rights, over tavern licenses for the purpose of raising revenue, is given to the Provincial Legislatures, the **exclusive** legislative authority of the Dominion extends to the regulation of trade and commerce, and this Court has repeatedly held, that the Dominion Parliament has the right to legislate on all matters left under its control by the Constitution, though, in doing so it may interfere with some of the powers left to the Local Legislatures. [Emphasis in original].

When *The Citizens Insurance Company v. William Parsons* reached the Supreme Court of Canada, the justices, by a narrow three to two margin, upheld an Ontario law imposing statutory conditions on insurance policies. In so doing, the Court seemed to retreat somewhat from its previous decisions on the trade and commerce power.

This time, the decision was appealed to the JCPC which, in 1881, confirmed the Supreme Court of Canada’s judgment. This was the first in a string of decisions from the JCPC that set limits on the federal government’s authority to regulate trade and commerce in the country. The Judicial Committee ruled that the federal government has the authority to regulate in the areas of interprovincial trade and international trade, (the so-called first branch or limb), but it may also provide for the “general regulation of trade affecting the whole dominion,” (the so-called second branch or limb, which was rarely invoked or referred to until the 1970s).⁷ The JCPC ruling undermined the interprovincial aspect of the first branch when it declared that the federal power “does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province...” (*The Citizens Insurance Company of Canada v. William Parsons*, [1881], 1 A.C. 96 113). Intraprovincial contracts did not fall under s. 91(2), even if the impact of those contracts was felt beyond the borders of a province.

While both the Supreme Court and the Judicial Committee upheld the Ontario law, they presented very different attitudes toward the federal trade and commerce power. The JCPC took the opportunity to set limits on the federal trade and commerce power, limits that became narrower as a result of subsequent JCPC decisions that built on the *Parsons* case. On the other hand, the Supreme Court of Canada ruling was careful to keep the trade and commerce power intact. This comes out in the comments of Chief Justice Ritchie, writing for the majority: (*The Citizens Insurance Company v. Parsons*, [1880], 4 S.C.R. 215 242).

No one can dispute the general power of parliament to legislate as to “trade and commerce,” and that where, over matters with which local legislatures have power to

⁷ According to Patrick Monahan, “In the dozens of cases in which the Privy Council subsequently considered the trade and commerce power, it essentially ignored the second branch entirely and analyzed the issues exclusively in terms of the first branch” (Monahan 2006: 246). James MacPherson found that between 1881 and 1980 the courts invoked the power only twice (MacPherson 1980-81: 175n.).

deal, local legislation conflicts with an Act passed by the Dominion parliament in the exercise of any of the general powers confided to it, the legislation of the local must yield to the supremacy of the Dominion parliament; in other words, that the provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion parliament may prescribe. I adhere to what I said in *Valin v. Langlois* (1), that the property and civil rights referred to, were not all property and all civil rights, but that the terms “property and civil rights” must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion parliament, and that the power of the local legislatures was to be subject to the general and special legislative powers of the Dominion parliament....

For the Chief Justice, the law was simply about regulating a contract of indemnity. It was not about “a regulation of trade and commerce” (Ibid.: 243). As John Saywell writes, “Even including *Parsons*, the federal power over trade and commerce was interpreted [by the Supreme Court of Canada] sufficiently broadly to include internal trade, while property and civil rights were bounded by the federal enumerations and...by the residual clause” (Saywell 2002: 56).

III. The Meaning of Federalism

Finding a consensus on the definition of federalism is not as easy a task as it seems. Indeed, Hueglin and Fenna found that “Scholars of federalism have shown a surprising difficulty over the years in agreeing on the definition of their subject” (Hueglin, Fenna 2006: 33, fn. 3). That being so, it might be fruitful to go back to the beginning.

Some scholars see federalism, or at least federalist thinking, as having its roots in the time of the ancient Israelites (beginning in the thirteenth century, BCE) or in medieval Catholic thought or in ancient Greece (Elazar 1987; Ward, MacDonald 2009; Aroney 2009). However, the consensus appears to be that it emerged most explicitly in the seventeenth century.

There is disagreement as to whose work most resembles today's concept of federalism. Karmis and Norman, for instance, in their collection of federalist writings, state that the “German jurist Johannes Althusius and German philosopher Samuel Pufendorf were among the pioneers of this alternative federalist approach” (Karmis, Norman 2005: 25). On the other hand, Patrick Riley concludes that Althusius's system of interconnected networks and groups “has little to do with the modern notion of the federal state...” (Riley 1976: 36). Rather, for Riley, it amounts to “medieval corporatism.” He explains: (Ibid.: 34)

...what Althusius is getting at is not “federalism” in any modern sense, but collegial, city and provincial autonomy within a hierarchical system which recognizes a highest political order acting only on the next-highest level of the symbiotic association, and not directly on citizens or *collegia*.

Riley's view is that two other Germans, Ludolph Hugo and Gottfried Wilhelm Leibniz, held a conception of federalism more closely related to current understandings of federalism than did Althusius. Riley writes: (Ibid.: 40)

Whether there is anything in Althusius's *Politics* which is as valuable to an understanding of federalism as Hugo's theory of “double governments,” or Leibniz's notion that federalism is necessarily misrepresented if viewed in terms of “indivisible” sovereignty, one may reasonably doubt.

According to Riley, Hugo was the first to identify three types of government: confederal leagues, decentralized unitary states like the Roman Empire, and federations which featured “double government” with a division of powers based on territory (Føllesdal 2010: 5). This third type emerges “when the civil power is somehow divided between the highest and the lower governments, so that the higher manages those matters pertaining to the common welfare, the lower those things pertaining to the welfare of the individual regions” (Riley 1976: 23). Lee Ward interprets Hugo's double government as involving the “clear subordination of part to whole.” Thus, Hugo “retained the logic of supremacy and subordination” and argued that the laws of the territories “should comply with imperial legislation and be subject to oversight by the imperial courts” (Ward 2009: 101-102).

Riley argues further that, unlike their contemporaries and predecessors, Hugo and Leibniz were able to think of a federal arrangement as something more than an alliance or a confederation. For Leibniz, who believed that “there was no such thing as absolute central power in *any* government” (Riley 1976: 28; emphasis in original), federalism was an arrangement whereby several territories “unite into one body, with the territorial hegemony of each preserved intact” (Ibid.). But a federal arrangement was also a kind of union, requiring that “a certain administration be formed, with some power even over the members, which power obtains as a matter of ordinary law, in matters of greater moment and those which concern the public welfare” (Ibid.: 29).

Roughly a century after Leibniz and Hugo wrote, David Hume penned “Idea of a Perfect Commonwealth” (Essay 16) in which he described his preferred form of government. It features a kind of federalism and, although brief, it influenced the American founders, particularly James Madison.

In this Essay, Hume proposes the division of Great Britain and Ireland, “or any territory of equal extent,” into 100 counties, each of which would be divided into 100 parishes. Each county would elect 100 representatives from the county who, in turn, would elect one Senator from their ranks. Thus, 100 Senators would be elected and “endowed with the whole executive power of the commonwealth” (paragraph 10). The Senators then elect,

a protector, who represents the dignity of the commonwealth, and presides in the senate; two secretaries of state; these six councils, a council of state, a council of religion and learning, a council of trade, a council of laws, a council of war, a council of the admiralty, each council consisting of five persons; together with six commissioners of the treasury and a first commissioner. All these must be senators. The senate also names all the ambassadors to foreign courts, who may either be senators or not. (paragraph 19)

Each county, “a kind of republic within itself,” may enact by-laws. However, “The Senate, or any single county, may, at any time, annul any bye-law of another county” (paragraph 29).

Jordan and Yenor conclude that Hume's proposed arrangement “sought to tilt authority toward the national government” and to avoid “an overly decentralized form of federalism” (Jordan, Yenor 2009: 125-126). Giving the Senate veto power over county legislation was Hume's way of ensuring that county legislation “agrees with general interest” (paragraph 63).⁸

⁸ In the US, James Madison liked Hume's idea of a Senate veto and had tried, unsuccessfully, to get the 1787 Constitutional Convention to agree to a constitutional provision empowering the Congress to veto state legislation.

Hume's contemporary, Montesquieu, is associated with the idea of small republics confederating for mutual security. However, in his analysis of Montesquieu's views, Lee Ward argues that his most significant reflections “were not contained in his brief treatment of confederate republics, but rather in the lengthy discussion of Gothic constitutionalism that concludes *The Spirit of the Laws*” (Ward 2007: 552).

For Montesquieu, the confederate republic was an institutional device that enabled several small republics to come together in a military alliance. Such a republic was, in fact, a “society of societies” that, says Ward, lacked “internal coherence and unity” (Ibid.: 555). Summing up Montesquieu's reflections here, Ward writes: “Montesquieu's discussion of confederate republics suggests that the federal principle has only a limited and problematic application within the rubric of traditional republican regime analysis” (Ibid.).

An admirer of the English system of government, Montesquieu nevertheless had reservations about its centralized parliamentary authority because, in the process of establishing parliamentary supremacy, England had destroyed Gothic constitutionalism under which “power gradually devolved from the center to the 'intermediate, subordinate, and dependent powers'...” (Ibid.: 562). Among those powers were provincial and local institutions which, though relatively autonomous, were also subordinate. Together, the intermediate powers would serve as a check on the English parliament.

According to Ward, Montesquieu considered the medieval French constitution in great detail. That constitution “was in essence a federal structure that required the central monarchy to share power with the regional nobility on matters executive, legislative, and judicial.” Regrettably, “the centralization project of Richelieu” virtually destroyed “the provincial checks on central authority....”

Ward distinguishes between Montesquieu's confederated republics and the Gothic constitutionalism that once prevailed in both England and France. He writes: (Ibid.: 568)

While the confederate republic and the Gothic constitution share a common spirit of decentralization and compound vertical structures, they differ inasmuch as the Gothic principle of balancing power among classes and between the center and periphery assumes a historical idea of the nation and a degree of organic unity and subordination of autonomous powers practically impossible, or at least unlikely, in the “society of societies” characterizing Montesquieu's conception of the confederal republic.

The Spirit of the Laws also contains a discussion of two republics, namely the republic of the Lycians and the republic of Holland. According to Ward and Fott, the former had a degree of centralization and (Ward, Fott 2009: 117).

moved toward becoming a society of individuals rather than of societies or political bodies. It aimed toward being one large state ruled by a single central government rather than an alliance of multiple, self-governing entities cooperating together for the common good of all.

Interestingly, it was the founders of Canada who operationalized Hume's idea by inserting into the *Constitution Act, 1867* the federal powers of reservation and disallowance, powers that have fallen to disuse.

In contrast, the republic of Holland “remains a society of societies rather than of individuals, and the member-states retain their sovereignty as opposed to being subordinated to a single central government” (Ibid.: 118).

“Surprisingly, Montesquieu says, 'If one had to propose a model of a fine federal republic, I would choose the republic of Lycia’” (Ibid.: 117).

Turning to the US, in 1787 the drafters of the present constitution met for the purpose of revising the *Articles of Confederation of 1781*, their first attempt at constitution-making. It had proven to be so unworkable that there was almost unanimous agreement that the central government needed additional powers. For the group that became known as the Federalists, the purpose of the meeting was to draft a constitution that would add substantially to the central power and place it clearly at the top of a hierarchical relationship with the state governments. “By 1787 Madison, like others, had become a thorough nationalist, intent on subordinating the states as far as possible to the sovereignty of the central government” (Wood 1969: 473). In Federalist papers 14 and 46, at paragraphs 7 and 9 respectively, Madison refers to the states as “subordinate governments.” According to Gordon Wood, Madison favoured “a due supremacy of the national authority,” with local authorities tolerated only “so far as they can be subordinately useful” (Ibid.: 525). One Anti-Federalist, Richard Henry Lee, declared that, “Instead of being thirteen republics, under a federal head” the proposed Constitution was “clearly designed to make us one consolidated government” (Ibid.: 526). *The Federalist Papers*, written by Madison, Alexander Hamilton and John Jay, was largely an effort to justify the strengthening of the federal government.

Two of the clauses in the American constitution that give effect to the aims of the Federalists are the interstate commerce clause, Article I, and the supremacy clause, Article VI. The latter states that the constitution and all laws of the United States “shall be the supreme law of the land.” Thus, any federal law trumps any conflicting state law. What emerged from this clause is the preemption doctrine under which the federal government can occupy any field almost at will.

A third broad power of the US federal government is its spending power, which has been unequivocally upheld by the Supreme Court. Indeed, former Chief Justice, William Rehnquist, wrote: “[O]bjectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of funds” (Sky 2003: 345).

Since the presidency of Franklin Roosevelt, the main feature of American constitutional history has been the enlargement of federal government power via judicial decisions. One of the more remarkable decisions of the US high court is *Garcia v. San Antonio Metropolitan Transit Authority*. In this case, the justices decided that the wages and hours provisions of the federal *Fair Labor Standards Act* did apply to the employees of the Transit Authority as a result of the constitution's interstate commerce clause. Justice Blackmun, writing for the majority, explained that America's founding fathers, (*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), 552),

chose to rely on a federal system in which restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations upon the objects of federal authority. State sovereignty interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal powers.

In other words, according to the majority of the Court, in the American system of federalism the interests of each state are protected not by each state government but rather by national political institutions.

What we might conclude here is simply that the political thinkers who wrote about federalism distinguished it from confederalism and saw it as a system in which the central authority had some degree of power over the territorial governments.⁹ Further, in federations, citizens are not beyond the reach of central governments.¹⁰ The central governments have more clout than those in confederations. Today, not surprisingly therefore, the central governments in most federations tend to have more power than the sub-national governments. As the comparative federalism scholar, Pablo Beramendi, writes: "...central governments in federations (as opposed to confederations) enjoy a much stronger institutional position vis-à-vis subnational governments" (Beramendi, 2007: 754).

Among modern federalism thinkers Kenneth Wheare is one of the most often cited, and indeed, the justices referred to Wheare in the *Secession Reference* at paragraph 55. In his classic volume, *Federal Government*, Wheare offers a clear definition of federalism, which supports what the justices wrote in the *Securities Reference* regarding the co-ordinate status of the two levels of government. However, in his elaboration of the concept, he appears to undermine his definition.

By the federal principle, Wheare meant "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" (Wheare 1964: 10). He distinguished between the government of South Africa at the time and the US government by explaining that in the former "the regional governments are subordinate to the general government..." but, said Wheare, "in the United States they are co-ordinate. This difference is what is fundamental, and this is the difference that provides the real distinction" (Ibid.: 13). Making the point again, Wheare declared that the test which he applied to determine whether a government is federal or not is this: (Ibid.: 33)

9 In 1863, another writer, Pierre-Joseph Proudhon, published *The Principle of Federation*. He defines the subject of his book this way: (Proudhon 2005: 177)

What is essential to and characteristic of the federal contract, and what I most wish the reader to notice, is that in this system the contracting parties, whether heads of family, towns, cantons, provinces, or states, not only undertake bilateral and commutative obligations, but in making the pact reserve for themselves more rights, more liberty, more authority, more property than they abandon.

Upon reading this definition, one senses that Proudhon is not talking about a federation and, indeed, it soon appears that he is using the terms, federation and confederation, interchangeably. Karmis and Norman confirm this when they write: (Karmis, Norman 2005: 104)

Proudhon's conception of federalism broke with previous models in several ways, although it was institutionally much closer to the "ancient" species of (con)federal system. In the twentieth century debate over the integration of Europe, his relatively numerous followers in Europe would call this conception "integral federalism," involving confederations of confederations in the economic as well as in the political sphere, and at both the national and the international level.

10 Spinoza distinguished between confederations and federations. And in his view, too, federations have direct links with citizens. George Gross has written: "Spinoza's federal polity is *more than* 'a sovereign over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals.' The laws of his polity are binding on the whole population" (Gross 1996: 133-134), emphasis added).

Does a system of government embody predominantly a division of powers between general and regional authorities, each of which, in its own sphere, is co-ordinate with the others and independent of them? If so, that government is federal.

What seems contradictory in Wheare's book is his classification of the US¹¹ and Australia as countries with federal systems even though in both countries the central governments are dominant. The fact that in both countries the central government dominates undermines his definition of federalism. He undermined his work further when he wrote: (Wheare 1964: 34)

All this concentration on the federal principle may give the impression that I regard it as a kind of end or good in itself and that any deviation from it in law or in practice is a weakness or defect in a system of government. It seems necessary to say, therefore, that this is not my view....And therefore, while I have maintained that it is necessary to define the federal principle dogmatically, I do not maintain that it is necessary to apply it religiously. The choice before those who are framing a government for a group of states or communities must not be presumed to be one between completely federal government and completely non-federal government. ***They are at liberty to use the federal principle in such a manner and to such a degree as they think appropriate to the circumstances.*** [Emphasis added.]

In other words, Wheare would appear to accept that a system of government is not necessarily “unfederal” if the central power is dominant.

In my view, federalism is a system of governance characterized by a constitutionally protected division of law-making powers between a central government and constituent governments, applied on a territorial basis. That said, several other points ought to be made.

The first is that federalism is a type of mechanism for unification. Colonies and states enter into a federal arrangement in order to come together or stay together. They recognize that, because federalism is above all a means for effecting a union of some sort, they will have to surrender at least some of their autonomy and powers to a central authority. The central government retains a degree of dominance or authority over the constituent units. In return, they receive protection and financial aid, as well as authority to legislate in certain, specified areas.

A second point that should be made about federalism is that it “is not a fixed and exact thing,” as Jennifer Smith notes. She argues that, although “it can be defined under the Constitution in terms of levels of government, each armed with specified powers and responsibilities,” federalism has “a fluid, even elusive quality. For one reason, there is no one, perfect type against which all others can be measured. There is no standard. Instead there is a range of federal systems, each uniquely composed of a different package of features” (Smith

11 Federal government dominance in the US was illustrated in the 1978 case, *United States Steel Corp. v. Multistate Tax Commission*. When several states created a compact to promote uniformity in their tax systems, US Steel brought suit to have the compact declared unconstitutional because it violated this clause in the American constitution: “No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State.” The steel maker argued that the compact had never been ratified by Congress and, therefore, was unconstitutional. In rejecting the steel maker's argument, the Court ruled that “application of the Compact Clause is limited to agreements that are '***directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States***'” (Aleinikoff 1987: 996, emphasis added).

2004: 8). F.R. Scott would have concurred with Smith. It was his view that Canadian federalism was never meant to conform to a preconceived notion of federalism (Scott 1977: 298)

...the Canadian constitution was never expected to operate on strictly federal principles as the political scientist understands them; we adopted, for what seemed good reasons, a constitution leaning toward a strong central authority whose power might offset in some degree the centrifugal forces which are always present in the body politic.

Scott cautioned against being misled “by the word ‘federal,’ which has a meaning in political theory which it does not have in Canadian constitutional law” (Ibid.: 189). The definition of Canadian federalism should be based on what the Canadian constitution provides, not on some accepted meaning of federalism. In Scott’s view, “We should not say ‘A federal state requires such and such relationships between the governments, therefore we will find them in the Canadian constitution.’ We should say ‘This is what the Canadian constitution provides: what kind of federalism is it’” (Ibid.: 177)?

A third point is made by Hueglin and Fenna. Echoing what our political philosophers argued, they emphasize that ***“sovereignty is shared and powers are divided between two or more levels of government each of which enjoys a direct relationship with the people”*** (Hueglin, Fenna 2006: 32-33; emphasis in original). A federal union is, therefore, unlike a confederal arrangement. The latter is a union of governments whereas the former is a union of both states and individuals. Thus, a confederal government cannot legislate for individuals. Canada was always intended to be a federal union, notwithstanding the term used to describe the creation of Canada. The citizens of Canada enjoy a direct relationship with their central government.

Federal states differ in their institutional configurations because they differ in the political values that they privilege and support, which is the fourth point that must be made here. In their discussion of the different visions of Canadian federalism, Rocher and Smith agree that federalism not only embraces certain institutional features (e.g., two levels of government) it also reflects a society’s norms and values. Diversity, equality, efficiency, harmony, and democracy are among the values that a federal system may at any one point in time either privilege or undermine (Rocher, Smith 2003: 23). Thus, the Australian constitutional scholar, Cheryl Saunders, observes that a “national preoccupation with equity or equality” tends to be reflected in the assignment of power to the federal government or “in some other mechanisms designed to achieve the same result” (Saunders 1995: 70). She states further that in the European Union, where perfecting the internal market (the efficiency value) is a key objective, there have been “pressures for uniformity or harmonization in different but related areas, including social policy, industrial relations, and the environment” (Ibid.).

Here in Canada, one of the important tasks of the federal government has long been to ensure that individuals receive relatively equal treatment regardless of where they live in the country. However, one can argue that, in recent years, the salience of the equality value has receded, while the desire to accommodate diversity has heightened.

Since the 1990s, decentralization, political and administrative, has ridden a wave across the globe. While this wave has probably crested, with some scholars now questioning the benefits of decentralization, (or perhaps more accurately, wondering about the absence of research to support

the claims of decentralization)¹², there is little doubt that for many decentralization remains a cardinal principle in the design of governance.

In Canada and elsewhere, e.g., Spain and Belgium, decentralization has meant increasing the powers of regional governments (provinces, states, autonomous communities, länder).¹³ In Canada, it has been helped along by:

- nationalist and secessionist agitation in Quebec;
- the economic clout that has accrued to provinces as a consequence of their ownership of natural resources;
- the absence of a consistently robust response from the federal government;
- apparent elite acceptance of provincialization and devolution;
- the unleashing of provincialist momentum that resulted from the Meech Lake Accord/Charlottetown Accord debacle;
- the provincialist legacy of the JCPC; and
- the marginalization of the peace, order and good government clause.

Constitutions are not supposed to be swayed by political waves. That is why they are so hard to amend. And, as noted earlier and as will be discussed in the next section, the Canadian constitution that the founders conceived gives the federal level some substantial and invasive powers, including:

- the spending and taxing powers;
- the declaratory power;
- the criminal law power;
- the employment insurance power (as a result of the 1940 amendment);
- powers over international affairs and international trade;
- power over interprovincial trade;
- substantial powers regarding the environment; and
- the peace, order and good government power (although this was weakened by the JCPC in a number of judgments).

It is, therefore, very difficult to understand how the justices could say, in the *Securities Reference*, that “The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other” (paragraph 71). The constitution suggests, and the founders intended, otherwise. It is not the role of the judiciary to decide on cases in a way that would render federal powers meaningless because of some vision of federalism that it may hold. It is not its role to pursue a vision of Canada that would turn it from a federation into a confederation.

12 Beramendi concludes that “The recent literature on federalism leaves no space for any federal illusion of any kind. The more scholars find out about federalism and decentralization, the more cautious they become in predicting their effects or advocating their adoption” (Beramendi 2007: 775).

13 South Africa resisted the trend, with respect to federalism. The post-apartheid constitution provides for a dominant central government. Hueglin and Fenna write: “The federal division of powers in the South African Constitution...essentially followed the German model by establishing a cooperative pattern of administrative federalism. While concurrency predominates, and the provinces have been assigned only a very limited range of powers over parochial matters...the national government has been given sweeping powers to set national standards and norms....As a consequence, the South African federal system appears highly centralized and leaves to the provinces little room for autonomous development” (Hueglin, Fenna 2006: 166).

To illustrate the point: assume that the country's federal and provincial political leaders, in their wisdom, decided to amend the constitution so that the bulk of law-making authority resided with the provincial governments and that Ottawa's jurisdiction was restricted to defence and national security. In this scenario, the Supreme Court of Canada would be overstepping its authority, in the extreme, were it to lay out a vision of Canadian governance that was directly at odds with that set out in the new, amended constitution, and then follow up by significantly enlarging the powers of the central government and circumscribing the powers of the provinces.

On the issue of decentralization, the absence from both the *Securities Act Reference* and the *Secession Reference* of a discussion of just how decentralized Canada has become is remarkable, especially for a Court concerned about balance in the Canadian federation.

If the justices had pursued this issue, they would have noticed, for instance, the considerable revenue growth of the provinces. Bakvis, Baier and Brown point out that, in 1955, Ottawa collected approximately 70 per cent of all taxes. By the 1990s, that share had fallen to about 44 per cent. The reason for this decline, they explain, is that, in response to the substantial growth in provincial expenditures, Ottawa “ceded considerable tax room on corporate and personal income to the provinces in the 1950s, 1960s and 1970s. In addition, since the provinces can tax pretty much anything they want, “taxes both big and small have proliferated at the provincial level” (Bakvis, Baier, Brown 2009: 142).

Bakvis, Baier and Brown point out further that the huge transfers to the provincial governments come almost condition free. “There are probably fewer conditions attached to intergovernmental cash and tax transfers in Canada than in any other federal system” (Ibid.: 144). They write: (Ibid.: 144-145)

In fiscal year 2007-08 the three biggest programs, accounting for more than 95 per cent of all federal cash transfers, were the Equalization Program, the Canada Health Transfer (CHT), and the Canada Social Transfer (CST). The former is wholly unconditional, and although the CHT and CST include a few conditions (about meeting the five basic principles of medicare and ensuring that migrants from other provinces can qualify for welfare payments after a reasonable waiting period), they still leave considerable room for provincial interpretation, and the medicare conditions in particular are difficult to enforce.

This kind of information, it would seem, needs to be considered by the justices if they are going to make conclusions about the nature of Canadian federalism.

The justices might also be interested in the work of political scientists who have attempted to rank federal countries on a centralization-decentralization axis. Hueglin and Fenna, for instance, assessed six federal countries on the degree of centralization and decentralization and came up with this ranking, from most centralized nation to most decentralized: India; South Africa; Germany; Australia; United States; Switzerland; Canada (Hueglin, Fenna 2006: 36).¹⁴ The justices may have been astonished to learn that Canada would now be considered, by two highly regarded scholars, more decentralized than Switzerland.¹⁵

14 The authors do not explain how they arrived at this ranking.

15 In his book, the Hon. Stéphane Dion quoted Edmond Orban of the Université de Montreal who found from his work that the provinces of Canada “enjoy relatively greater autonomy and, in the case of the larger provinces, relatively greater opportunities than do the länder and, in particular, the Swiss cantons” (Dion 1999: 95).

A more comprehensive scale was developed by Ferran Requejo, a Spanish scholar, who could also be fairly described as a Catalan nationalist supportive of what is called multinational federalism. The table below shows the results of Requejo's analysis of the "degree of constitutional self-government" enjoyed by federated units or regions in twenty-two nations. The indicators that Requejo used are: (Requejo 2010: 285-286)¹⁶

a) the kind of legislative powers enjoyed by these sub-units (8) – subdivided in specific areas of government as follows: economy/infrastructure/communications (2), education and culture (2), welfare (2), internal affairs/penal/civil codes and others (2); b) the executive/administrative powers (2); c) whether or not the federated entities have the right to conduct their own foreign policy, taking into account both the scope of the matters and agreements with federal support (2); and d) their economic decentralization (8): it is calculated according to a single average index obtained taking into account the distribution of the public revenues and the public expenditures...in each country.

Degree of Constitutional Decentralization

Country	Ranking	Points
Venezuela	1	3.5
Malaysia	2	4
Mexico	3	6.5
Pakistan	4	6.5
South Africa	5	7
Italy	6	8
Nigeria	7	8.5
Austria	8	9.5
Brazil	9	10
UK	10	11
India	11	11.5
Spain	12	12
Argentina	13	13
Russia	14	13.5
Germany	15	14
Belgium	16	15.5
US	17	15.5
Australia	18	16
Switzerland	19	17
Canada	20	17
Bosnia-Herzegovina	21	18.5
Serbia-Montenegro	22	19.5

¹⁶ The numbers in brackets are the points allocated.

Of the twenty-two countries listed, Canada, along with Switzerland, ranks twentieth in degree of decentralization. In other words, Canada is among the most decentralized countries in the federal world. The differences between Canada and some of the other federal countries may not be substantial but it seems beyond argument that Canada's federalism has become highly decentralized. Again, this kind of information ought not to be ignored by Supreme Court justices if they are intent on discussing the nature of Canadian federalism in their opinions, especially if the issue of balance is a concern to them.

IV. The Supreme Court's Federalism in the *Secession Reference*

Despite their intention to discuss federalism as a fundamental principle of Canada's constitutional order, the justices did not spend a lot of time doing so. Barely three pages are allocated to federalism and most of that is spent affirming federalism as an underlying principle of the constitution and defending it as a system that allows the provincial governments “to develop their societies.”

At paragraph 32, the justices identify four fundamental principles of the constitution: (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217).

In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities.

At paragraph 49, they make clear that the principles are equal in status: “No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of the others.”¹⁷

On federalism, they state at paragraph 55:

It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the Constitution Act, 1867, the federal system was only partial....*This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces.* [Italics added.]

The phrasing in this passage is curious. In the italicized sentence, it is declared that “the federal government retained sweeping powers...” The justices would have been more precise if they had written that the constitution – agreed to by the founders, including the representatives from Lower Canada and the Maritimes, and enacted into law by the British Parliament – *gave the federal government sweeping powers*. The latter wording would have affirmed that the founders made a conscious decision to give Ottawa substantial constitutional tools and, were the federal government to use those tools, it would be acting legally, constitutionally and in accord with the design of the founders.

¹⁷ Despite the passage of many years, it is still not evident why the justices would not include territorial integrity or national cohesion or Canadian solidarity in their list of fundamental principles. Nor is it evident why the justices would place federalism on the same plane as minority rights, the rule of law and democracy. While federalism may be a fundamental principle of the constitutional order, surely the history of this country would lead one to conclude that federalism ought to be subject to more fundamental principles, e.g., minority rights and the rule of law.

Paragraph 55 goes on to state:

Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned.

Again, in this passage the justices write as though federalism is primarily about enlarging the power of the subnational governments. Hugh Mellon makes a similar criticism: “The treatment of federalism is centred on provinces and provincial communities, and there is very little reference to the place of the federal government or to any sense of national community” (Mellon 2007: 218). As noted earlier, this does not convey an accurate understanding of federalism.

The reference to the disallowance power was also curious. What exactly were the justices trying to imply? Among other things, the passage ignores the reality that the disallowance power was used frequently, in particular by Macdonald; in total, beginning in 1869, the disallowance power was used by the federal government 112 times (La Forest 1965: 83-101).¹⁸ Sixty-five provincial acts were disallowed between 1869 and 1896 (Russell 2011: 162).¹⁹ Other “sweeping powers,” e.g., the federal spending power, the criminal law power, and the rule of paramountcy, remain in the federal arsenal (as do the trade and commerce power and the peace, order and good government power, although, admittedly, they could not now be described as “sweeping”). Are the justices implying that, in order to have federalism in Canada, the strong federal powers must go the way of the disallowance power?²⁰

It is also worth reminding ourselves here that the disallowance power had the support of some notable constitutional framers, including George-Étienne Cartier. As Macdonald's closest ally, Cartier saw, and accepted, that the Confederation agreement gave to Ottawa certain powers that placed it in a dominant position vis-à-vis the provinces. It appears that he not only accepted them he saw them as tools to be used.²¹ For instance, referring to the fears expressed by the English commercial class in Québec, Cartier said in his speech to the Legislative Assembly in February 1865: “There could be no reason for well-grounded fear that the minority could be made to suffer by means of any laws affecting the rights of property....But even supposing such a thing did

18 Ironically, it was Oliver Mowat who, during the Quebec Conference, moved the resolution to empower the federal government to disallow provincial legislation.

19 The disallowance power has not been used since 1943.

20 The disallowance power has gotten some pretty bad press. While such a power has no place in a modern federal system, Garth Stevenson, after reviewing the use of the power, concludes that, by and large, it was not used “excessively, arbitrarily, or unfairly” (Stevenson 1993: 251-252). In addition, if the disallowance power had been used to nullify the 1890 Manitoba *Public Schools Act* and the 1890 Manitoba *Official Language Act*, French-Canadians in Quebec may have felt more comfortable in Canada and more comfortable with the federal authority. In an excellent article on the Manitoba enactments, Gordon Bale concluded that those enactments, and the refusal of federal politicians to use the disallowance power and the decision of the JCPC to accept the constitutionality of the enactments (contrary to the decision of the Supreme Court of Canada), contributed to the growth of separatism in Quebec (Bale 1985).

21 According to G.V. La Forest, the disallowance power was also supported by E.P. Taché, N.F. Belleau, and Hector Langevin, as well as by Macdonald, Alexander Mackenzie, Paul Denis, John Sanborn, George Brown, and John Rose. Among those opposed were A.A. Dorion and J.B.E. Dorion (La Forest 1965: 5-12).

occur, there was a remedy provided under the proposed constitution” (Ajzenstat 1999: 335).²² Cartier's remedy, of course, was the federal power to disallow provincial legislation.

In their discussion of federalism in the *Secession Reference*, the justices do not go so far as to describe Canadian federalism as co-ordinate federalism. The closest that they come to defining federalism is at paragraph 56 where they state, “In a federal system such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*.” There is no mention of equality of status.²³

However, the justices do stress the autonomy of the provinces and at paragraph 58 refer to the JCPC's judgment in *Re the Initiative and Referendum Act* which came down in 1919. The passage from that 1919 decision states that the purpose of the *Constitution Act, 1867* was

not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

This quotation appears to be the basis of the justices' acceptance of co-ordinate federalism as one of the organizing principles of the Canadian federation. It is very similar to one articulated in another JCPC decision, *The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick* of 1892. It states:

The object of the [British North America] Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

These comments from the Judicial Committee are not about a federation. Rather, they are a description of a confederation, which recalls the *Articles of Confederation* that, as discussed earlier, was the American founders' first attempt at a constitution. To say, as the Law Lords did, that each province was to retain “its independence and autonomy” grossly misrepresents the founders' intentions. The Confederation debates show that the object of the founders' efforts was to create a unified country not a “commonwealth of independent states.”

The degree to which the sentiment conveyed in both versions is at odds with the stated intentions and actions of the country's founders is almost breath-taking. They were indeed set on making the federal government the dominant government in the country. This assessment has wide agreement among political scientists and constitutional scholars in Canada. For instance, Frederick Vaughan has written: “It is impossible to overemphasize the conclusion that the

²² Interestingly, in the same speech, Cartier stated that “it would be for the general government to deal with our [that is, Québec's] commercial matters.” This appears to reflect an acknowledgement of Ottawa's trade and commerce power and its applicability *within* provinces.

²³ The same may be said of another case, *Canadian Western Bank v. Alberta* [2007] 2 S.C.R. Nowhere in the justices' four-paragraph discussion of Canadian federalism, paragraphs 21-24, is mention made of co-ordinate federalism or the non-subordination of the levels of government.

constitutional framers resolutely intended to establish a strong central government and at the same time to reduce the legislative authority of the provincial governments” (Vaughan 2003: 66). In the 1972 report of the Special Joint Committee on the Constitution, the parliamentarians stated: (Bayefsky 1989: Vol. 1, 261)

The division of powers set out by the Fathers of Confederation in 1867 seemed to give more power to the Federal Parliament than to the Provincial Legislatures, and seemed to favour a system in which Parliament would be the dominant authority. The peace, order and good government clause, the disallowance power, the residuary power, the nature of the powers in section 91 as opposed to section 92; sections 24, 58, 59, 90, 93, 94, 95 and 96 and the *general spirit of the entire Constitution all point to this*. [Emphasis added.]

In *Lenoir v. Ritchie* 1879, Justice Gwynne, writing for the majority of the Supreme Court, declared: “Nothing can be plainer, as it seems to me, than that the several provinces are subordinated to the Dominion Government...” (*Lenoir v. Ritchie*, [1879] 3 S.C.R. 575, 635). In the *Patriation Reference*, Chief Justice Laskin along with Justices Estey and McIntyre wrote: (*Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 872)²⁴

The *B.N.A. Act* has not created a perfect or ideal federal state. *Its provisions have accorded a measure of paramountcy to the federal Parliament*. Certainly this has been done in a more marked degree in Canada than in many other federal states. For example, one need only look to the power of reservation and disallowance of provincial enactments; the power to declare works in a province to be for the benefit of all Canada and to place them under federal regulatory control; the wide powers to legislate generally for the peace, order and good government of Canada as a whole; the power to enact the criminal law of the entire country; the power to create and admit provinces out of existing territories and, as well, the paramountcy accorded federal legislation. [Emphasis added.]

Perhaps it would be more persuasive if, rather than rely on scholars and justices, we went right to the founders to find out what they intended, beginning with Macdonald himself: (Canada Provincial Parliament 1865: 33)

We thereby strengthen the central parliament and make the Confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent....There are numerous subjects which belong, of right, both to the local and the general parliaments. In all these cases it is provided, in order to prevent a conflict of authority, that where there is concurrent jurisdiction in the general and local parliaments...and that when the legislation of the one is averse to or contradictory of the legislation of the other, in all such cases the action of the general parliament must overrule, ex-necessitate, the action of the local legislature.

On the founders' intentions regarding trade and commerce, the historical record is clear. For George Brown, a leader among the country's constitutional drafters, ensuring the free flow of commerce was to be a federal responsibility. In his speech to his legislative colleagues, he stated:

²⁴ With respect to the disallowance power, Monahan makes the point that, “in one particularly important area of legislation, education, the federal Parliament was not limited to disallowing provincial laws but could actually enact remedial legislation of its own to override a valid provincial law or decision taken by a provincial authority pursuant to a valid provincial law” (Monahan 2006: 99). This power, Monahan explains, “could be exercised to override any decisions of provincial authorities which, in the opinion of the federal government, affected guaranteed rights of religious minorities in relation to denominational schools” (Ibid.: 99, fn. 11).

“And finally, all matters of trade and commerce, banking and currency, and all questions common to the whole people, we have vested fully and unrestrictedly in the General Government” (Canada Provincial Parliament 1865: 108). George Étienne-Cartier agreed: “Questions of commerce, of international communication and all matters of general interest, would be discussed and determined in the General Legislature” (Canada Provincial Parliament 1865: 55).

Alexander T. Galt also made clear that trade and commerce were to be a federal concern. He stated: (Galt 1864: 10)

It was most important to see that no local legislature should by its separate action be able to put any such restrictions on the free interchange of commodities as to prevent the manufactures of the rest from finding a market in any one province, and thus from sharing in the advantages of the extended Union.

He stated further that the federal government “would have the regulation of all the trade and commerce of the country, for besides that these were subjects in reference to which no local interest could exist; it was desirable that they should be dealt with throughout the Confederation on the same principles” (Ibid.)

In 1879, Charles Fisher, yet another of the framers of the *Constitution Act, 1867*, who became a justice of the New Brunswick Supreme Court, stated: “It was clearly the intention of the framers of the Act that Parliament should have power to regulate the trade between the several Provinces, and the internal trade of each Province as well as the foreign trade of the whole Dominion” (Saywell 2002: 26). Similarly, Louis Caron and Christopher Dunkin, constitutional framers who later became judges with the Québec Superior Court, wrote that the federal trade and commerce power “is general, and without restriction, and must of necessity include as well the internal trade and commerce of each Province as that of the whole Dominion” (Ibid.: 27). The comment is significant because Dunkin was not a fan of the agreement that created Canada.

It would be difficult to find clearer statements of the founders’ intentions regarding federal power and specifically the trade and commerce power. And yet, a mere generation after the agreement creating Canada, the JCPC - a foreign judicial body, part of the government structure of an Imperial power and *whose President was simultaneously a member of the British Cabinet* - took it upon itself to articulate a vision of Canadian federalism that was directly in opposition to that laid out by the founders. This would appear to be the significance of the justices’ quotation from *Re the Initiative and Referendum Act*, not its emphasis on provincial autonomy. The justices might have written a more persuasive opinion if they had based their analysis of Canadian federalism not on that JCPC quotation but rather on their own observation stated almost as an aside at paragraph 96 of the *Secession Reference*: “The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces.”

V. Conclusion

The Supreme Court of Canada's recent federalism, as discussed in the *Securities Act Reference* and the *Secession Reference*, has been the focus of analysis of this paper. It began by pointing to the references to federalism contained in the *Securities* opinion, noting in particular the Court's comment that the federal and provincial governments are co-ordinate. Section III offered a discussion of the meaning of federalism and of the nature of Canadian federalism, and section IV discussed the references to federalism in the *Secession Reference*.

With respect to the first and third questions identified in the introduction to the paper, it is difficult to say definitively whether the *Securities Reference's* description of federalism differs substantially from the justices' view of federalism contained in the *Secession Reference*. On the one hand, the use of the words, co-ordinate and non-subordination, in the *Securities Reference* suggests, at the least, that there is a hardening of the provincialist views among the current justices. On the other hand, in the *Secession Reference*, the justices explicitly based their understanding of federalism on the JCPC's vision as expressed in *Re the Initiative and Referendum Act, 1919* and in the *Maritime Bank* decision. So, even though they did not use the terms, co-ordinate and non-subordination, their basic view of Canadian federalism held in both opinions.

On the second question, the justices did not say in any precise way what they meant by co-ordinate federalism in jurisdictional terms. Certainly, the claim that the two levels of government are co-ordinate raises a host of questions regarding the current division of powers, some of which were posed in this paper. Given that current division, it would seem that a major constitutional overhaul would be required before Canadian federalism could be called co-ordinate. It can be legitimately asked: are the justices determined to make that overhaul happen?

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