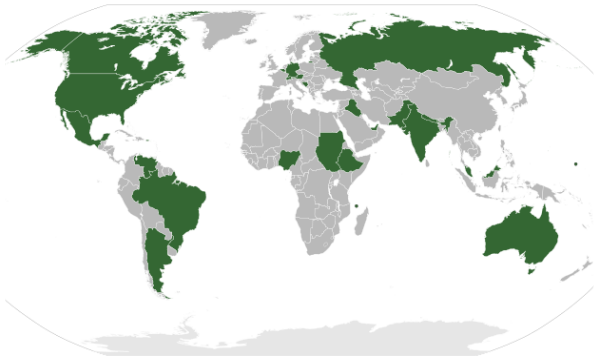
2011 Edition

Volume 12

FEDERALISM-E

FEDERALISM-E, VOLUME 12



FEDERALISM-E CONTENTS

FEDERALISM-E

Volume 12 May 2011

Editors Address

Federalism-E is a peer-reviewed undergraduate journal that encourages scholarly debate and research in the area of federalism and explores topics such as political theory, multi-level governance, and intergovernmental relations. Papers were submitted from across the country and from overseas, and then sent to other undergraduate students who volunteered to be apart of our peer review board. After extensive evaluation, this years papers were selected and returned to the authors for them to edit their papers according to the feedback. The result is our 12th consecutive year of publication.

It is with great pleasure that we present this years collaborative work. We are publishing Federalism-e in the hopes to encourage undergraduate students to contribute to the community of academic studies and to create a forum for better understanding the topic of federalism.

Federalism-E est un journal universitaire de premier cycle également révisé par des universitaires, qui encourage les débats pédagogiques dans le domaine du fédéralisme et explore des sujets tels que les théories politiques, le gouvernement à plusieurs échelons ainsi que les relations intergouvernementales. Les essais furent soumis de partout au pays et même de l'étranger. Après de nombreuses évaluations, les essais qui vous seront présentés furent sélectionnés et retournés aux auteurs afin que ceux-ci fassent les corrections nécessaires pour leur publication. Le résultat vous est donc présenté dans le volume n◦12 de cette année.

C'est avec grand plaisir que nous présentons le fruit de cette collaboration. Nous publions Federalism-E dans l'espoir d'encourager les étudiants de premier cycle à contribuer plus à la communauté universitaire et à créer un forum pour améliorer la compréhension sur le sujet du fédéralisme. Nous espérons que vous apprécierez l'édition de cette année.

Geneviève Martel & Joycelyn Moffat

Co-Editors

Collège militaire royal du Canada, Royal Military College of Canada

Contributing Universities

Dalhousie University

McGill University

Queen's University

Royal Military College of

Sheffield Uiniversity

Université de Laval

University of Victoria

University of Waterloo

FEDERALISM-E

Volume 12 May 2011

Introduction to the Topic of Federalism

L'équipe du journal E.-Federalism ainsi que les auteurs ayant collaboré, sont fiers de vous présenter le volume n◦12, l'édition 2011.

Encore une fois cette année, vous retrouverez des articles des plus intéressants sur des sujets tels que : le rôle du fédéralisme dans le développement des services de santé nationaux en passant par le rôle impartial de la Cour Suprême du Canada dans la fédération. Bref, vous trouverez une multitude de textes reliés au fédéralisme qui vous apprendront beaucoup sur le sujet.

Le fédéralisme est un projet politique qui regroupe à l'intérieur une même identité politique, des groupes différents. Le fédéralisme est donc caractérisé par une volonté de ces groupes différents de s'assembler ensemble vers un but commun. Le fédéralisme est, aussi pour cette raison, un système politique plus flexible afin de permettre une telle cohabitation. Les relations intergouvernementales s'avèrent cependant être chose complexe parce que le gouvernement fédéral a la responsabilité ingrate de faire en sorte de maintenir les pouvoirs de façon équilibrée.

Il existe plusieurs pays fédéraux dans le monde par exemple les États-Unis, l'Inde, le Brésil et bien sûr le Canada. L'étude du fédéralisme est donc toujours d'actualité et nécessaire. Les textes qui suivront traiteront donc des différents aspects de cette organisation politique.

The team of the journal e-federalism and the authors that contributed to this edition, are proud to present you volume 12, edition 2011.

Again this year, you will find fascinating articles on subjects like: the role of the development of national health care services and the impartial role of the Supreme Court of Canada in the Canadian federation. Furthermore, you will find many texts related to federalism that are extremely informative on the subject.

Federalism is a political project that brings together different identities inside of a political group. Federalism is characterized by a will of those different groups to collaborate for the purposes of working towards and achieving a common objective. Federalism is, for this reason, characterized by its flexibility to permit this cohabitation. Relations between governments are complexes and the federal government has the ungrateful task to maintain a balance of power.

There are many federal states including the United-States, India, Brazil and of course, Canada. So we can say that the study of federalism is always actual and necessary. The papers in this edition will explore the above mentioned subjects and more.

Le nationalisme comme l'Eros et le Thanatos des fédérations Réflexion critique entre Sigmund Freud et Michael Ignatieff

Åsbjørn Melkevik

Université Laval

Åsbjørn Melkevik vient juste de graduer pour son baccalauréat en science politique à l'Université Laval. Il poursuivra ses études supérieures en s'intéressant à l'épistémologie du nationalisme. Ses intérêts portent sur la philosophie politique ainsi que l'histoire des idées et plus particulièrement sur les questions de parlementarisme, de nationalisme et de fédéralisme.

Introduction : nationalisme et federalism

L'être humain serait, selon Sigmund Freud, divisé entre deux pulsions : l'Éros et le Thanatos. L'Éros, soit la pulsion de vie, et le Thanatos, soit la pulsion de mort, oeuvrent continuellement ensemble, en amalgame, dans toutes actions humaines. En effet, Freud écrit concernant l'être humain qu'« il fallait qu'il y eût, en dehors de la pulsion à conserver la substance vivante, à la rassembler en unités de plus en plus grandes, une autre pulsion, opposée à elle, qui tende à dissoudre ces unités et à les ramener à l'état anorganique des primes origines. [1]» Loin de nous l'idée de faire de la psychologie sociale ; les parallèles entre les individus et les groupes sont trop souvent trompeurs. Or, il nous semble intéressant d'examiner les relations entre le nationalisme, comme idéologie, et l'existence des fédérations à travers cette idée simple de *vie* et de *mort* – d'unification et de séparation. Michael Ignatieff a bien su exprimer le danger de désintégration des pays fédéraux relié à la logique même du nationalisme – lui-même ayant été inspiré de la critique de Freud sur la civilisation. Pourtant, cette réflexion voulant identifier le nationalisme comme élément *morbide* dans ce paradis des États souverains, ne nous semble simplement pas appropriée. Aussi, l'objectif du présent essai est d'éclairer la relation entre le fédéralisme et le nationalisme par une réflexion essentiellement *critique* ; nous défendrons que le nationalisme ne doive être identifié ni à une pathologie, ni à une solution miracle. La réflexion critique que nous allons développer ici se basera sur principalement les travaux de Michael Ignatieff et de Sigmund Freud, mais aussi sur des auteurs comme Michael Hechter et Éric J. Hobsbawm. Ces auteurs ont tous assurément une vision négative du nationalisme ; vision qui est certes intéressante, mais non pas suffisante. Nous reprenons donc la terminologie de Freud simplement pour exprimer une idée que le philosophe Schiller avait déjà énoncée : « faim et amour » assurent la cohésion des rouages du monde .[2] L'expression de « rouage » n'est peut-être pas appropriée, puisqu'elle sous-entend un certain déterminisme, mais nous pouvons dire que les fédérations sont bien soumises à ces conditions naturelles de vie et de mort. Plusieurs fédérations sont mortes, d'autres sont nées et certaines sont « malades » – ou largement dysfonctionnelles si l'on préfère une terminologie plus réaliste. Mais ces *états* des fédérations ne doivent pas être retenus contre le nationalisme.

Dans la première partie de notre essai, nous analyserons la dimension « imaginaire » du nationalisme. Le nationalisme sera envisagé sous son aspect politiquement rassembleur, en lien avec l'Éros, ce qui nous permettra de critiquer une conception identitaire du nationalisme. Dans notre deuxième partie, nous exposerons la vision du nationalisme de Michael Ignatieff, qui met l'accent sur le côté dangereux – le Thanatos – du nationalisme, à travers le concept du *narcissisme de la petite différence* qu'il reprend de Freud. Dans notre troisième partie, nous donnerons notre vision critique du nationalisme, en étant particulièrement opposés à une vision qui voudrait trop ranger le nationalisme dans une catégorisation binaire – entre le bien et le mal.[3]

L'Éros et la naissance des fédérations

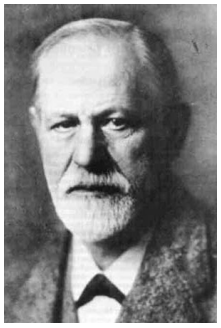
Pour Freud, la civilisation – qu'il confond avec le terme de culture – signifie la fin de la libre manifestation des pulsions, de la même manière que pour Hobbes le contrat social signifie la sortie de l'état de nature : « L'homme de culture a fait l'échange d'une part de possibilité de bonheur contre une part de sécurité. [4]» La cohésion de l'État repose sur cette promesse de sécurité ; mais cette promesse, si elle est une condition nécessaire, n'en est pas pour autant une condition suffisante. L'État repose en partie, comme nous l'enseigne Max Weber, sur le monopole de la contrainte légitime, qui assure la sécurité. Mais cela n'est encore pas suffisant : il faut aussi une identité. L'identité « construite », qui est fournie par le nationalisme, se re-

trouve par conséquent un puissant facteur de la création des États-nations ou des fédérations ; le nationalisme est l'Éros des nouveaux États.

Le mythe originel de la nation

Commençons par nous tourner vers les pères fondateurs des États-Unis ; autant à la lecture des *Federalist Papers* que dans le processus même de création des États-Unis, il est clair que le nationalisme a été à l'origine de fédérations plus que convenables et durables. Les États-Unis représentent un archétype du fédéralisme et pourtant plusieurs de ses fondateurs furent des nationalistes – pensons à Hamilton. Les États-Unis peuvent autant se réclamer d'être une nation que les Irlandais. Pourquoi ? Les irlandais n'ont-ils pas plus de ressemblance entre eux, par rapport à l'ultra diversité qui a cours aux États-Unis ? Or, dans son analyse du nationalisme, Ignatieff, dans le même esprit que Benedict Anderson et Éric J. Hobsbawm, déclare : « A nation, therefore, is an imagined community. [5]» Oui, évidemment il n'y a pas de critères objectifs qui s'imposeraient à tout être humain et qui feraient chacun s'écrier : « Ah ! voilà une nation » quand il en verrait une .[6] Ainsi, pour trouver les « vraies nations », on est forcé de se référer au schéma d'interprétation de la vérité de Tarski : « un flocon de neige est blanc si et seulement si un flocon de neige est effectivement blanc.[7] », donc une nation existe si et seulement si elle existe *en fait* ; mais la nation n'est pas un fait observable, la dimension factuelle résidant exclusivement dans la croyance d'individus. Cela nous permet de dire qu'il n'y a *aucune* supposée factualité – société distincte, langue différente, institution rassembleuse ou bagage historique commun – qui puisse créer une nation, que ce soit seul ou en combinaison avec d'autres facteurs. La nation est une *idée* qui existe parce qu'elle est pensée : « je suis pensé donc je suis ».

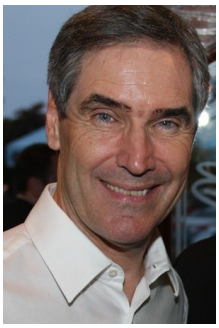
Les nations existent simplement parce qu'un nombre considérable de gens le *croient* et *agissent* en conséquence de cette croyance ; en effet le concept appartient selon Max Weber au domaine des valeurs . [8] Tout rapport au monde est imaginé, il ne sert à rien de décrier les produits de l'imagination – dont font partie autant l'État et la religion que le nationalisme. Que toute relation au monde soit sans conteste construite par l'activité cognitive ne rend pas ces constructions inutiles ou mauvaises pour autant ; ces constructions – que ce soit les nations ou les religions – jouent un rôle social important. Même les névroses ont une certaine utilité – mais le nationalisme n'est pas une névrose contrairement à ce que certains pensent, ou donnent l'impression de penser. Il ne sert à rien normativement de démontrer, comme Hobsbawm, que les nations ne trouvent pas leur source dans une *vraie* vie communautaire, puisque si cela est louable du point de vue de la « vérité historique », cela ne doit pas nous inciter à les écarter comme non authentiques ou comme archaïques .[9] Les États-Unis et l'Allemagne, pour ne donner que deux exemples, ont été construits sur de tels « sentiments » imaginés – et c'est très bien ainsi, car ces deux pays ne souffrent pas pour autant de tares majeures.



Sigmund Freud

Le nationalisme comme idée ou comme identité

Qu'est-ce que le nationalisme pour Michael Ignatieff ?: « Nationalism is a doctrine which holds, (1) that the world's people are divided into nation, (2) that these nations should have the right of self-determination, and (3) that full self-determination requires statehood. »[10] Une telle définition nous semble réductionniste. En effet, la définition de Ignatieff est problématique, étant orientée vers un *fait d'indépendance* – évidemment que le nationalisme est une puissante idéologie pour entraîner la création de nouveaux États. Mais cela rend bien mal compte des nations *déjà* indépendantes – des États-nations – dans lesquelles les citoyens peuvent évidemment être nationalistes sans faire au-



Michael Ignatieff

cune référence à la question réglée de la souveraineté. Louis Balthazar critique une définition semblable à celle de Ignatieff en soulignant que : « le nationalisme québécois, même au cours des trente dernières années, est un phénomène plus large que l'aspiration à la souveraineté. On peut être nationaliste au Québec sans être souverainiste. » Ainsi, Balthazar préfère définir le nationalisme « comme un mouvement qui se porte à la défense, à la préservation et au développement d'une identité nationale. »[11] C'est ce qu'il appelle le *nationalisme autonomiste*, définition qui peut sembler plus appropriée – au fait près que le terme « mouvement » n'exprime pas suffisamment la dimension idéologique du nationalisme. Or, l'identité est aussi une notion extrêmement ambiguë. Si l'identité – ou le sentiment national – était originellement le ciment des communautés, on a le sentiment aujourd'hui que le terme a perdu tout son sens unificateur et est finalement rentré dans une logique de reconnaissance qui ne peut qu'entraîner une fragmentation sociale – d'où son caractère potentiellement destructeur pour les fédérations.

La négation de la pluralité

Dans *La société des identités*, Jacques Beauchemin pose le problème essentiel d'une dynamique politico-identitaire, débouchant sur « la formulation de revendications, toujours plus nombreuses, portées par des groupes d'acteurs dont le principe de regroupement est l'identité [12] ».

Ce désir de *reconnaissance* – terme de Hegel repris entre autres par Charles Taylor – entraîne simplement une perte de sens du politique. La logique voulant qu'en appartenant à une communauté – sexuelle, générationnelle, professionnelle ou ethnique – un individu dispose d'une identité devant être reconnue politiquement est sûrement à l'opposé de tous les principes du libéralisme politique qui fondent nos régimes politiques occidentaux. L'identité est un concept extrêmement mouvant, depuis déjà un certain temps, et ne semble plus entrer dans une certaine correspondance avec la nation ; il y a un recul de l'identité politique de collectivité au profit d'une fragmentation vers l'individu. Michael Ignatieff attribue, comme nous allons le voir, à l'identité nationaliste beaucoup de méfaits – à peu près l'équivalent du Thanatos des fédérations. Or, il ne faut jamais oublier que l'identité est toujours personnelle ; c'est une expérience d'*un* individu. Il y a donc un grand risque à généraliser la notion. Il n'y a évidemment pas d'identité préconstruite « prêt-à-porter » qui permette de dire : je suis nationaliste *donc* je pense ainsi, ou je suis cosmopolite *donc* j'ai une identité opposée à celle des nationalistes. Ce sont là toujours des choix individuels ; par contre le nationalisme, en tant qu'idéologie fournit effectivement un cadre de pensée. Il nous semble donc que penser le nationalisme à partir de l'identité n'est qu'une impasse intellectuelle ; il est beaucoup trop facile d'attribuer aux identités toutes sortes d'intentions. Le nationalisme doit être pensé à partir des nationalistes et de leur croyance dans une *idée* qui occupe une place importante dans l'imaginaire politique – et non à partir d'un sentiment romantique flou ou d'une conception psychologisante.

Le Thanatos et la mort des fédérations

Pour plusieurs penseurs politiques, le nationalisme fait incontestablement figure de trouble fête à cette belle table que représente le monde divisé en États souverains [13] : « The key narrative of the new world order is the disintegration of nation-states into ethnic civil war; the key architects of that order are warlords; and the key language for our age is ethnic nationalism.[14] » Michael Ignatieff écrivait ces propos sévères dans son livre *Blood and Belonging* et il est utile pour notre propos de suivre sa réflexion sur la mort des fédérations par le nationalisme. Or, son diagnostic est exagéré ; le nationalisme n'est pas comparable aux cavaliers de l'enfer qui viendraient ravager le « nouvel ordre mondial », mais bien plutôt un facteur idéologique puissant à l'échelle de la politique mondiale qu'il faut effectivement prendre en compte dans une réflexion politique. Nous allons ici exposer l'argumentation de Ignatieff sur le nationalisme comme Thanatos des fédérations et des États en général, tout en étant conscients que les conclusions qu'il en tire – soit le rejet du nationalisme comme option politique viable – nous semble largement abusives.

La négation de la pluralité

Ignatieff écrit : « Federalism is a politics that seeks to reconcile two competing principles: the ethnic principle, according to which people wished to be ruled by their own, with the civic principle, according to which strangers wish to come together to form a community of equals, based not on ethnicity but on citizenship. [15]» Le fédéralisme implique donc minimalement une dualité de l'appartenance civique, de l'identité politique ; de sorte que les citoyens puissent se reconnaître autant dans l'État fédéral que fédéré, sans avoir à choisir ou à rejeter une identité au profit d'une autre. Or, selon Ignatieff, c'est précisément cette dualité ou pluralité

des identités qui est niée par l'idéologie nationaliste .[16] Le nationalisme nie qu'une personne puisse être plus que Serbe ou Croate, par exemple. Cette négation de la pluralité se constitue évidemment dans le milieu politique – on est partisan ou on ne l'est pas –, mais aussi dans la société, dans la culture et jusque dans les plus petits aspects de la vie. On est d'abord Serbe ou Croate et puis c'est tout ; on n'est plus un fils, un travailleur, un voisin ou peut-être même un amateur de jazz. L'identité nationaliste se constitue, selon Ignatieff, en rejetant toutes les autres pour former une exclusivité de l'appartenance – appartenance dont la caractéristique est d'être différentielle. Aussi, souligne-t-il le caractère négatif de l'identité nationaliste : « Un Serbe est un individu qui n'est pas Croate. Et vice-versa. Mais une différence relationnelle est également une tautologie creuse. Nous ne sommes pas ce que nous ne sommes pas. [17]»

L'exclusivité de l'appartenance imposée par le nationalisme est permise, toujours selon Ignatieff, par une altération de la réalité historique : « Le sentiment nationaliste n'*exprime* pas seulement une identité préexistence : il en *constitue* une nouvelle. [18]» Cette nouvelle identité est colorée téléologiquement ; un certain but, une normativité, est introduit à l'intérieur même de l'identité : je suis Québécois *donc* je souhaite l'indépendance ; ou pire encore, je suis Serbe *donc* je suis l'ennemi des Croates. De ce fait, « Le nationalisme est une fiction : il exige la suspension volontaire du jugement. Prêter foi aux fictions nationalistes, c'est oublier certaines réalités. [19]» Aussi, c'est inscrire dans la réalité des intentions qui n'y sont pas .[20] En ce sens, nous pourrions dire que le nationalisme se situe dans ce que Hume appelait le paralogisme naturaliste ; il y a passage non logique de la factualité à la normativité.

Le narcissisme de la petite différence

Jean-Pierre Derriennic a écrit que « Le nationalisme civique est un luxe réservé à ceux qui n'ont pas de question nationale à résoudre. [21]» En effet, lorsque le nationalisme rentre dans une situation problématique ou conflictuelle, il est très facile pour l'argumentaire de déraper et de créer des conditions favorisant le recours à la violence ; Ignatieff utilise très justement l'expression clinique de *paranoïa* pour décrire la situation des Balkans durant les années 90, telle une peur hobbesienne qui suit la désintégration de l'État fédéral .[22] Un des risques du nationalisme c'est ce que Ignatieff nomme à la suite de Freud le *narcissisme de la petite différence* : « Moins les différences sont importantes entre deux groupes, plus ils doivent lutter pour dépeindre ces différences comme absolues.[23] » La différence entre Québécois français et canadien-anglais – ou entre Serbe et Croate – est effectivement assez mince lorsque l'on adopte une position détachée ; la langue et la religion peuvent certes être différentes, mais il n'en reste pas moins que le statut de « voisin » impose une relation qui rend – ou qui devrait rendre, surtout dans un pays fédéral – la différence presque banale par rapport à la ressemblance. Mais alors, c'est précisément la différence qui devient l'enjeu de toutes les attentions ; cela devient le facteur qui fait que l'on *existe*, l'élément sans quoi l'on ne serait que comme le *reste des autres*. Le problème devient l'autisme « à savoir la maladie de groupes tellement enfermés dans leur propre condition de victimes, tellement pris dans leurs propres mythes ou rituels de violence qu'ils ne peuvent ni écouter ni entendre qui que ce soit en dehors d'eux-mêmes, qu'ils ne peuvent rien apprendre des autres. [24]» En somme, le nationaliste qui aura abandonné la conception civique ne pourra plus discuter dans un cadre fédéral et risque bien de passer à l'assouvissement de son Thanatos, de sa pulsion de mort, d'une manière ou d'une autre. La conclusion pratique que Michael Ignatieff tire des théories du narcissisme de Freud, nous semble avisée : « nous ne serons vraisemblablement plus tolérants envers d'autres identités que si nous apprenons à aimer la nôtre un peu moins. [25]» S'il ne faut pas nécessairement s'aimer moins, il faut à tout le moins apprendre à ne pas détester l'autre.

Pour reprendre les mots sévères de Freud contre la religion, nous pourrions presque dire de plusieurs idéologies nationalistes : « Elles sont toutes des illusions, indémontrables, nul ne saurait être contraint de les tenir pour vraies, d'y croire. Quelques-unes d'entre elles sont tellement invraisemblables, tellement en contradiction avec tout ce que notre expérience nous a péniblement appris de la réalité du monde, que l'on peut – tout en tenant compte des différences psychologiques – les comparer aux idées délirantes.[26] » Mais voilà le problème : tous les nationalismes ne sont pas des idées farfelues – tous ne sont pas soutenus par le *Credo quia absurde*[27] de Freud. Quand il est clair que les délires idéologiques de *pureté de race*, de *droits ancestraux immémoriaux* ou de *peuple ennemi* sont à bannir comme étant simplement inapproprié dans une société minimalement civilisée, il est moins évident que les revendications nationalistes des Québécois ou des Irlandais, par exemple, sont de simples menaces adressées à la souveraineté du territoire d'un État sérieux.[28]

L'ambiguïté du nationalisme

S'il fallait en croire des auteurs comme Michael Hechter, le nationalisme serait la *créature* qui appor-

terait de terribles violences dans le monde moderne – Ignatieff se rapproche énormément de cette conception. Hechter se demande donc : « Can this dark side of nationalism ever be contained ?[29]» Cette question est selon nous un non-sens. Toute chose est potentiellement dangereuse ; on ne saurait trop insister sur la modération aristotélicienne pour le nationalisme, comme pour toutes autres idéologies politiques. L'emphase mise sur le côté sombre fait malheureusement oublier le reste. L'État a aussi son côté sombre – les guerres étatiques – de la même manière que le nationalisme ethnique a le sien – les guerres ethniques ou civiles[30]. Si donc l'on oppose l'État au nationalisme – le nationalisme comme destructeur des États –, on se retrouve pris entre Charybde et Scylla ; un type de guerre contre un autre. Mais cela ne serait pas honnête intellectuellement ; à peu près tout le monde s'entend pour dire qu'il ne faut pas condamner l'État pour des dérapages qui y sont rattachés. Or, ce bon sens s'évapore lorsque l'on fait mention du nationalisme – auquel l'on rajoute souvent hypocritement le mot *ethnique*. Sans vouloir être un idéaliste platonicien, il nous semble utile de rappeler un principe simple : il y a l'idée et il y a la chose. La chose n'est pas l'idée, puisque toute chose relève de plusieurs idées – de la même manière que pour Freud toute action humaine relève toujours et de l'Eros et du Thanatos. Si donc il y a eu des actes de violence perpétrés au nom du nationalisme, ce n'est pas l'idée de nation qui est à blâmer, mais ce sont les individus. Si une femme tue son mari, on ne condamnera sûrement pas l'institution du mariage, mais bien la femme[31]. Nous avons montré que Michael Ignatieff est presque aussi sévère envers le nationalisme que Freud envers la religion – et ce n'est pas peu dire. Ainsi, après avoir exposé ces idées sur la mort des fédérations, il nous faut être juste et accorder au nationalisme un certain crédit.

> <<FEDERALISM IS NOT A POLITICAL IDEOLOGY. IT IS JUST A PARTICULAR WAY OF SHARING POLITICAL POWER AMONG DIFFERENT PEOPLES WITHIN A STATE. BUT IT IS NATIONALISM'S POLITICAL ANTITHESIS.>>

Les sentiments d'identités et leur dépassement

Michael Ignatieff écrit : « Federalism is not a political ideology. It is just a particular way of sharing political power among different peoples within a state. But it is nationalism's political antithesis.[32]» Or, ici nous devons soulever fortement notre désaccord ; le Canada est la preuve vivante que le fédéralisme peut bien s'accommoder de nationalismes divers. L'important est de maintenir la possibilité de la pluralité des identités ; si le nationalisme réussit à nier cette possibilité, alors le fédéralisme est effectivement sur la « voie de la perdition ». La question est de savoir si la négation de la pluralité des identités qu'Ignatieff identifie comme étant un élément caractéristique du nationalisme est effectivement une caractéristique indépassable [33]. Au Canada, c'est la langue qui est le facteur identitaire rassembleur premier. Si nous dépassons les sentiments d'identité nationale, qui séparent les individus, et qui prennent souvent leur origine dans la langue, alors nous pourrons considérer la langue comme un outil communicationnel qui rapproche les individus[34]. Il n'y a aucune bonne raison pour que la langue devienne un objet de confrontation. Le Canada, comme les États-Unis, est une terre d'immigration et forcément il y a plusieurs nationalismes, identités et cultures qui se côtoient. Il ne sert à rien d'avoir peur, comme Allan Bloom, de la « dark music from Africa » qui envahit les États-Unis ; ou de s'étonner, comme Michael Hechter, des noms exotiques des personnages de Disney, de Dumbo à Simba. Autant Ignatieff que Hechter s'entendent pour affirmer que le nationalisme est l'une des principales « forces » politiques contemporaines. C'est en effet le cas, mais précisément cela signifie que le nationalisme peut être l'instrument permettant l'accomplissement des plus louables actions – comme en Norvège et aux États-Unis – et des pires – comme en ex-Yougoslavie.[35] Il faut être minimalement juste et accorder comme point positif au nationalisme plus que « the establishment of folk festivals and the production of works of art, literature, music, and even dress, celebrating the virtues of a host of nations.[36]» S'il fallait choisir entre le massacre d'individus et la confection de robes aux couleurs nationales, le choix ne serait pas difficile. Mais voilà, le nationalisme a aussi à son actif, répétons-le, la création d'États aussi prospères que la Norvège et les États-Unis.

Nationalisme d'unification et de dissociation

L'opposition entre nationalisme d'unification et nationalisme de dissociation est trop facile, puisque c'est souvent le même nationalisme qui va unir puis dissocier. Michael Hechter nous offre une classification du nationalisme en 4 types : 1) *State-building nationalism* is the nationalism that is embodied in the attempt to assimilate or incorporate culturally distinctive territories in a given state. 2) *Peripheral nationalism* occurs when a culturally distinctive territory resists incorporation into an expanding state, or attempts to

secede and set up its own government. 3) *Irredentist nationalism* occurs with the attempt to extend the existing boundaries of a state by incorporating territories of an adjacent state occupied principally by co-nationals 4) *unification nationalism* involves the merger of a politically divided but culturally homogeneous territory into one state.[37] Si alors l'on examine le cas de la Hongrie, force est de constater que le nationalisme ne se classe pas facilement. Le nationalisme de la Hongrie, de 1848 à 1866, est clairement *peripheral* ; du « printemps des peuples » jusqu'à la fin de la domination autrichienne. En 1867, la Hongrie devient une partie séparée dans l'Empire Habsbourg d'Autriche-Hongrie et acquière une grande autonomie. La Hongrie se retrouve alors avec un territoire peuplé à environ 48% de Magyars ; le nationalisme deviendra évidemment davantage de type *State-building*, et les différentes minorités seront soumises à une entreprise d'assimilation. En 1918-1920, le territoire de la Hongrie sera amputé ; plusieurs minorités hongroises se retrouveront dans des territoires à l'extérieur de la Hongrie. Il y aura naturellement un nationalisme davantage *irrédentiste*, qui sera très apparent sous l'amiral Horty, régent du Royaume de Hongrie de 1920 à 1944, ce dernier ayant causé la mort ou l'internement de beaucoup trop d'individus, entre autres avec son alliance au régime nazi. La Hongrie amputée de la Croatie-Slavonie se retrouvait ironiquement avec un amiral à la tête de l'État, quand le pays n'avait plus aucune frontière maritime.

Il faut se rassurer : les nationalistes ne sont pas psychologiquement déséquilibrés ou simplement instables, en ce sens qu'ils ne cessent de changer d'objectifs. Ces divers revirements sont des conséquences de la « poursuite de l'autodétermination » qui est l'*essence* même du nationalisme et à laquelle le fédéralisme offre une bonne solution. Ignatieff écrit : « La difficulté avec le nationalisme, ce n'est pas le désir d'autodétermination lui-même, mais l'illusion épistémologique même que vous pouvez être chez vous, que vous ne pouvez être compris que par des gens comme vous. Ce qu'il y a de faux dans le nationalisme n'est pas le désir d'être maître chez soi, mais la conviction que seuls des gens comme vous méritent d'habiter la maison.[38]» Cette illusion peut effectivement être fâcheuse, mais elle rencontre vite ses limites pratiques – sinon les nationalismes se fragmenteraient à l'infini, dissolvant ainsi toute possibilité de vie politique. Je ne pense pas que si un jour le Québec, l'Écosse, ou la Catalogne deviennent indépendants les citoyens « non-pures laines » soient expulsés ou se séparent à nouveau ; le nationalisme a plutôt tendance dans ces pays à se contenir dans une certaine civilité. Jean-Pierre Derriennic dirait sûrement que « La difficulté n'est pas d'*être* indépendant, mais de le *devenir* [39]» et il aurait très certainement raison – le risque de débordement non civilisé est à craindre plutôt dans le processus de dévaluation du pouvoir vers la nouvelle entité politique. Ce processus est d'une immense complexité lorsque l'on est réaliste et que l'on prend au sérieux tous les aspects de la question tout en respectant le règne de la Loi – d'où « Le refus de la complexité qui s'exprime dans le slogan "il faut en finir" [et qui] est un des signes annonciateurs classiques de la violence politique.[40]» Mais cette complexité ne doit pas être un obstacle insurmontable – *les moyens ne doivent pas justifier les fins*.

<u>Conclusion : préférer le dialogue à la réfutation</u>

George Grant sommait le nationaliste québécois de se rappeler l'adage « I fear the Greeks, especially when they come with gifts.[41]» Il semblerait que Michael Ignatieff ait bien pris note de cet adage, puisque, en tant que politicien, il n'offre *rien* au nationalisme québécois. Mais c'est peut être mieux ainsi. Nous ne croyons pas que le fédéralisme et le nationalisme soient si radicalement opposés que le fédéralisme doive pour exister faire continuellement des cadeaux au nationalisme, mais si c'est le cas alors peut-être faut-il annoncer la mort prochaine du Canada. C'est une conclusion à laquelle nous ne sommes pas prêts d'adhérer. L'idéologie n'impose *rien* ; ce sont toujours des individus qui seront les acteurs politiques clés et qui pourront utiliser leur jugement critique de manière minimalement rationnelle. Il faut s'opposer à la logique d'une société close, selon la terminologie de Karl Popper, ou à un repli identitaire et refuser le Thanatos, que ce soit dans un État-nation ou dans une fédération. Il faut donc repousser ce que Freud écrit : « L'avantage d'une sphère de culture plus petite – permettre à la pulsion de trouver une issue dans les hostilités envers ceux de l'extérieur – n'est pas à dédaigner.[42]» La guerre civile est la pire possibilité de dérapage de l'interaction entre le fédéralisme et le nationalisme, mais remplacer cela par les guerres interétatiques n'est pas plus satisfaisant.

Les nationalismes sont des *idéologies politiques* et pour cela même, selon les mots de Raymond Aron, dans *l'Opium des intellectuels*, « Elles ne tombent pas directement sous l'alternative du vrai et du faux […] [43]» Les nationalismes ont contribué à la création des meilleures démocraties et fédérations du monde occidental, de la même manière que la religion a fait régner une morale louable à l'espèce humaine et a été le stimulant

menant aux plus belles démonstrations de l'art ; alors que c'est des constructions idéologiques importe peu. Il y eut certes des massacres ethniques, comme il y eut l'Inquisition, mais ce sont là des manifestations malheureuses du penchant à l'agression, du Thanatos que l'on retrouve partout. Pour reprendre encore les mots de Aron sur les idéologies politiques – et donc aussi sur les nationalismes – disons qu'« Elles expriment une perspective sur le monde et une volonté tournée vers l'avenir. » Il poursuit reprenant magnifiquement la distinction aristotélicienne de l'*Éthique à Nicomaque* : « La philosophie dernière et la hiérarchie des préférences appellent le dialogue plutôt que la preuve ou la réfutation (246). » Le nationalisme ne doit pas être réfuté ; il faut en discuter. La fédération offre une telle possibilité de discuter.

NOTES

[1]Sigmund FREUD, *Le malaise dans la culture*, Paris, Presses Universitaires de France, 1995, page 60.

[2]*Ibid*., page 59.

[3]Nous n'aborderons pas la question du processus de sécession entraîné par le nationalisme dans une fédération, auquel nous avons déjà consacré un article – le présent article lui est complémentaire en quelque sorte. Cf. Åsbjørn MELKEVIK, « La question de la sécession dans une fédération. Une critique des mauvaises interprétations », *Federalism-E*, vol 11, 2010, [disponible en ligne], www.federalism-e.com

[4]Sigmund FREUD, *Le malaise dans la culture*, *op. cit.*, page 57.

[5]Michael IGNATIEFF, *Blood and Belonging*, Toronto, Penguin Canada, 1993, page 171.

[6]« Le problème est qu'il n'y a aucun moyen d'expliquer à un observateur comment reconnaître *a priori* une nation parmi d'autres entités, comme nous pourrions lui donner le moyen de reconnaître un oiseau ou de distinguer une souris d'un lézard. Ce serait tellement simple si nous pouvions observer les nations comme nous observons les oiseaux ! » Eric J. HOBSBAWM, *Nations et nationalisme depuis 1780. Programme, mythe, réalité*, Paris, Gallimard, Folio histoire, 1992, page 19.

[7]"*'P' est vrai*" si et seulement si p (où p est la proposition exprimée par l'énoncé 'P').

[8]Max WEBER, *Economy and Society*, Berkeley – California, University of California Press, 1978, page 922.

[9]Hobsbawm prétend « qu'aucun nationaliste politique engagé ne peut être un historien sérieux des nations et du nationalisme » Pourquoi? Est-ce que c'est interdit dans un code de déontologie ; est-ce une aporie intellectuelle ; ou sinon est-ce impossible de la même manière qu'un économiste soit communiste ? Eric J. HOBSBAWM, *Nations et nationalisme depuis 1780*, *op. cit.*, page 32.

[10]Michael IGNATIEFF, *Blood and Belonging*, *op. cit.*, page 172.

[11]Louis BALTHAZAR, « Le nationalisme autonomiste des Québécois », dans, sous la direction de Michel Sarra-Bournet, *Les nationalismes au Québec de XIXe au XXIe siècle*, Québec, Les Presses de l'Université Laval, coll. Prisme, 2001, page 195.

[112]acques BEAUCHEMIN, *La société des identités*, Outremont, Athéna éditions, 2004, page 25.

[13]Dans le même esprit que Platon : « existe-t-il pour une cité un mal plus grand que celui qui la déchire et la morcelle au lieu de l'unifier ? Existe-t-il un plus grand bien que ce qui en assure le lien et l'unité ? » *La République*, 462b

[14]Michael IGNATIEFF, *Blood and Belonging*, *op. cit.*, page xi.

[15]*Ibid*., page 172.

[16]« Le nationalisme nie la possibilité de cette appartenance multiple. Il insiste sur la primauté de l'appartenance nationale sur toutes les autres allégeances. » Michael IGNATIEFF, *L'honneur du guerrier*. *Guerre ethnique et conscience moderne*, Québec – Paris, Les Presses de l'Université Laval – Éditions La Découverte, coll. Prisme, 2000, page 45.

[117]*bid*., page 36.

[18]*Ibid*., page 37. Dans le même esprit : « L'oubli, et je dirai même l'erreur historique sont un facteur essentiel de la création d'une nation […] » Ernest RENAN, « Qu'est-ce qu'une nation ? », 1882, dans *Les nationalismes au Québec de XIXe au XXIe siècle*, *op. cit.*, page 351.

[19]Michael IGNATIEFF, *L'honneur du guerrier*, *op. cit.*, page 37-38.

[20]« [Le nationalisme] est un discours qui transforme les faits de la différence en un récit qui justifie l'autodétermination politique. » *Ibid*., page 58.

[21]Jean-Pierre DERRIENNIC, *Nationalisme et démocratie : réflexions sur les illusions des indépendantistes québécois*, Montréal, Boréal, 1995, page 24.

[22]Michael IGNATIEFF, *L'honneur du guerrier*, *op. cit.*, page 44.

[23]*Ibid*., page 50. Freud écrivait sur ce sujet : « des communautés voisines, et proches aussi les unes des autres par ailleurs, se combattent et se raillent réciproquement, tels les Espagnols et les Portugais, les Allemands du Nord et ceux du Sud, les Anglais et les Ecossais, etc. » Sigmund FREUD, *Le malaise dans la culture*, *op. cit.*, page 56.

[24]Michael IGNATIEFF, *L'honneur du guerrier*, *op. cit.*, page 60.

[25]*Ibid*., page 62.

[26]Sigmund FREUD, *L'avenir d'une illusion*, Paris, Presses Universitaires de France, 1995, page 32.

[27]Je crois parce que c'est absurde.

[28]Ce que même Ignatieff doit reconnaître : « Nationalism in Quebec has long ceased to be the nationalism of resentment. […] It is now a rhetoric of self-affirmation. » Michael IGNATIEFF, *Blood and Belonging*, *op. cit.*, page 193.

[29]Michael HECHTER, *Containing Nationalism*, Oxford – New York, Oxford University Press, 2000. page 134.

[30]Nous éprouvons une difficulté épistémologique à identifier la dimension ethnique de la violence au nationalisme ; la nation n'a rien à voir avec l'ethnie. Les rapprochements entre nation et ethnie sont souvent indus selon nous.

[31]Nous prenons l'image à titre d'exemple sans vouloir comparer la relation nationalisme-fédéralisme à un mariage, comme le fait Ignatieff. La comparaison du Canada à un mauvais marriage est certainement injuste et n'est pas appropriée : « I had no idea, for example, that what for me was a family romance was, for the other partner, a loveless marriage » et « Federalism in this case was like some marriages that cohere, paradoxically because both parties are united in their grievances toward each other. » Michael IGNATIEFF, *Blood and Belonging*, *op. cit.*, page 171 et 193.

[32]*Ibid*., page 172. Par ailleurs, le fait que le fédéralisme soit une procédure politique n'exclut pas que ce soit une idéologie politique. Au Canada – et de manière différente aux Etats-Unis –, il y a très sûrement une idéologie politique qui se réclame d'être *fédéraliste*.

[33]Michael Ignatieff lui-même est revenu sur cette question. Au discours d'acceptation de la direction du Parti libéral du Canada, il a dit : « Nous respectons nos différences. Nous acceptons nos identités diverses. Nous n'imposons pas un patriotisme singulier. Nous laissons la liberté d'appartenance à nos citoyens. Soyez Québécois et Canadien, soyez les deux dans l'ordre qui vous semble bon. Ça c'est le génie du Canada. C'est notre exemple pour le monde. » Prononcé le 2 mai 2009, Vancouver.

[34]Åsbjørn MELKEVIK, « Bilinguisme ou dualité linguistique », *Le Droit*, mardi le 21 avril 2009, page 13.

[35]Comme dans *Star Wars*, la force n'est ni bonne ni mauvaise.

[36]Michael HECHTER, *Containing Nationalism*, *op. cit.*, page 4.

[37]*Ibid*., page 15-17.

[38]Michael IGNATIEFF, *L'honneur du guerrier*, *op. cit.*, page 59.

[39]Jean-Pierre DERRIENNIC, *Nationalisme et démocratie*, *op. cit.*, page 25.

[40]*Ibid*., page 114.

[41]George GRANT, *Lament for a Nation. The Defeat of Canadian Nationalism*, Ottawa, Carleton University Press, 1986, page 78.

[42]Sigmund FREUD, *Le malaise dans la culture*, *op. cit.*, page 56.

[43]Raymond ARON, *L'Opium des intellectuels*, Paris, Gallimard, 1968, page 246.

Bibliographie

ARON, Raymond, L'Opium des intellectuels, Paris, Gallimard, 1968.

BALTHAZAR, Louis, «Le nationalisme autonomiste des Québécois », dans, sous la direction de Michel Sarra-Bournet, Les nationa-

lismes au Québec de XIXe au XXIe siècle, Québec, Les Presses de l'Université Laval, coll. Prisme, 2001.

BEAUCHEMIN, Jacques, La société des identités, Outremont, Athéna éditions, 2004.

BOUDON, Raymond, L'idéologie, Paris, Fayard, 1986.

DERRIENNIC, Jean-Pierre, Nationalisme et démocratie : réflexions sur les illusions des indépendantistes québécois, Montréal, Boréal, 1995.

FREUD, Sigmund, Le malaise dans la culture, Paris, Presses Universitaires de France, 1995.

FREUD, Sigmund, L'avenir d'une illusion, Paris, Presses Universitaires de France, 1995.

GRANT, George, Lament for a Nation. The Defeat of Canadian Nationalism, Ottawa, Carleton University Press, 1986.

HECHTER, Michael, Containing Nationalism, Oxford – New York, Oxford University Press, 2000.

HOBSBAWM, Eric J., Nations et nationalisme depuis 1780. Programme, mythe, réalité, Paris, Gallimard, Folio histoire, 1992.

IGNATIEFF, Michael, Blood and Belonging. Journeys Into The New Nationalism, Toronto, Penguin Canada, 1993.

IGNATIEFF, Michael, L'honneur du guerrier. Guerre ethnique et conscience moderne, Québec – Paris, Les Presses de l'Université Laval – Éditions La Découverte, coll. Prisme, 2000.

MELKEVIK, Åsbjørn, « Bilinguisme ou dualité linguistique », Le Droit, mardi le 21 avril 2009, page 13.

MELKEVIK, Åsbjørn, « La question de la sécession dans une fédération. Une critique des mauvaises interprétations », Federalism-E, vol 11, (2010), <http://www.federalism-e.com>.

WEBER, Max, Economy and Society, Berkeley, California, University of California Press, 1978.

The Role of Federalism in Development of National Healthcare: A Comparison of Canada and Australia

Stanislav Moroz

McGill University

THIS PAPER WILL DRAW EXTENSIVELY UPON THE WORK OF GWENDOLYN GRAY, WHOSE WORK ON FEDERALISM IN AUSTRALIAN AND CANADIAN HEALTH POLICY IS TRULY INDISPENSIBLE

Introduction

In many narratives of the development of the Canadian healthcare system(s), Saskatchewan's policy experimentation is a major driving force behind federal policy. Yet, this idea is not universally accepted. Gerard Boychuk questions the role of provincial experimentation, arguing "the effects of provincial innovations…were much more ambiguous in their implications for future federal reform" (Boychuk 2). Boychuk's argument is at the crux of a larger issue: the effect of provincial experimentation on federal healthcare policy. To put this question into a larger historical perspective, this paper will compare the historical development of healthcare in Canada and Australia, focusing on the role of federalism in this development. The goal of this comparison is to demonstrate how greater provincial autonomy in health policy in Canada has contributed to a relatively stable progression in federal health policy, while the centralized nature of the Australian state has contributed to one of the most the most tumultuous developments of national healthcare in the world. Because the history of "health policy" is too broad a subject, this paper will focus on hospital care, provision of medical services, and health insurance. From this historical comparison, one can see two major reasons that greater decentralization contributes to stability. First, it allows for provincial experimentation which helps create a national consensus on policy. Second, it reduces the stakes in federal policy, paving the way for a smaller, but more popular and stable federal role.

Canada and Australia's political, geographic, and social similarities make these two countries an obvious comparison. Both have low population densities, robust industrialized economies, parliamentary electoral systems, first nations communities, and are constitutional monarchies with ties to Britain (Huo 171). Both are federal states, but their *forms* of federalism distribute power quite differently. While Canadian provinces have a great deal of autonomy in health policy, Australia passed a constitutional amendment in 1946 substantially impeding on state control of health. There are other differences as well, notably the role of Québec, the nature of the bicameral parliamentary systems, and the different number of major political parties. Because of these differences, this argument relies on a looser version of the 'most-similar-systems' comparative method (Huo 168). Instead of isolating one variable and showing how it affects continuity in federal health policy, this will instead show why that one variable (decentralization) is important despite the presence of other potential explanations. I will proceed by presenting the history of the development of Australian and Canadian healthcare, respectively, and then explaining what lessons one can draw about federalism from this comparison.

In Australia pre-1946, the government role in health was focused on service provision, not insurance. During this period, Australia's health policy was determined almost entirely on a state level. The major feature of the Australian system was the development of public hospitals. As hospitals and medical science improved, more people wanted hospital care, putting strain on hospital finances (Gray 53). States took the lead in solving this excess demand. South Australia and Western Australia both created two types of hospitals. "Government" hospitals still functioned for people who could not pay medical fees, and "government-subsidized" hospitals were created for people who could afford to pay fees (Gray 56). In New South Wales, the McGowan Labor government promised to introduce free and universal hospital care in 1911, but was not able to because Labor had only a slight majority. Still, New South Wales managed to implement several public services (including a maternity scheme and school medical service) and New South Wales and Victoria both established intermediate and private wings to public hospitals. Lastly, Tasmania and Queensland succeeded in nationalizing their hospitals and providing free universal hospital care (Gray 59). Before WWII,

states pursued different paths but were all generally moving towards greater government involvement in provision of health services.

In 1941, Labor came to power on a national level and began trying to increase the constitutional powers of the commonwealth. In 1946, each state approved a referendum question which "empowers the Commonwealth to legislate with respect to 'the provision of maternity allowances widows pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances" (Gray 64). Another crucial change in federal-state relations was the effective transfer of income-tax powers from the states to the commonwealth (the Australian federal state) in 1942 (Carling 9). While the social service amendment gave the federal government the right to intervene in health policy, the change in financial powers radically limited states' roles in developing independent policies.

The federal government was able to implement free hospital care without much political opposition even before the 1946 constitutional amendment. In 1945, the Commonwealth implemented a scheme which paid states a subsidy of six shillings per occupied bed per day if they agreed to provide free accommodation in public hospitals. (Browning) New South Wales and Victoria had reservations about the plan but they ultimately accepted the terms of the offer. During this process, state-led experimentation helped make passing this policy easier. As Gwendolyn Gray points out, "there was no radical departure from existing practice. People were familiar with the provision of free hospital care for low-income earners" (Gray 73). Also, this period illustrates how Australian health policy paralleled Canada's before the federal government formally had power over health policy. This cost sharing agreement passed relatively easily, and even states who did not agree to the principle of free hospital care, like Victoria, agreed because of financial incentives. The commonwealth's lack of authority over the issue of hospitals limited potential federal policy to a conditional funding agreement. While this directly funded hospitals (whereas Canada funded hospital insurance), Australia's political difficulty in implementing the hospital-benefits scheme mirrors the implementation of hospital insurance in Canada.

After the 1946 constitutional amendment, the Chifley national labor government tried to implement a free comprehensive national medical service (Browning). The Chifley government's proposal gave the Commonwealth the responsibility of funding, providing policy direction, and the establishment of a federal health authority, and left implementation to the states (Gray 77-78). Ultimately, the Commonwealth could not reach an agreement with the (Australian Branch of the) British Medical Authority (BMA), who were staunchly opposed to this plan. Gray notes that "the plan for a national health service was an extension and expansion of policies and ideas that had seriously developed in the more innovative states" (Gray 81). So, in 1946 -7, when the days of state experimentation were still relatively recent, and relevant to the current system, the Commonwealth looked to old attempts at policy experimentation within states. One of the reasons that this proposal failed could be that no state was able to establish a comprehensive medical service. While they created momentum for state intervention in the provision of services, state policy experimentation had not yet succeeded in familiarizing the public with a National Health Service.

In 1949, a Liberal-Country coalition government led by Robert Menzies came into power. They were aligned with the BMA and ideologically opposed to Labor's vision for healthcare. The Menzies government introduced a plan for subsidized voluntary insurance. To create demand for private insurance, they eliminated subsidies to hospitals based on the previous hospital care plan. Every state except for Queensland was unable or unwill-

ing to maintain free hospital care (Gray 93). This dramatic reversal of policy begins to show how the more centralized federalism post-1946 contributed to instability in health policy. In this instance even free hospital care, which grew out of state experimentation and encountered little political opposition, was not safe from reversal. The new division of power in health and financing gave the Commonwealth the ability to implement an entirely different vision of health policy without any meaningful opposition from states (Gray 95).

In 1972, the Whitlam labor government came into power and reversed course again. The Whitlam government introduced a universal compulsory insurance program administered by a statutory authority, Medibank. (Gray 135) The (now) Australian Medical Association (AMA) focused on defeating the bill in the Senate because Labor only had a majority in the House. After two rejections in the Senate, the government called a joint sitting of both Houses, and the "Health Insurance Bill and the Health Insurance Commission Bill" passed. The Commonwealth also pressured states into accepting a joint hospital financing agreement. It is notable that the Whitlam government introduced a bulk-billing scheme for paying doctors, which was imported from Saskatchewan. One can see that when states lost the financial and constitutional power to experiment, the Commonwealth turned to Canada for ideas in health policy (Gray 134).

The next two changes of government had similar results. The Fraser government (non-Labor) was elected in 1975. Since Medibank had only been operating for a brief period of time, Fraser dismantled it relatively easily. Fraser's government restricted federal benefits to those with private insurance, and established schemes for pensioners, poor people, and those eligible for sickness benefits (Gray 150). Then, in 1982, the Hayden labor government essentially reintroduced Medibank with minor changes. In this entire process, the will of states was basically irrelevant. As Gray puts it, "compared with their Canadian counterparts, the states appear to accept federal domination as inevitable." However, since the Hayden government's Medicare plan, Australian health policy has not encountered any major shifts in its fundamental principles (Gray 151).

In Canada, prior to WWII the federal government had little involvement in healthcare. Eastern and Central provinces were also not particularly involved in the provision or funding of health services potentially due to higher levels of philanthropy and greater population density (Gray 27). Western provinces on the other hand were active at this time. In 1932, the Cooperative Commonwealth Federation (CCF) formed, and advocated free access to health services. The CCF pressured the Saskatchewan liberals to introduce health insurance legislation in 1944. Alberta was actually the first province to *pass* a health insurance bill (1935), but the act was never implemented. In Manitoba, a committee recommended a mix of insurance and directly provided services. In British Columbia, health insurance legislation was introduced several times and a report recommended compulsory insurance for people with incomes below $200 per month. While none of these initiatives resulted in a comprehensive healthcare scheme, they did generate public support for some sort of scheme in the future (Gray 29) .

Support for the CCF increased as public opinion shifted left during WWII (Gray 93). This pushed the Liberals and the (newly named) Progressive Conservatives to address the issue of health and social policy. While the liberal Prime Minister at the time, William Lyon Mackenzie King, nominally supported increased social services, the cabinet member most committed to national health insurance was Ian Mackenzie. Mackenzie helped establish the Heagerty Committee, which in 1943 produced a report recommending universal compulsory health insurance and federal-provincial cost sharing (Gray 31). The Mackenzie government decided to drop attempts at health insurance legislation in 1944 as a result of electoral concerns (Taylor 53). While the federal government would not attempt a major health insurance policy again until 1955, in 1945 every major party platform included health insurance plans, and public support for a national plan was at 80% (Gray 32).

From 1944 to 1955, provinces were active in introducing hospital insurance policy. The Saskatchewan CCF led by Tommy Douglas won the 1944 provincial election. Tommy Douglas campaigned on free universal comprehensive healthcare. Because of strong opposition by the Saskatchewan College of Physicians and Surgeons and limited finances, though, the CCF began with a more modest hospital insurance plan. This policy was relatively uncontroversial, yet it was cited in the Hall Commission as a "testing ground for the solution of many problems associated with universal coverage and administration in a government body" (Gray 35). British Columbia and Alberta followed with hospital insurance plans in 1948 and 1950, respectively. Unlike British Columbia and Saskatchewan, Alberta's plan involved 50-50 cost sharing between municipalities, and had less comprehensive coverage. These provinces studied Saskatchewan's system for inspiration. These innovations came with high costs, and provincial pressure for a national hospital insurance plan to ease

the financial burden of universal hospital care increased (Goffman 6). This also demonstrated the high public support for provincial hospital insurance, as premiers focused on making hospital insurance a smaller financial burden instead of turning against the principle of universal hospital insurance. In 1957 the federal government introduced a hospital insurance plan based on the principle of cost-sharing, and began to sign individual agreements with provinces. The House voted 165-0 to implement the hospital insurance plan, and parliament erupted in applause, potentially showing the strong public support (Gray 37).

With a smaller hospital insurance burden facing provinces, it became possible to consider comprehensive national medical insurance on a provincial level. Medical insurance was more controversial, though, since it altered the remuneration of physicians and required agreement from the Canadian Medical Association (CMA). Nevertheless, Tommy Douglas announced a medical insurance plan in Saskatchewan in 1959 (Gray 39). The CMA strongly opposed such a plan, and "the provincial election of 1960 was virtually transformed into a referendum on the proposed scheme" (Gray 40). The CCF won a majority of seats, and proceeded to implement a universal medical insurance program. The government and the CMA were initially unable to come to an agreement, and most physicians in the provinces withdrew non-emergency care. However, as public opinion turned against the physicians, the two parties were able to come to the bargaining table and agree to a medical insurance program (Gray 41). Other provinces implemented rival medical service plans in the aftermath of Saskatchewan's adoption of universal medical insurance. Alberta introduced an income-based subsidy of private insurance. Ontario and British Columbia introduced public insurance plans which would be subsidized for low income persons (Boychuk 6). Québec also supported a policy of subsidized voluntary insurance for low income-persons (Boychuk 8). Boychuk rightfully points out that Saskatchewan's system of medical care insurance was in the minority, but the implications of this for the general argument must be further explored.

A number of conditions facilitated the process of implementing Medicare on a national level. The new Liberal leader, Lester Pearson, supported medical care for all Canadians. Also, the CMA, trying to slow down the implementation of Medicare in Saskatchewan, called for a government inquiry into healthcare. This resulted in the Hall commission, which ironically recommended the establishment of provincially administered health insurance funds financed by general revenue (Gray 42-43). Despite opposition from the CMA, Québec and Ontario, and the minister of finance Mitchell Sharp, the House passed the Medical Care Act by a margin of 172-2 in 1966. The Medical Care Act was essentially a cost-sharing agreement conditioned on provincial implementation of universal medical-insurance plans. The CMA then focused its efforts on provinces which still had to agree to the federal plan, but each province eventually approved to the federal government's terms. As shown in both Canada and Australia, cost-sharing provides powerful financial incentives for provincial acceptance of federal agreements (Gray 45).

Québec's decision to eventually agree to the terms of Medicare is particularly interesting for studies of provincial experimentation. When the liberal government passed Bill 8, effectively accepting the federal offer, they included a concession for physicians: up to 3% of physicians within each specialty and 3% of general practitioners could opt out of the public health insurance system. This compromise failed to satisfy the Québec specialists, and three quarters of them left the province in protest. The government soon ordered them back to work, though, during the Front de libération du Québec crisis (Taylor 172). In the aftermath of this fiasco, Québec actually gained more control over medical fees than originally proposed and (at least nominally) banned fees at the point of service (Gray 47). This policy experimentation laid the groundwork for the Canadian Health Act, which (among other things) banned user fees and extra billing. Gray points out that pro-reform activists specifically referred to Québec's system as the one they wanted implemented in all of Canada (Gray 118). As with Saskatchewan's demonstration that medical insurance and hospital insurance would not destroy the system, Québec showed the same for user fees and extra billing.

The first pattern in this historical development is that Canadian federal health policy has been based on provincial experiments in healthcare, while Australian federal health policy has been based on foreign experiments. As mentioned, Canadian federal hospital insurance and medical insurance both resembled Saskatchewan's policy experimentation. The Canadian Health Act's ban on extra billing was facilitated by prior experimentation by British Columbia and Québec (Taylor 173). Australian federalism also resembled this pattern before 1946. Before the constitutional amendment, the federal hospital care plan was based on free hospital care in Tasmania. After the constitutional amendment, Australian federal developments in health policy did not resemble state initiatives, as states had little resources to experiment with. In fact, Australia's national health insurance program borrowed its billing scheme directly from Saskatchewan.

This difference logically contributes to the difference in the continuity of Australia's and Canada's health policy development processes. The public and policymakers are much more likely to support a policy that has proven effective within the *same* country than one that is effective in foreign experiments. It was very difficult for physicians or opposition parties to convince the public that Medicare could not work after it proved effective in Saskatchewan. As a result, public support for Hospital Insurance, Medicare, and banning extra billing in Canada was high. This pattern thus demonstrates that provincial experimentation can contribute to stability by generating support for federal programs that have proven effective at a sub-federal level.

THIS HISTORICAL COMPARISON SUPPORTS THE IDEA THAT PROVINCIAL EXPERIMENTATION AND THE FEDERAL DISTRIBUTION OF POWER IN CANADA TRULY WAS A DRIVING FORCE IN THE ROAD UP TO MEDICARE AND THE CANADIAN HEALTH ACT.

The second pattern in this historical development is that greater federal power facilitates policy reversal. Centralization actually made it more difficult for the Australian Commonwealth to institute popular, lasting health reform. The Commonwealth was involved directly in implementation and details, unlike the Canadian federal government which gave conditional funding to provinces. Gray explains that in Canada "federalism gave the central government an opportunity to take highly popular policy action to defend universal insurance without incurring the political costs of implementation that fell to the provinces" (Gray 104). The political consequences of the federal government's involvement in health are thus higher in Australia, and the Australian Commonwealth simply has the power to implement system-wide change rapidly. Federalism (generally) exists to lower the stakes of extremely contentious (or even irreconcilable) federal politics, while letting sub-national units make controversial decisions independently. Canada's more decentralized version of federalism thus contributed to stability in federal health policy, whereas Australia's more centralized version facilitated multiple policy U-turns.

Boychuk claims that Saskatchewan's medical insurance plan created backlash or "negative feedback" which negated the positive effects of the policy on the prospects of a federal universal health insurance bill. He first claims that the CMA became stronger in its opposition after Saskatchewan's medical insurance plan. The CMA had long been opposed to this sort of policy, though, and it is obvious that they would react strongly when a government actually succeeded in passing it. At some point in the development process, the CMA inevitably had to react this way. Next, he argues that other provinces responded with different plans, and Saskatchewan's plan was actually in the minority. (Boychuk 6) However, the demonstration effect was actually *more effective* as a result of this. The other provinces provide an easy point of comparison for Saskatchewan's policy. For example, while Saskatchewan's policy was universal, the Hall Commission noted that "at the end of 1963, some 628,290 of Alberta's estimated population of 1398000 were insured" (Royal Commission on Health Services v. 1 395). Hall Commission could obviously tell which plan best achieved universality; it was not a random choice. Finally, Boychuk notes that the Saskatchewan medical service plan showed federal policymakers that any federal plan would be subject to intense opposition from physicians. (Boychuk 8) However, as Saskatchewan's developed further, this opposition was shown to be less reasonable. In Boychuk's main example against a progressive provincially-led healthcare development, he erroneously over-magnifies the "negative feedback" from Saskatchewan's plan.

Other explanations for these developments cannot convincingly deny the role of federalism in different policy development. Some may argue that the AMA was substantially stronger than the CMA, but a major reason that the CMA was not as strong in Canada is public support. This public support is partially a function of provincial experimentation, which familiarized and popularized people with new health policy. The strong cultural differences between English-Canada and Québec could only logically make the system in Canada *more* unstable, so this is not a difference that could explain the tumultuous development of health policy in Australia. Also, while Australia did not have a third party like the CCF/NDP to push reform, Labor placed healthcare on the agenda in the same way as the CCF (Gray 51). Lastly, while Australia has a true bi-cameral system, the only time this was a potential problem (Whitlam's Medibank), Australia combined both houses in a joint-sitting and it was overcome (Gray 138).

Conclusion

This historical comparison supports the idea that provincial experimentation and the federal distribution of power in Canada truly was a driving

force in the road up to Medicare and the Canadian Health Act. However, one should be cautious in generalizing the conclusions of this study. The differences in policy development were determined by multiple factors, not *just* differences in federalism. Also, Australia's multiple policy reversals are an extreme example of what can happen. Still, this comparative analysis shows how decentralization can contribute to the development and progression of health and social policy.

Resources

BOYCHUK, Gerard W. "Territorial Politics and the Development of Health Care in Canada, 196-1984." Annual Meeting of the Canadian Political Science Association ,2005.

BROWNING, Bob. "Health Funding and Medical Professionalism - A short historical survey of the relationship between government and the medical profession in Australia." History of Medicine: Australian Academy of Medicine and Surgery. Dec. 2000. <http://www.aams.org.au/contents.php?subdir=library/history/funding_prof_med_au/&filename=index>.

CANADA. Royal Commission on Health Services. Report vol. 1, (Hall Report). Ottawa: Queen's Printer, 1964.

CARLING, Robert. "A state income tax for Australia?" Personal Income Tax Reform Symposium, New South Wales. Apr. 2009. <http://www.atax.unsw.edu.au/research/pitr-symposium-07/papers/Paper_09-Carling.pdf>

GOFFMAN, Irving J. "The political history of national hospital insurance in Canada." Commonwealth and Comparative Politics 3.2,1965.

GRAY, Gwendolyn. Federalism and health policy : the development of health systems in Canada and Australia / Gwendolyn Gray,University of Toronto Press, Toronto ; Buffalo : 1991.

HUO, Jingjing. "Comparing Welfare States in Australia and Canada: A Party Competition Theory of Welfare State Development" Paper presented at the annual meeting of the The Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois, 16 Apr. 2004, 26 may 2009. <http://www.allacademic.com/meta/p82997_index.html>

TAYLOR, Malcolm G. Insuring National Health Care: The Canadian Experience. Chapel Hill and London: The University of North Carolina, 1990.

OPEN FEDERALISM:HARPER'S PROPOSAL FOR CANADIAN FEDERALISM

Andrew Harmes

Dalhousie University

Introduction

In order to try and address certain pressing issues in contemporary Canadian politics, the Harper government has developed the concept of open federalism aimed at protecting areas of provincial jurisdiction from federal influence. Although this system of federalism is not entirely new in Canadian politics, it would be a change in the current relationship between the federal and provincial levels of government. While the concept of open federalism does make an intriguing argument to address certain issues in contemporary Canadian politics, especially concerning Quebec, it does not necessarily address issues in most other provinces or work to strengthen national unity outside of Quebec.

This paper will begin first by defining federalism and providing a brief overview of its history in Canada. Secondly, Harper's proposal of "open federalism" will be defined and compared to other forms of Canadian federalism. Next, open federalism, as an appropriate and effective response to contemporary issues will be analyzed. More specifically, the question of whether or not open federalism will increase national unity and strengthen federal-provincial relations will be answered. Issues concerning Quebec and Alberta will be highlighted, including proposed solutions to the problem of fiscal imbalance, before recognizing the shortcomings of open federalism and its implications for smaller, less powerful provinces. This paper will conclude by arguing that the type of decentralized government proposed in open federalism could lead to a race-to-the-bottom that would entail the destruction of national social policies and institutions that are, in part, intended to unite Canada.

Federalism

Federalism is defined as being a political system in which legislative power is distributed between two or more constitutionally distinct levels of government (Robinson and Simeon, 2004). In Canada, power is divided between the federal government, and provincial or territorial governments. The *Constitution Act of 1867* (previously entitled the *British North America Act*) clearly defined the division of powers between these two levels of government. The federal government was given jurisdiction over areas such as defence, criminal law, postal service, and transportation. The provincial governments were given control over separate areas such as education, health, and welfare. The division of power was clearly defined in the *Constitution Act of 1867* and each level of government was to remain within its appointed jurisdictions.

This distinct separation of powers became increasingly diluted in the years following the *Constitution Act of 1867*. The federal government became more involved in the affairs of the provinces in attempts to establish a stronger national identity. An example of this is a nationalizing vision; a dimension of Canadian federalism intended to strengthen the federation. This vision in Canadian politics was aimed at denying other sources of political identity, particularly identities based upon region or province, by creating a more centralized government (Rocher and Smith, 2003). Agreements, such as the Social Union Framework Agreement (SUFA), were created based on a nationalizing vision and reinforced the federal government's spending power in areas of provincial jurisdiction (Rocher and Smith, 2003). This form of federalism, was not defined by a strict division of power that had been the basis of the original form of Canadian federalism. It is worth noting that when the Canadian Constitution was created, it was actually intended to be very centralized, and basically quasi-federal. However, due to early rulings made by the Judicial Committee of the Privy Council (JCPC) that took away certain powers from the federal government, Canada began as a highly decentralized federal state (Baier, 2007).

Open Federalism

Harper's proposal of open federalism is, in a sense, not new, because it would be a return to a more decentralized federal system. Open federalism is a type of federalism that, according to Harper, involves a "renewed respect for the division of powers between the federal and provincial governments" (Harmes, 2007, p. 417) that would have a strong central government, but that government would respect the exclusive jurisdiction of the provinces. Open federalism involves a more decentralized federation, characterized by a higher level of respect for the constitutional division of powers. It is a proposal that would try to "reverse years of federal encroachment into areas of provincial jurisdiction and to satisfy the aspirations of Quebec nationalists" (Harmes, 2007, p. 418). It would aim to achieve a strong central government through efficiency in constitutionally mandated areas of federal responsibility. Essentially, open federalism is intended please the provincial and territorial sub-units of Canada by giving them autonomy over powers set out in the constitution, and have the federal government focus its energy on its own constitutionally entrenched powers.

The Conservative Party of Canada's *Policy Declaration* (2005), which was adopted at its National Policy Convention, states that they support "the restoration of a constitutional balance between the federal and provincial and territorial governments" (p. 6). The idea of strong provinces within Canada is also accepted with the premise that the federal government "should work co-operatively with the provinces to improve the lives of Canadians while respecting the division of power and responsibilities outlined in the Constitution" (Conservative Party of Canada, 2005, p. 6). The *Policy Declaration* (2005) continues on to say that federal spending in areas of provincial jurisdiction should be limited, and that there should also be an opt-out formula that includes full compensation should a province decide to refuse federal involvement in an area of provincial jurisdiction.

The *Policy Declaration* adopted by the Conservative Party under Harper generally implies a level of focus on "the original distribution of powers in the Constitution Act and support for disentangling the activities of the orders of government" (Young, 2006, p.19). It would be a return to a federalist system more like the highly decentralized system of federalism in Canada's earlier years. Therefore, it can be concluded that the Harper Conservatives' proposed concept of open federalism is new, in a sense, because it is different than the recent centralized form of federalism. However, open federalism is also not entirely new because it is a concept that can be compared to earlier forms of federalism in Canada's political history. The Harper government cannot return completely to a federal system like the one in the early years of Canada because areas such as the environment, transportation, and infrastructure will demand collaborative cooperation (The Ottawa Citizen, 2006), but this is as close a return as possible, given the societal changes that have occurred over the last century or so.

Stephen Harper

Role in Addressing Contemporary Issues in Canada

The concept of open federalism is primarily concerned with increasing national unity and strengthening provincial relations as sub-units in the Canadian federation. Operating as a minority government, it is the Harper Conservatives' goal to obtain a majority government by getting the provinces and their citizens on board with open federalism. Having the support of Alberta and Quebec would significantly improve Harper's chance of having a majority government and it is likely that both Alberta and Quebec would support, although for different reasons, a more decentralized federal system. As Young (2006) points out, Harper has proposed deeper reform in the way of open federalism in order to address Quebec's situation within Canada (more specifically Quebec's non-signature of the Constitution), Western alienation, and the

need to build a long-term partnership with Canada's aboriginal peoples. These are important issues in contemporary Canadian politics that open federalism is concerned with. This paper will be primarily focused on Quebec's situation within Canada in terms of open federalism.

The issue of Quebec's situation within Canada is certainly not a new one in Canadian politics. Because of Quebec's unique linguistic and ethnic culture, its position within Canada is different in that it is not an Anglophone majority. The majority of Quebec's citizens are Francophone and French is the province's official language, so this naturally alters its relationship with the rest of the country. Quebec's unique situation has been a hot topic in Canadian politics for years, and numerous Prime Ministers before Harper have tried to incorporate Quebec's demands into the federal system. Mulroney's famous failed attempts at constitutional reform in Meech Lake and Charlottetown intended to improve Quebec's position in Canada, but ended up providing ammunition for the secession movement in Quebec. Open federalism is Harper's way of recognizing Quebec's unique situation in Canada and adhering to its demands for increased political autonomy through policy change rather than constitutional reform.

The federal government of Canada has for years used its 'spending power' in areas of provincial jurisdiction, whether or not it was welcomed by the province. According to Telford (2008), 'spending power' gives the federal government "the authority to extend grants to the provinces to create and support programs that are matters of exclusive provincial jurisdiction" (p. 15). "This power has been controversial, particularly among those Canadians, especially in Quebec, who insist on strict adherence to the principle of the provinces' autonomy in their exclusive jurisdictions" (Brown, 2007, p.65). Open federalism addresses this by clearly stating that the federal government should limit its involvement in provincial jurisdiction and promote national unity through its own areas of power. This approach is very clear, but as open federalism addresses the financial characteristic of federal-provincial relations in a deeper manner, the issue becomes more complex.

The fiscal imbalance that exists between the federal and provincial levels of government has been an especially important topic in Quebec, and open federalism proposes a plan to help end this financial issue. As defined by Brown (2007), "a fiscal imbalance exists when a province's revenues are still not sufficient to meet its needs, even after federal transfers are taken into account" (p.67). This was the case in Canada before the recession; with the federal government running a surplus while most, or all provinces were in debt. This imbalance means that the federal government has more financial resources than necessary, while provincial governments do not have enough resources to meet their spending responsibilities. Quebec has been persistent in demanding that this fiscal imbalance be recognized and addressed. Quebec accuses the federal government of using "its spending power to bolster its presence in, and control over, the areas of provincial jurisdiction, despite the opposition" (Commission on Fiscal Imbalance, 2001) when the provinces cannot meet their own spending responsibilities.

Open federalism, according to the Harper government, acknowledges that a fiscal imbalance does exist. However, Harmes (2007) notes that their proposed solution is very ambiguous (p.419). The options proposed are varied, and "would each have very different implications for the distribution of powers between the federal and provincial governments" (Harmes, 2007, p.419). In considering that federal spending power, according to Harper, has been "outrageous" and "gave rise to domineering and paternalistic federalism" (Harmes, 2007, p.420), increasing federal transfers to the provinces would have to include an opt-in or opt-out clause in order to be even considered by provinces as a solution to the fiscal imbalance. However, this could prove to be problematic because what would be the incentive for provinces to opt-in, if given the option of opting out? Federal transfers, like the Canada Health Transfer (CHT) and the Canada Social Transfer (CST), are conditional payments to be spent in the areas of health care, welfare, post-secondary education, etc. As Brown (2007) acknowledges, payments like these are "important means through which the federal government can build national programs while leaving their delivery to the provincial governments" (p.68). However, if given the option of opting out, provinces may decide to neglect social programs and use these transfers in other areas. Since it is more beneficial, economically, for provinces to attract businesses rather than people who require social assistance programs, provinces might find themselves in a race-to-the-bottom where they reduce corporate taxes in competition with one another to attract businesses. This would certainly lead to the destruction of social programs, and is an example that supports Gibbins (1998) assessment that "decentralization is incompatible with the maintenance of national standards" (p.145).

The federal government could decrease taxation on its citizens, which would then allow more tax room for the

provinces to increase their own taxes independently. This would ideally put an end to the fiscal imbalance and provide provincial governments with appropriate funds to provide adequate social programs. However, this system is not a perfect one. Because the wealth of citizens varies from province to province, the amount of money available to be raised from taxes in each province also varies on a per person basis. This means that there would now be a horizontal fiscal imbalance. Because the citizens in Alberta are wealthier than those in Prince Edward Island, the Alberta government could raise much more money, per citizen, than the P.E.I. government could.

Another option available to the Harper government would be to simply enrich equalization payments. This would likely earn Quebec's approval, because equalization payments are unconditional the provincial government would be able to control how the money is spent without intervention from the federal government. This doesn't seem to be a completely effective solution either, even though it would have the support of Quebec, because it would have a similar result as the opt-in or opt-out clause discussed earlier. Having the ability to decide how these funds should be distributed on an individual provincial basis would likely cause social programs, which are very important, especially in Canada's smaller, poorer provinces, to deteriorate. I think the federal government could most definitely improve Quebec's position within Canada by implementing open federalism. However, I also find that open federalism may be problematic in other ways because it ignores the regions of Canada that would be in favour of maintaining a national standard for social programs.

An Effective Strategy?

I understand that the goal of any minority government is to become a majority government, and, while earning support in every province is important, it is especially difficult to do so without having the support of Quebec and Alberta. Therefore, it does make sense for the Harper government to implement open federalism, allowing provinces to work freely within their jurisdiction, and even the financial playing field between the two levels of government would certainly improve Quebec's support and would likely do the same in Alberta. Open federalism is about "national unity" and is "meant to address issues arising out of the Canadian federation's regional and linguistic cleavages" (Harmes, 2007, p.427). However, by focusing so much attention on pleasing Quebec, Harper's concept of open federalism fails to recognize other parts of Canada. Lost in the debate of open federalism, is what this concept would mean to smaller, less powerful provinces such as Manitoba, and the Atlantic provinces.

Central to the concept of open federalism is the removal of the federal government in areas of provincial jurisdiction. This is largely tied to social institutions that were originally under control of provinces, but which have been overtaken or influenced by the federal government. Open federalism would have the federal government withdraw their influence over these institutions. But do all provinces want complete control over their social institutions? Do smaller provinces, such as P.E.I. or New Brunswick, have the capabilities to handle these programs? Perhaps it is just powerful provinces, such as Quebec and Ontario, which want more control over the social institutions in their province. If the federal government removes itself from areas of social policy (as would be the case in open federalism) and the social institutions begin to deteriorate in Canada's smaller provinces, then all open federalism would have accomplished is the strengthening of the larger provinces, and the alienation of weaker ones.

Canada is a country of many differences. Because of our vast territory, and our cultural, ethnic, and linguistic differences, it can often be hard to get all citizens to feel united in one country. The national programs and social institutions that are funded by the federal government are not perfect. They are however, intended to be equal from one province to the next and they do serve as a means of connecting citizens across the country. Federal transfers to provinces and the financial imbalance that has existed because of financial discrepancies certainly should be addressed, but having the federal government essentially remove itself from social policies and institutions is not the answer to unifying Canada. Although certainly not a perfect system, intergovernmental transfer payments are an important means "through which the federal government can build national programs while leaving their delivery to the provincial governments" (Brown, 2007, p.68). Open federalism might strengthen certain parts of Canada, but it also may weaken and alienate other areas.

Complying to meet the demands of one or more provinces is not the way to strengthen national unity. In fact, since the Harper government has begun implementing open federalism "the tenor of intergovernmental relations has been raised but not in a harmonious pitch" (Brock, 2007, p.2). There is certainly an argument, which can be made, that the Harper government "may fuel the very fires of national disintegration which they seek to quell" (Brock, 2007, p.3).

Conclusion

Open federalism does serve as an interesting and possibly effective option in addressing certain questions in contemporary Canadian politics. It does propose an interesting solution to Quebec's demand to resolve the fiscal imbalance and their demands for increased autonomy. It also might very well please Alberta, as open federalism would allow Alberta to have more control over its massive revenues from oil and gas (Brown, 2007, p.63). Open federalism might also be well supported by the business community of Canada because it would return "the federal government to something closer to the role of the night watchman state" (Harmes, 2007, 433). Open federalism is certainly a concept that does have support in Canada and it may, in fact, be a useful strategy used by Harper to achieve a majority government in the next election.

It is important to recognize the support for open federalism because it does propose an interesting platform to gain Quebec's support, but it would be unwise to ignore the repercussions that could arise from its implementation. This type of decentralization of government could create the conditions for "a race to the bottom and a further shredding of the safety social net" (Harmes, 2007, p.434). This destruction of the national social policies and institutions that connect Canada from province-to-province would, most certainly, have an impact on Canadian citizens and most likely be a detriment to strengthening a united country. In a government press release promoting open federalism, Harper is quoted as saying "Canadians want their governments to work for them. They are fed up with the spectacle of turf wars and squabbling over money. They want their leaders to work together to deal with real-life priorities" (The Office of the Prime Minister, 2006). This is likely an accurate statement of national sentiment, but what is going to be Canadians' response if open federalism fails? What if open federalism fails and the concept ends up being unpopular because certain provinces lack the capabilities to run their own social programs? The 1995 Referendum that almost saw Quebec vote in favour of secession was a response to two failed attempts at constitutional reform. It is hard to say with any degree of confidence that Canada can handle another Prime Minister's failed attempt to unify the country.

Resources

BAIER, Gerald. The Courts, "the Division of Power, and Dispute Resolution" Canadian Federalism: Performance, Effectiveness and Legitimacy (second edition*)*. Toronto: Oxford University Press, 2007.

BROCK, Kathy L. "Open Federalism, Section 94, and Principled Federalism: Contradictions in Vision", The Canadian Political Science Association, University of Saskatchewan. 1 June 2007. 22 Oct. 2010. <http://www.cpsa-acsp.ca/papers-2007/Brock-Kathy.pdf >

BROWN, Douglas. "Fiscal federalism" Searching for Balance. Canadian Federalism: Performance, Effectiveness and Legitimacy (second edition). Toronto: Oxford University Press.

CANADA. Department of Justice. Constitution Acts, 1867 to 1982. 14 Jan. 2011. 20 Jan. 2011 <http://laws.justice.gc.ca/en/Const/9.html#anchorsc:7-bo-ga:l_III>

CONSERVATIVE PARTY OF CANADA. "Open Federalism." Policy Declaration. Section D, 6-7. 2005.

GIBBINS, Roger. "Decentralization and the Dilemma of National Standards" Edited by Mark Charleton, Crosscurrents: Contemporary Political Issues (third edition). Toronto: ITP Nelson, 1998.

HARMES, Adam. " The Political Economy of Open Federalism" Canadian Journal of Political Science. 40:2, 417-437, 2007.

Quebec Commission on Fiscal Imbalance. "Fiscal Imbalance: Problems and Issues." Discussion Paper for Public Consultation. 2001. 29 Oct. 2010. <http://www.desequilibrefiscal.gouv.qc.ca/en/pdf/fiscal_imbalance.pdf>

ROBINSON, Ian and Richard Simeon. " The Dynamics of Canadian Federalism " InJames Bickerton and Alain-G. Gagnon (eds). Canadian Politics (fourth edition). Peterborough, Ontario: Broadview Press, 2004.

ROCHER, Francois and Miriam Smith. " The Four Dimensions of Canadian Federalism", *New Trends in Canada Federalism (second edition)*, Peterborough, ON: Broadview Press, 2003.

TELFORD, Hamish, Peter Graefe, Keith Banting. " Defining the Federal Government's Role in Social Policy: The Spending Power and Other Instruments " IRPP Policy Matters 9 (3), 2008.

YOUNG, Robert. "Open Federalism and Canadian Municipalities", Institute of Intergovernmental Relations, Queen's University, 17 Apr. 2006, 2 Nov. 2010, <http://politicalscience.uwo.ca/mlg/Papers/Open%20Federalism.pdf>

"The Country According to Stephen Harper." The Ottawa Citizen. 12 June 2006, 26 Oct. 2010 , <http://www.canada.com/ottawacitizen/news/story.html?id=f3a671e2-e780-41ec-af41-b0b1a1081f40&k=18722>

"Prime Minister Promotes Federalism." The Office of the Prime Minister. 21 Apr. 2006. 29 Oct. 2010, <http://pm.gc.ca/eng/media.asp?id=1123>

Referenda and Representative Democracy: Congruence or Irony?

Éléna Choquette

McGill University

«Asserting that limited information precludes reasoned choice is equivalent to requiring that people who want to brush their teeth recall the ingredients of their toothpaste.»

Lupia and McCubbins. *Can Citizens Learn What They Need To Know?* : 37.

Introduction

It has been frequently argued that the level of political knowledge of Canadian constituents remains relatively low; the knowledge of basic political facts, such as the name of different political candidates and representatives, their objectives, the functioning of elementary governmental institutions, and the relevant economic context, is unevenly distributed, and low on average. I wish to examine in this paper the consequences that such observations entail. In other words, this essay explores the repercussions of the Canadian political disinformation on electoral behaviour. I will look more precisely at the entailment of the Canadian level of political sophistication on the outcome of federal elections as well as federal and provincial referenda.

Generally, it will be argued that the Canadian "knowledge deficit" has marginal effects upon the party configuration of the House of Commons, meaning that political disinformation has virtually no effect when it comes to national elections. That is to say that in our current system, Canadians can afford to know little and still profit from a Parliament that is configured virtually as it would have been had they been better informed.

However, it will also be argued that the same levels of information have less desirable results when time comes for Canadians to express themselves via referenda on electoral or constitutional reform. Essentially due to some mechanics inherent to the very fact of questioning Canadians on complex issues that have abstract and minute repercussions on their lives, referenda results do not yield policies that stand for their interests.

This suggests that Canadians should accept the idea that their interests are better served by others, whose professions consist in the making of public policy. In order to explore this idea in some depth, we will first start, in the section below, by defining relevant terms, and circumscribing different theoretical notions, such as political information and education, involved in the present discussion.

Political knowledge

Many scholars have assumed and continue to assume that for representative democracy to function effectively, it necessitates a well-informed and attentive citizenry. Precisely because they are run by *selected* officials, the popular choices upon which representative democracies are based must, at a very minimum, be non-random (Lupia and McCubbins: 3, Fournier, 2002: 92, Weissberg in Bennett: 477). At best, popular votes are informed by basic political facts that help citizens assessing the respective merits of different political options, in light of their own preferences and interests.

In the scientific literature, political information is described as being political data (Carpini and Keeter: 1179, Lupia and McCubbins: 24, Johnston *et al.*, 1996: 221), stocked in the long-term conscious memory and capable of being recalled (Fournier, 2002: 93, Luskin: 858). For instance, it is generally expected that a voter knows about the names of main political actors, political parties, and about different party stances on important domestic and foreign issues. One's level of political information is typically related to, but not determined by, cognitive capacities (Luskin: 857), interest in politics, political activity, exposure to the media, education, and socio-demographics, such as gender and race (Fournier, 2002: 98).

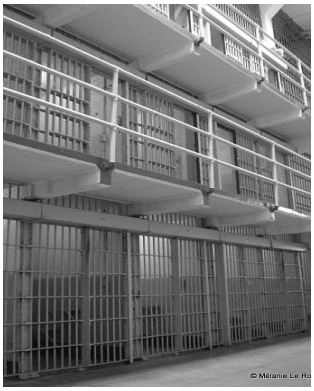
Misinformation, as the holding of misguided information, must not be confused with disinformation, which consists in a lack of information. Fournier argues insightfully that misinformation is not the norm for Canadians (Fournier, 2002: 93, 96). Furthermore, Lupia and McCubbins comment that the conditions under which political misinformation, or deception, is generated "are not trivially satisfied" (10). For citizens to be misguided, a communicator must lie, and be believed. For the present matter, misinformation will therefore

not be a source of concern.

Political information is likewise conceptually distinct from rationality. If the former consists in mere data, the quality of which is assessed in terms of accuracy, the latter is mostly assessed in terms of consistency (Converse, 1964).[1] In other words, rationality represents the extent to which a rational being can make choices in accordance with his principles and preferences. Interestingly, it is often argued that it is quite irrational for citizens to get informed, for the costs of acquiring political information largely outweighs the benefits (Fournier, 2002: 93, Gidengil *et al.*, 2004: 58, Lupia and McCubbins: 7, Luskin: 864, Johnston *et al.*, 1996: 19).

Another branch of the literature on political information claims that individuals can mimic the decision-making processes of individuals equipped with full information and come up with the same conclusions. Thanks to different cues and information shortcuts, some scholars argue that electors can make the "correct" decision, that is the one they would have been taken, had they been better informed (Blais *et al*, 2009: 257, Bartels: 194-197). Cues are oral and written testimonies of other people that provide indications about how one should vote, given certain principles and preferences. Information shortcuts play a similar role in electoral behaviour. According to McKelvey and Ordeshook, electors can successfully use trustworthy and knowledgeable endorsements to compensate for their lack of encyclopaedic knowledge (McKelvey and Ordeshook in Bartels: 198). "Ask not for more sobriety and piety from citizens, for they are voters, not judges; offer them instead cues and signals which connect their world with the world of politics," Popkin argues (236, see also Alvarez: 9, Gerber and Lupia: 2, Johnston *et al.*, 1996: 283, Lupia, 1994: 63, Lupia and McCubbins: 64, 148, 201). Although cues and shortcuts cannot absolutely overcome knowledge deficits, they have the potential to cause electoral and referenda results that, in the aggregate, resemble that of a quite knowledgeable electorate.[2]

In an analogous manner, aggregation may compensate for information differentials in Canadian constituencies. According to the jury theorem of Condorcet, the more people are voting, the more likely they will reach the "correct[3]" decision, for errors will cancel out one another (Page and Shapiro, 1992, notably in Blais *et al*, 2009: 256, and Bélanger et Pétry for Canadian data). Therefore, thanks to the "miracle of aggregation" no bias caused by a lack of information would subsist in electoral results. Nevertheless, the inherent problem of the theorem is that not all biases are truly "random" and capable of being cancelled out (Bartels: 199). The effects of aggregate processes, information shortcuts, and cues will be contextualised throughout this essay, and their usefulness, assessed under different circumstances.



«If the information-Yes vote relationship proves indeed to be positive, then one reading of the event is that the Charlottetown Accord was a test which most Canadians failed.»

Johnston *et al.*, *The Challenge of Direct Democracy*: 28

Education as a source of spuriousness

One might worry that the distribution of political information is not unrelated to some socio-economic factors such as, most significantly, the level of education (Fournier, 2002: 98, Berinsky and Cutler: 1, Johnston *et al.*, 1996: 227). In fact, education was found to be the most important demographic characteristic to discriminate those who are more informed from those who are less (Bennett: 485, Gidengil *et al.*, 2004: 49). Indeed, the «education» variable predicts comparatively well how people tend to acquire information. Moreover, education itself often causes easier acquisition and processing of information (Gidengil *et al.*, 2004: 50). Therefore, it seems, we need be concerned about the qualitatively different decisions that highly educated people tend to make, not specifically because of their very holding of information, but because of the different roles educated citizens tend to play, and the different cultural universe[4] they inhabit (Johnston *et al.*, 1996: 231, 238).

Were education a confounding factor, however, the alleged influence of information

on opinions and decisions, in the aggregate, would collapse with a proper control for relevant socio-demographic characteristics such as education. Yet, it does *not*. While control for education (as well as other key political attribute variables) attenuates to some degree the repercussions of information, the relationship between high levels of information and distinct opinions remains statistically significant (Berinsky and Cutler: 4). Hence, not only intuitively but empirically, it seems that information have an influence of its own on opinions and on electoral behaviour: by implication, a well-informed individual will tend to have distinct opinions and distinct voting patterns.[5]

Assessment of Political Information Levels in Canada

It proves difficult to gauge levels of political information; indeed some extensive academic articles are entirely devoted to the usefulness of different measure of political information (see Carpini and Keeter, 1993 and Luskin: 857). Nevertheless, many researchers maintain that the North Americans' level of political information appears to be quite low, at least from anything approaching elite standards (Gerber and Lupia: 1, Bennett: 482, Alvarez: 2, Luskin: 889, Fournier, 2002: 94, Gidengil *et al.*, 2004: 45, Blais *et al*, 2009: 256). For Schumpeter, "the typical citizen drops down to a lower level of mental performance as soon as he enters the political field. He argues and analyses in a way which he would readily recognize as infantile within the sphere of his real interests" (Schumpeter in Lupia and McCubbins: 4).

Political knowledge, besides from being low, is unevenly distributed across the electorate (Fournier 2002). According to the Canadian Democratic Audit research project, Canadians sharing particular socio-demographic characteristics have systematically lower levels of political knowledge; all other things being equal, female, young and new Canadians know less (Gidengil *et al.*, 2004: 51-55). Finally, the politically apathetic and very aged generally have less political information than their peers (Bennett: 485).

In light of the above briefing and the assumption that political information is essential for the proper functioning of our political regime, what does the generally low level and unequal distribution of knowledge therefore entails for Canadians? Under which conditions is political information most crucial and the lack thereof, most threatening? The following section aims at rigorously circumscribing the repercussions of Canadian political disinformation on electoral behaviour.

Political Information and Electoral Behaviour

We start from the findings of two different studies conducted on the effect of political information on electoral behaviour and outcomes. Bartels conducted a study, published in 1996, on six presidential elections in the United States between 1972 and 1992. The study showed that the aggregate deviations from the hypothetical "fully informed" election outcome range from 0,35 to 5.6 percentage points, with an average deviation of 3,66 percentages points. Thanks to their national prominence, Bartels analyses that incumbent presidents do almost five percentage points better than if American voters were fully informed (Bartels: 201, see also Alvarez: 170). Previous electoral experience, personal characteristics and aspects of the larger political context may also account for part of the disparity (Bartels: 202, Alvarez: 170).

A comparable study with analogous data was conducted in Canada. In 'Information, Visibility and Elections', Blais *et al.* investigate the effect of political information on the voting behaviour of Canadians in six federal elections between 1993 and 2006. They find that information has no significant effect on vote choice in three elections out of six, namely in 1988, 2004 and 2006. In the other three, the Liberal vote would have been three to five percentage points lower had Canadians been better informed; the New Democratic Party (left) and Reform or Alliance (right) would have benefitted from information gains (Blais *et al*, 2009: 260-270).

According to their approximations, the ultimate outcome of three elections would have been very similar, in that the Liberal Party would have maintained a plurality of the vote[6] (Blais *et al*, 2009: 270). In at least one election, in 1997, the party configuration of the House of Commons would have been different. The Liberals, had Canadians known more about all party platforms and candidates, would have received 35 percent of the vote instead of 38. Because in 1997 the Liberals won 155 seats out of 301, barely enough to form a majority government, a three percentage point lower in vote share would most probably have resulted in a Liberal minority government. The researchers ultimately attribute the knowledge gap to the lack of visibility of some parties and candidates, in some constituencies (Blais *et al*, 2009: 266).

In sum, it seems that Canadian knowledge deficit, parallel to that of the Americans, has "quite modest" (Blais *et al*, 2009: 271) repercussions on the final party configuration of the House of

Commons. Yet, is a 5-percentage points a cause for concern? To better assess the implications of such findings, we will contrast them with the repercussions of knowledge gap on the Canadian vote in four different federal and provincial referenda.

Provincial and Federal Referenda

In 2004, the British Columbia Liberal Party appointed a Citizens' Assembly on Electoral Reform responsible for drafting a recommendation that was put in a referendum held concurrently with the 2005 provincial election (Fournier *et al.*, forthcoming: 135). If passed, the proposal would be implemented.[7] Since the first referendum failed only by a small margin, it was organised a second time during the 2009 provincial election, and likewise failed to pass. A similar Assembly was implemented in Ontario, and its recommendation lost in the 1997 referendum. If the imposition of high thresholds did hypothetically prevent the propositions from being implemented in one occasion (the reform proposal in British Colombia initially won over

50% of popular support in 2005), Canadians rejected decisively in two occasions the Assembly's proposal to abandon the existing SMP electoral system and replace it with a new one[8] (Fournier *et al.*, forthcoming: 126).

According to Fournier *et al.*, these referendum failures are fundamentally attributable to a substantive information deficit. Although a wealth of information on electoral systems was made available on the assembly's website and sent by mail, it is unlikely that voters were sufficiently engaged by the debate to invest the time necessary to reach the assembly participants' level of information on electoral reform (Fournier *et al.*, forthcoming: 120). As calculated by the researchers, popular support for the three referendum would have approached or even surpassed the 60% threshold imposed by the government, had electors held more political information on electoral systems and the Assembly's activities; "if all voters had behaved like those who knew something about MMP/STV and the assembly […] then the votes in favour of change would have averaged an extra 21 percentage points in the three referendums" (Fournier *et al.*, forthcoming: 128). In sum, the more knowledgeable the people were about the recommended reform, the most likely they were to vote for it (Fournier *et al.*, forthcoming: 141).

Johnston and his colleagues, in *The Challenge of Direct Democracy* notably examine the patterns of electoral behaviour during the 1992 federal referendum on the ratification of the Charlottetown Accord, a comprehensive package of constitutional amendments (Johnston *et al.*, 1996: 4)

Generally, the researchers argue that voters who knew more had a greater propensity to vote in favour of the Accord than those who knew less: the likelihood of well-informed voters of saying Yes approached the 50:50 ratio (Johnston *et al.*, 1996: 238, 285), whereas the electorate as a whole, defined by both high and low levels of information, rejected the proposal with a majority of 55%.

For the scholars, 'getting to Yes required an ability to deal with abstractions and a positive orientation to certain traditionally devalued out-groups, both things promoted by education and information'. Therefore, there is once again a legitimate worry that the "education" variable functioned as a confounding factor in the relationship between the information and electoral behaviour (Johnston *et al.*, 1996: 219, 228, 234-238). However, they illustrate persuasively that levels of education and information indeed worked in the same direction, but *independently* (Johnston *et al.*, 1996: 281). In sum, superior levels of information, they argue, "made a huge difference in 1992" in that it had an genuine influence in the referendum of a little bit more than five percentage points[9], notably under induction from polls (*ibid*.: 281-283).

From the above empirical findings, it appears rather clear that the repercussions of the Canadian knowledge gap were slight in regular federal elections. Out of six, one federal election could have changed the Liberal majority government into a minority one. However large the consequences of such a move could be for policy outcomes, it seems that knowledge discrepancies amongst voters in referenda have greater scale and effects: had Canadians been better informed, they would have consented to an electoral reform in Ontario and British Colombia, and would have approved the amendment of the Canadian Constitution. The next section goes into hypothetical justifications of such conclusions in attempting to circumscribe the conditions under which different levels of information help or prevent citizens from making the "right" choice.

Why the Knowledge Gap Matters in Referenda but Not in Elections

It might not always be the case but it turns out that in the last referenda held by the provincial or federal government (let aside that of Quebec sovereignty), Canadians had to

vote on questions that required very specific political knowledge electoral and constitutional reform. Yet, citizens are more generalists than they are specialists (Fournier, 2002: 93) and we know from McGraw and Pinney that momentarily accessible specific information in political campaigns (however irrelevant) has disturbing effects on opinions, especially amongst the non-sophisticated (McGraw and Pinney: 26).

In the case of the electoral reform, for instance, a comprehensive and intense learning phase was needed for the Assembly members to understand the implications of different voting systems (Fournier *et al.*, forthcoming: 36). It is non-contentious to argue that the electorate would likewise need a fair amount of time and information to be allowed to cast an educated vote. Therefore, it seems that only a subgroup of the population could afford the costs of acquiring and processing information in order to decide by themselves whether they should vote Yes or No to better serve their interests and preferences (however defined).

In fact, referenda (or direct legislation ballot) typically submit long, technical, and complex questions to the electorate just as that of electoral reform, however simple they may appear (Lupia, 1994: 6, 63, Johnston *et al.*, 1996: 10). Because voters often do not have a great deal of prior information about the alternatives, and given that new information is very expensive to acquire, people might opt-out, and rely more on others' endorsements (the discussion on cues and short-cuts will help clarify this point later). In sum, when the questions asked in referenda are so complex, with abstract and remote consequences on people's individual lives, it might become unreasonable for citizens to get informed (in that benefits outweigh costs) and it may likewise be unreasonable for government to think the electorate will be interested enough in learning about the details and its implications to care about the electoral outcome.

On the contrary, representative democracy functions efficiently in spite of citizens' low levels of political sophistication. In fact, the demands of the thermostatic model of representative democracy elaborated by Soroka and Wleizen (2010) are low; it requires of citizens to know simply whether government has increased or decreased spending in an area and whether it is by too large or too little an amount to conform to their preferences and interests. Equipped with that much information, it might be argued, they are entitled to vote "in the right way" in the next election. Interestingly, Soroka and Wleizen comment that in representative democracy, being perfectly informed is neither necessary nor useful on average (*ibid.*: 19, 161, 170).

Repeated character of elections

The very fact that elections come around at least every 4 years allows the electorate to constantly collect information in order to serve their interests best. As Bélanger and Pétry suggests, being polled about an issue, such as which political party is more entitled to govern this country, increases the likelihood that people recognise and understand the main points of political platforms. In other words, the fact that citizens can expect elections to occur every period of time does not necessarily affect their level of knowledge, but facilitate the usage of cognitive shortcuts that help citizens overcome their lack of political knowledge (Bélanger et Pétry: 205).

At the opposite, referendum questions typically pertain to unique issues about which few people care (Johnston *et al.*, 1996: 10). Much like opinion polls, they can even become "a way of manipulating opinion, precisely because they impose questions that might be quite foreign to people's concerns and to which people respond in order to […] avoid appearing ignorant" (Manin: 173). Referendum questions, Bourdieu worries, deny legitimate agnosticism, in that it forces people to make up their minds about questions whose answer citizens do not feel compelled to find: 'un des effets les plus pernicieux de l'enquête d'opinion consiste précisément à mettre les gens en demeure de répondre à des questions qu'ils ne se sont même pas posées' (Bourdieu: 226).

Stakes and Incentives

Fournier *et al.* implicitly assume, throughout *When Citizens Decide* that, when stakes are high, citizens do get informed because they have the proper incentive to do so (Fournier *et al.*, forthcoming: 13). But in general elections as well as in referenda, the size of the electorate is so large as to make it rational for citizens to free ride, that is to let the others bear the cost of deciding (Johnston *et al.*, 1996: 19).

This might prove even truer for referenda than for regular elections because in the latter case, constituencies are smaller, and people have control over who will represent them locally. Furthermore, countless political candidates have, in election campaigns, a strategic interest to coordinate their policy positions and to make voters aware of them (Gidengil *et al.*, 2004: 62, Lupia and McCubbins: 207). Inversely, it was not the case that British Columbi-

ans and Ontarians felt that an electoral reform was of much concern, and thus did not perceive the necessity to mobilise their efforts and energy for acquiring and disseminate information (Fournier *et al.*, forthcoming: 126). This might help to explain why participation drops off for direct ballots relative to candidate ballots (Johnston *et al.*, 1996: 19).

Availability and Accessibility of Information

Some domains of the political world have little bearing on individual lives; some may be too obscure or simply very small (Soroka and Wlezien, 2010: 182). In the case of the Citizen's Assembly propositions, for instance, the average citizen of British Colombia or Ontario was not exposed to substantial public debates about the prevailing electoral system and its alternatives. As a result, "it is hardly surprising that citizens ended up knowing little about them" (Fournier *et al.*, forthcoming: 134). In the case of the three referenda, Fournier *et al.* suggest that the lack of public debate might be attributed to the non-intervention of political parties, and the (subsequent) deficient media coverage of the Citizen's Assembly propositions. In fact, journalistic articles were not numerous, especially during the political campaign of the second referendum in British Colombia, and not very instructive[10] (Fournier *et al.*, forthcoming: 129). At the opposite, Alvarez argues that in regular elections, abundant political information pertaining to substantive aspects and policy positions of the candidates, especially at the end of campaigns, allows learning to occur, and debates to take place (Alvarez: 201).

Cues and Information Shortcuts

All of the above discussion speaks to the argument that regular elections allow for the effective use of cues and information shortcuts. The section on incentive, firstly, underlines the fact that political candidates have interest in clarifying their party's political stances. In so doing, they "establish a reliable party brand name that provides a useful cue to voters about candidates' policy positions" (Lupia and McCubbins: 207). Secondly, the fact that elections occur over and over again makes the usage of shortcuts coherent over time, and thus helps citizens overcome their lack of political knowledge.

Indeed it seems that party identification is a widely used and rather efficient voter cue. This may even prove truer inasmuch as regular elections provide media-friendly content. If the media takes up electoral issues, citizens will tend to hear more about them, and cues will tend to clarify (Fournier *et al.*, forthcoming: 134). The more speakers there are on issues (and there are lots in political campaigns, including friends and family), the more endorsements, and the more information shortcuts (Lupia and McCubbins: 206, Lupia, 1994: 63) Even though the availability of cues and shortcuts does not necessarily allow constituencies to vote exactly as if they were perfectly informed, it certainly helps them vote non-arbitrarily (Bartels: 217).

Yet, nonpartisan elections, or referenda, appear to Lupia and McCubbins as being the classic example of an institution that hinders reasoned choice under conditions of individual low -information (225). Referenda on constitutional or electoral reform tend to not to be run by established political parties but by groups that form for the sole purpose of taking a position on the direct legislation measure. (Lupia, 1994: 6). Hence, one of the most relevant types of cues, namely partisan endorsements, is often let aside in some referendum campaigns.

Furthermore, citizens may to be able to appeal to relevant past histories, another pertinent and useful cue (Lupia, 1994: 6), for referenda mostly ask unprecedented and specific questions. Finally, the fact that voters are deprived of those two key cues and information shortcuts are further complicated by the fact that in times of referenda, cues and shortcuts are often more *needed* (recall the referenda questions appeal more to specific than general political knowledge).

Conclusion

It may be concluded from the previous hypotheses and observations that Canadians' level of political information matters only marginally in times of federal elections. It indeed matters that political information is not so scarce that citizens systematically vote for the "wrong" party because of a complete lack of information. Yet, the current level of information seems good enough for us to not worry about knowledge deficits.

However, there are reasons to worry about the alleged knowledge gap that have more undesirable outcomes when Canadians are asked to express themselves in referenda. Because of the very nature of referendum questions and institutions, the "low-information rationality" seems here bound to fail. In the recent past referendum history, Canadians have taken decisions they would most probably not have taken had they knew more.

Trusteeship

Is that to say that we should abandon the idea that citizens can vote

political information matters only marginally in times of federal elections. It indeed matters that political information is not so scarce that citizens systematically vote for the "wrong" party because of a complete lack of information. Yet, the current level of information seems good enough for us to not worry about knowledge deficits.

However, there are reasons to worry about the alleged knowledge gap that have more undesirable outcomes when Canadians are asked to express themselves in referenda. Because of the very nature of referendum questions and institutions, the "low-information rationality" seems here bound to fail. In the recent past referendum history, Canadians have taken decisions they would most probably not have taken had they knew more.

Trusteeship

Is that to say that we should abandon the idea that citizens can vote on direct legislation because they are not informed enough? I do not think so. The idea behind this paper is that when policy issues are complex and that their repercussions upon Canadians' lives are remote and abstract, they should not necessarily be submitted to the electorate altogether. Indeed, if there are clear reasons to believe that stakes are high for Canadians (and that they will seek to accurately foresee the consequences of their vote), that information will spread, and be taken up by key political actors that will provide efficient cues for electors to pick up, the idea of a referendum may indeed prove ideal. This explains probably well the importance of submitting the question of Québec sovereignty to its population, and not to reserve it for cabinet decision.

In everyday politics, however, substantive representation may translate into the Pitkinian idea of trusteeship, more than that of delegate. In other words, it may prove appropriate for governments to take decisions with regards to feedback the population gives it, without being bound by it. If the level of political knowledge is to remain relatively low, elections, not referenda, are still the best-suited institution to substantially serve the interests of Canadians, however unflattering this idea might first appear. I hope this paper contributed to show that representative government is not the abandonment of the idea of self-governance, quite far from it. Rather, democratic elitism, in that it reconciles democracy with the existence of elite, (Best and Higley: 2) is perhaps the first theoretical framework to look into to explain what Johnston *et al.* called "Canada's dreary plebiscite history" (Johnston *et al.*, 1996: 252).

NOTES

[1]In his comprehensive inquiry into the definition of political sophistication, Luskin ascertains that political information is a variable, whereas rationality is a *constant*. Therefore, the quality of the latter would not fluctuate amongst individuals. (Luskin: 864)

[2]This is not to say people cannot be deceived by other's advices. Actually, cues are quite worrisome trade-offs, insofar as acting on others' endorsement decreases the level of knowledge required of citizens, but augments the possibility of deception. (Lupia and McCubbins: 2)

[3]That is, one they would have taken in conditions of complete knowledge.

[4]Berinsky and Cutler find that this culture leans towards more economically conservative and socially liberal opinions (4).

[5]Berinsky and Cutler are positive about the virtually direct relationship between information and opinion: in their study, they find that "the better informed have a different mean opinion than the less informed, [even] in the face of a welter of obvious confounding socio-demographic and political attributes of citizens […]. In other words, what we will call the *information gap* applies across the board, irrespective of other politically relevant characteristics. Although it does not follow logically, it is hard to avoid the conclusion that the effect is causal" (10).

[6]Indeed, it could be argued that the organisation and dispersion of the votes among the remaining parties can have significant consequences (and it does), but we want to focus here on the most substantial electoral outcomes, that is, the identity of the party that wins the most seats in the legislature, and whether or not it forms a majority government.

[7]For the referendum to pass, it would require a rather high 60 % popular support across the province as well as a simple majority in 60% of the electoral districts (Fournier *et al.*, forthcoming: 29).

[8]Indeed, the Citizen's Assemblies were not *entirely* representative: participants tended to be better educated and older than the electorate at large. One must recall that all deliberative processes (in deciding to vote as well as in participating in the Assembly) involve some degree of inevitable self-selection (Fournier *et al.*, forthcoming: 21).

In any case, the researchers argue, the three reform proposals genuinely reflected the principles to which assembly members subscribed; the very fact that extremely large majorities adopted the final proposals ultimately suggests that a more representative assembly would probably have come to the same recommendations (Fournier *et al.*, forthcoming: 138).

[9]The researchers argue that the information variable did more that shift the vote's direction toward the Yes: its also reduced most group differences in the vote, it made ideas more important relative to feeling, it tightened the connection between substantive arguments, both general and specific, about the Accord and the vote. All in all, "it changed voters' calculus by taking them out of the group and into a larger forum" (Johnston *et al.*, 1996: 284).

[10]The case may be different for the national referendum of 1992, because political parties did take part in the discussions. Perhaps the intervention of political cues account for the better media coverage the referenda received, and the lesser gap between that results and the hypothetical "perfect information" electoral outcome.

Bibliography

ALVAREZ, R. Michael. Information and Elections, Michigan studies in political analysis. Ann Arbor: University of Michigan Press, 1997.

BARTELS, Larry M. "Uninformed Votes: Information Effects in Presidential Elections". *American Journal of Political Science* 40 (1):194-230. 1996

BÉLANGER, Éric, and François Pétry. "The Rational Public? A Canadian Test of the Page and Shapiro Argument". International Journal of Public Opinion Research 17 (2):190-212. 2005.

BENNETT, Stephen Earl. 1988. "Know-Nothings" Revisited: The Meaning of Political Ignorance Today. *Social Science Quarterly* 69 (2):476-490.

BERINSKY, Adam, and Frederic Cutler. "Political Information and Political Attitudes: Is There a Direct Link?", Paper prepared for the Annual Meeting of the Canadian Political Science Association. Ottawa: Annual Meeting of the Canadian Political Science Association, 1998

BEST, Heinrich, and John Higley. Democratic Elitism: New Theoretical and Comparative Perspectives, International studies in sociology and social anthropology,. Leiden ; Boston: Brill, 2010.

BLAIS, André, Elisabeth Gidengil, Patrick Fournier, and Neil Nevitte. "Information, Visibility and Elections: Why Electoral Outcomes Differ When Voters are Better Informed".European Journal of Political Research 48:256-280, 2009.

BORCHERT, Jens. "They Ain't Making Elites Like They Used to": The Never Ending Trouble with Democratic Leadership. In Democratic Elitism : New Theoretical and Comparative Perspectives, edited by H. Best and J. Higley. Leiden ; Boston: Brill, 2010.

BOURDIEU, Pierre. Questions de sociologie, Reprise. Paris: Minuit, 2002.

CARPINI, Michael X. Dell, and Scott Keeter. "Measuring Political Knowledge: Putting First Things First". American Journal of Political Science 37 (4):1179, 1993.

DAHL, Robert Alan. On Democracy. New Haven: Yale University Press, 1998.

EVERITT, Joanna Marie, and Brenda Lee O'Neill. Citizen Politics: Research and Theory in Canadian Political Behaviour. Don Mills, Ont.: Oxford University Press, 2002.

FOURNIER, Patrick. "The Uninformed Canadian Voter", Citizen Politics: Research and Theory in Canadian Political Behaviour, edited by J. M. Everitt and B. L. O'Neill. Don Mills, Ont.: Oxford University Press, 2002.

FOURNIER, Patrick, Henk Van der Kolk, Kenneth R. Carty, André Blais, and Jonathan Rose, When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform. Oxford: Book manuscript for Oxford University Press, 2010.

GERBER, Elisabeth R., and Arthur Lupia. When Do Campaigns Matter? Informed Votes, the Heteroscedastic Logit and the Responsiveness of Electoral Outcomes. Pasadena: CA: California Institute of Technology Social Science, 1993.

GIDENGIL, Elisabeth, André Blais, Neil Nevitte, and Richard Nadeau. Citizens, Canadian Democratic Audit. Vancouver: UBC Press, 2004.

Disenfranchisement: Objectives and Objections

Casey McDermott

McGill University

Introduction

Since the entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982, much debate has focused on the legal, equality, and democratic rights of both individuals and groups. While acknowledging the progress in areas such as legal and equality rights, debates regarding democratic rights seem timeless and unsusceptible to the idea of the "living tree."[1] This paper will analyze the highly controversial debate surrounding prisoner disenfranchisement and assert that voting is a fundamental right in democratic society. Through the analysis of the political objectives as well as the upholding and dissenting judgements in *Sauvé 2*, a decision where the Court held that prisoners have the right to vote under section 3 of the *Canadian Charter of Rights and Freedoms*, this paper will consider the philosophical justifications for disenfranchisement in conjunction with the weaknesses in the arguments given by the judiciary.[2] As revoking the voting rights of prisoners has a basis in social contract theory, a philosophical debate stemming from John Rawls' work *A Theory of Justice* will also be considered.[3] In addition to being a right, practical reasons for allowing prisoner enfranchisement will show that is a normatively desirable public policy choice.

In the first section, this paper will consider the pro-disenfranchisement stance held by the governmental objectives and justifications in *Sauvé 2*. Justice Gonthier's reply to the argument of inequality will be analyzed second before finally considering the weaknesses in Chief Justice McLachlin's argument based on political theory. The second section is a rebuttal to each of the arguments previously made. Opposing philosophies, logical reasoning as well as demographic statistics will be used to further the originally stated thesis. Finally, this paper will conclude with a brief analysis of the political and social consequences criminal disenfranchisement has on the process of prisoner rehabilitation. While this paper draws its main arguments from the Canadian context of *Sauvé 2*, cases from the United States will also be considered. With fifteen states disenfranchising ex-felons for life, there has been much philosophical and practical debate over the right of incarcerated individuals to vote. As such, the arguments contained within these cases are important tools for each side of disenfranchisement and will be considered throughout this paper.

Disenfranchisement: a Tool

In *Judging Democracy*[4], Christopher Manfredi and Mark Rush compare and contrast the American and Canadian judicial systems by examining similar decisions made in the neighbouring countries. In particular, they look at the decisions made regarding prisoner's voting rights through the analysis of *Sauvé 2* and *Richardson*.[5] While their analysis showed opposite judgements in the two cases, Manfredi and Rush noted that the debates the two courts engaged in were essentially the same as both argued the underlying philosophy of disenfranchisement. Moreover, the fact that both cases were highly divided within each court shows that the political theory behind decisions concerning voting rights are of particular importance.[6] As such, when analyzing the pro-disenfranchisement position of the government and Justice Gonthier in *Sauvé 2*, examples from the US will also be considered.

Governmental Objectives with the *Canadian Elections Act*

Section 51(*e*) of the *Canadian Elections Act* was the provision contested as unconstitutional in *Sauvé 2*. It was this particular subsection of the federal legislation which denied the right to vote to "[e]very person who is imprisoned in a correctional institution serving a sentence of two years of more."[7] Although Sauvé's lawyer argued that it was unconstitutional under sections 3 and 15 of the Canadian *Charter*, this paper will pay particular focus to

the infringement under section 3, which states "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[8] As the crown agreed that the provisions of the *Canadian Elections Act* did infringe upon the right to vote, the governmental objectives are of particular importance in determining whether the infringement was justified. In the *Sauvé 2* judgement, Chief Justice McLachlin underlined the two governmental objectives for s.51(e) as "(1) to enhance civic responsibility and respect for the rule of law; and (2) to […] enhance the general purpose of the criminal sanction."[9] Although one cannot deny that both objectives are highly symbolic of a democratic society[10], whether or not they advance a justified limitation will be assessed.

After removing the rhetoric surrounding the first reason behind the denial of inmates to vote, one is left with one of classical liberalism's central concepts: the social contract.[11] In classical social contract theory if one breaks the contract by breaking the law, it follows that one is no longer in society. In more modern terms, if someone breaks the law, they no longer have a right to participate in society; in particular, they no longer have the right to vote. This thought is widespread throughout political theory and is not confined to the Canadian judicial sphere. Social contract theory was also at the heart of Judge Friendly's decision to disenfranchise ex-felons in the American *Green v. Board of Elections* trial.[12] As it is central to the philosophical debates of almost every case concerning prisoner disenfranchisement, the theory of the social contract will be considered later in this section with reference to one of the weaknesses in Chief Justice McLachlin's decision.

As the second governmental objective in the *Elections Act*, to "enhance the general purpose of the criminal sanction,"[13] is not based in political theory but rather aims at providing additional punishment, it requires less philosophical analysis than the previously stated objective. This justification is "intended to be morally educative for incarcerated […] offenders,"[14] as well as an additional deterrent to possible lawbreakers. This political goal of increased punishment is intended to increase the psychological effects of incarceration on an offender as opposed to simply the physical consequences of being jailed. The logic behind this justification is the assumption that by the threat or, in the case of a convicted criminal, the actual revocation of an important part of one's Canadian citizenship will lead to more remorse in the inmate.

Choosing Inequality

Chief Justice McLachlin refers to the expansion of suffrage as an important aspect of Canadian history and describes the idea of felon disenfranchisement as "ancient and obsolete."[15] As this argument finds root in the equality right section of the *Charter*[16] it is important to consider whether or not prisoners are being treated unfairly. Justice Gonthier's counterargument insists that this is not discriminatory, as the disenfranchisement is not "based on some irrelevant personal characteristic such as gender, race, or religion."[17] Similarly, in the United States Judge Krupansky used a similar counterargument against inequality. Felons are not "disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."[18] Because the reason behind a prisoner's disenfranchisement is a choice rather than a personal characteristic, it follows logically that it is non-discriminatory if he or she is punished by revocation of the right to vote.

Christopher Manfredi asserts a similar point in an article published in the Review of Politics. He asserts that restrictions on voting can be imposed, but only if done so in a universal fashion.[19] That is to say, a restriction that applies to the entire population equally (such as the age restriction) is legitimate. Therefore, threatening disenfranchisement as a consequence of criminal activity is similarly legitimate.[20]

Weaknesses in the McLachlin Judgement

To fully assess the arguments for disenfranchisement, the weaknesses in Chief Justice McLachlin's decision should be noted. Although this paper agrees with McLachlin's judgement, it acknowledges that the depth and breadth of her philosophical arguments are lacking. As Justice Gonthier notes in his dissenting judgement, McLachlin's position is based on "one philosopher [which leads her to] replace one reasonable position with another, dismissing the government's position as 'unhelpful'."[21]

As for matters of depth, one must consider McLachlin's philosophical argument that although "the social compact requires the citizens to obey the laws created by the democratic process […] it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity."[22] However, there is nothing in classical social contract theory that prohibits the disenfranchisement of a citizen's mem-

bership into society[23]; in fact, the consequence of societal banishment is arguably the most important effect of breaking the social contract.[24] Thus, when considering McLaughlin's analysis of social contract theory, one is left lacking an argument founded on philosophical voting theory.

Disenfranchisement: A Paradox

While there are many legitimate arguments favouring disenfranchisement, this section will analyze and address the previously made arguments – the legislative objective of enhancing civic responsibility and providing additional punishment, the counterargument to inequality, and the weaknesses in Chief Justice McLachlin's decision – to assert that criminal disenfranchisement is unconstitutional as well as impractical.

Legislative Limitations

The first governmental objective, to enhance civic responsibility, is based on social contract theory wherein a violation of said contract leads to a revocation of societal rights. It is this political theory that is behind the saying "he got what he deserved;" it is the thought of retribution. However ingrained that this may be in the average person's everyday psyche, one must ask if it has a place in removing fundamental rights. Although this idea is highly controversial, this paper asserts that classic social contract theory is out-dated in an era of universal suffrage in the democracies of the developed world. As such, the justification of enhancing civic responsibility given by government to limit the voting rights of prisoners is also outdated. This thought is promoted in *A Theory of Justice* wherein John Rawls sets social contract theory in a contemporary framework. This revamped notion of the social contract will be explored later in this section when discussing the weaknesses in McLachlin's judgement.

The second governmental objective of "providing additional punishment"[25] was to be carried out through both its deterring and educative elements. However, this paper argues that neither the means (education and deterrence) nor the ends (additional punishment) are practical. First, additional punishment as an educative tool is extremely limited. Denying the right to vote is paradoxical to the message trying to be sent as it "misrepresents the nature of our rights and obligations under the law and consequently undermines them."[26] In a democracy, individuals vote for those who represent them. However, if those representatives can then bar those citizens as this objective attempts to do, it shows a self-contradiction between the means and ends of the policy the government is attempting to achieve. Although the second objective of deterrence is not contradictory, it is impractical due to the low visibility of disenfranchisement.[27] This objection to deterrence flows into the overall impracticality of the objective; United States Justice Brennan argued that "the offender, if not deterred by the thought of the specific penalties of long imprisonment […] is not very likely to be swayed from his course by the prospect of expatriation."[28]

Indirect Discrimination through Disproportionate Representation

Both arguments given by Canadian Justice Gonthier and American Justice Krupansky assert that the disenfranchisement of felons cannot fall under a heading of discrimination as they are not due to "immutable characteristic[s]"[29] but rather to decisions made by each felon to commit a crime. Although this paper does not support the argument that prisoner disenfranchisement is discriminatory to prisoners, it does assert that the disproportionate amount of Aboriginal people in Canadian prisons and African-Americans in US penitentiaries should not be ignored. While Aboriginals comprise only 2.7% of the adult Canadian population, approximately 18.5% of offenders now serving federal sentences are of First Nations, Métis and Inuit ancestry and, should the current trend continue, it is expected to reach the 25% mark in less than 10 years.[30] There is a similar situation in the United States; 14% of the population of young men are African American, but they represent over 40% of the prison population.[31] With such disproportions in the prison population, already marginalized groups would suffer from indirect discrimination through disenfranchisement.

In "The Purity of the Ballot Box," Tribe contests the argument regarding decisions mentioned by Gonthier, Krupansky, and Manfredi arguing that they assume that "the criminality is the product of free choice."[32] This argument is highly controversial in modern debate. In light of the overwhelming number of "what if" scenarios, this paper will allow the reader to consider theoretical situations that would lead to an invalidation of the discrimination due to "free choice" argument both in terms of the means (the opportunity for choice) and ends (indirect discrimination of marginalized groups).

Strengths within Weaknesses

There were two major weaknesses in Chief Justice McLachlin's decision. First, she only used one political theorist to support her view and secondly, she misinterpreted the classical theory of the social contract. As previously mentioned, Justice Gonthier paid

particular attention to Chief Justice McLachlin's lack of breadth when noting that she only made reference to one political theorist, John Mill. In Mill's *Thoughts on Parliamentary Reform*[33], he describes the "possession and the exercise of political, and among others electoral, rights is not of the chief instruments both of moral and of intellectual training for the popular mind."[34] Gonthier's criticism of Mill is perfectly valid as political theory is based on competing philosophies. However, his criticism of McLachlin based on her using Mill is lacking. Political philosophy is constantly being debated; analysis and conclusion by one author simply provides ground for further discussion and contestation. This paper agrees that simply quoting one philosopher weakened the Chief Justice's position, however it is not a limiting factor in her judgement as Justice Gonthier asserts.

The second problem with Chief Justice McLachlin's judgement is based on her quoting of social contract theory. Her assertion that the failure of an individual to obey the law does not result in the nullification of said individual's citizenship is incorrect from the viewpoints of almost every major classical social contract theorist including Hobbes, Rousseau, Locke, and Kant. However, although this paper accepts McLachlin's misunderstanding of the classic social contract theory, it asserts that her position is nonetheless valid *in a modern context*.[35] John Rawls, a contemporary political philosopher has revamped the original social contract theory to a modern context in his 1971 book *A Theory of Justice*. Rawls refers to the "principle of participation" which is the principle of equal liberty defined in the political context.[36] He defines the underlying worth of the principle of participation is in the "fair opportunity to take part in and influence the political process"[37] wherein the "constitution must take steps to enhance the value of equal rights of participation for all members of society."[38] Rawls' work on social contract theory is based upon the same principles of equal representation as classical philosophers, but diverges in respect to voting rights. He sees the right to vote as fundamental; a government that disenfranchises some of its citizens is illegitimate as it is disrespecting the principle of "one elector, one vote."[39] As was previously noted, political theories often find base on the limitations of other theories. As such, this paper does not attempt to argue the superiority of one theory over another, but rather the appropriateness that one may hold in this particular case. The contemporary historical context in which Rawls writes is of considerable importance as the extension of suffrage beyond a small representation of the population.[40] As such, it is argued that the other authors cited regarding social contract theory are less applicable concerning voting rights and they are, in this context, outdated.

The Goal of Rehabilitation

It must ultimately be understood that intelligent people disagree. Although contrasting political theories is necessary when considering the opposing decisions many countries have taken concerning voting rights, it is important to consider aspects further than philosophy. As such, this paper will finish by considering an important aspect of criminal disenfranchisement: the rehabilitation process of ex-felons.

In contemporary society, rehabilitation is a particularly popular objective of the penal system.[41] Canada in particular attempts to strike a balance between punishment and treatment through programs intended to teach and council.[42] As the sentence of most inmates is less than life, they must at some point attempt to reintegrate into society. However, the case of fifteen American states disenfranchising ex-felons for life starkly contradicts the idea of rehabilitation and "indicates that society has less faith in the rehabilitative possibilities of prison than its rhetoric might suggest."[43] However, one must recognize that the *Canadian Elections Act* only denies the right to vote while an inmate is incarcerated. As such, this paper considers the long-term effects on an individual's psyche who has at one point been disenfranchised.

The judgement given by Justice Sachs in the South African decision in *August* is an example that clearly depicts the importance of enfranchisement as "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."[44] Although this decision is particularly relevant to South Africa due to the economic disparities in the country, it emphasizes an important aspect of voting; the feeling of inclusion. Chief Justice McLachlin refers to the connection between prisoners and society as an aspect that needs to be "bolster[ed] rather than undermine [d],"[45] as:

> "depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community, while the right to participate in voting helps teach democratic values and social responsibility."[46]

The dissenting decision in *Sauvé 2* made reference to the testimony given by the appellant Aaron Spence to show how disenfranchisement is "meaningful to offenders."[47] However, the testimony did not take into account the possible long-term feelings Spence may have towards a government that deprives individuals of something considered inherently "valuable."[48]

Ultimately, if the goal of rehabilitation is the reintegration of an ex-criminal into society, then limiting a fundamental democratic right is going directly against that objective. Therefore, if a society is both democratic and has rehabilitation as an objective of incarceration, it should not allow disenfranchisement. By denying felons the right to vote from felons, whether in the short or long-term, states are undermining the possibility of full reintegration into society by removing a sense of identity linked to the governing body.

Conclusion

Newton's Third Law of Motion states for every action there is an equal and opposite reaction. Political philosophy has taken on the same framework wherein every argument has an equally valid counterargument. In this balancing of conclusions, each argument is picking at flaws in the previous reasoning, which is exactly why philosophy is such a highly debated topic. The practical implications of political theory on modern affairs bring the controversy to the forum of governmental legislation and judicial decision. The effect of the two Canadian cases regarding prisoners' voting rights, *Sauvé 1* and *Sauvé 2*, respectively, has spurred great debate among academics. Manfredi removes the rhetoric used in both the justifications and philosophies to pinpoint the two questions American and Canadian Justices were arguing: "the meaning of citizenship and the rationale for punishment."[49] This paper contrasted those underlying philosophical debates surrounding the references to social contract theory, as well the debates concerning equality and effectiveness. The modern social contract put forward by scholars such as Rawls and Mill concur that although punishment is required when one breaks a law, the right to political representation through voting is fundamental in democratic society and should not be stripped of any citizen. To address arguments regarding equality, the overrepresentation of minority groups in the federal inmate population (Aboriginals in Canada and African-Americans in the United States) is a very important factor. The effectiveness of disenfranchisement to achieve the government's objective of further punishment through deterrence and education are weak at best, impractical and self-contradictory at worst. When these three overarching themes are concluded, this paper is left with a strong position against the disenfranchisement of prisoners, whether only during their sentenced incarceration or for life.

To further illustrate the detriment criminal disenfranchisement has on society, the practical implications denying the democratic right to vote on inmate rehabilitation was considered. The long-term effects disenfranchisement holds on an individual attempting to reintegrate into society decidedly outweigh the short-term goal of an educative message.

Section 3 of the *Canadian Charter of Rights and Freedoms* asserts that "[e]very citizen of Canada has the right to vote,"[50] without referring to any internal limitations. Moreover, this democratic right is not subject to the government's notwithstanding clause, which shows the value the right to vote holds in society. In the *Sauvé 2* judgment, the Supreme Court of Canada moved beyond the "stereotypes cloaked as common sense"[51] to assert the fundamental value voting holds in democratic society. This paper commends the Supreme Court of Canada on the progressive position taken that has removed the symbolic justification of disenfranchisement through the idea that "deviants are the source and embodiment of corruption, pollution, and moral turpitude."[52] The right of every citizen to vote lies at the heart of Canadian democracy, regardless if they live in a cell or bedroom.

NOTES

[1]The "living tree" metaphor is use to justify the evolution of jurisprudence analogous changing societal norms. *Edwards v. Attorney General of Canada*, [1930] A.C. 124 [*Edwards*].

[2]*Sauvé v. Canada*, [2002] 3 S.C.R. 519 [*Sauvé 2*]. Note that the lower court decision of *Sauvé 1* will not be analyzed independently, but only as it is referred to in *Sauvé 2.*

[3]John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

[4]Christopher Manfredi and Mark Rush, "Of Real and "Self-Proclaimed" Democracies: Differing Approaches to Criminal Disenfranchisement," in *Judging Democracy* (Peterborough: Broadview Press, 2008), 49-64.

[5]*Richardson v. Ramirez*, [1974] 418 U.S. 24 [*Richardson*].

[6]Highly controversial decisions usually result in a split court. The Supreme Court of Canada decision was 5-4 in favour of prisoner enfranchisement while the Supreme Court of the United States upheld the disenfranchisement of prisoners 6-3. *Sauvé 2*, *supra* note 2 at 1.; *Richardson*, *supra* note 5 at 1.

[7]*Canada Elections Act*, [1985] R.S.C. [*Elections Act*].

[8]*Canadian Charter of Rights and Freedoms,* s. 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[9]*Sauvé 2*, *supra* note 2 at 1.

[10]As per McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 21.

[11]Social contract theory explains the formation of society as an association of individuals who agree to come together in a political sphere wherein they abide by laws they themselves created. As per Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (New York: Penguin Books, 2004).

[12]This case is unavailable for public view ("cert. denied"), but was referred to by Laurence H. Tribe, "The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box'," *Harvard Law Review* 102, no. 6 (1989): 1304.

[13]*Sauvé 2*, *supra* note 2 at 1.

Caption describing picture or graphic.

[14]As per Gothier J. Ibid., at para. 72.

[15]McLachlin is referring to a time when the vote was only allowed to men of a certain age, income, and social class. *Sauvé 2*, *supra* note 2 at para. 43.

[16]S.15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[17]Gonthier J. in *Sauvé 2*, *supra* note 2 at para. 69.

[18]*Wesley v. Collins*. [1985] M.D. Tenn. [*Wesley*] at para. 27.

[19]Christopher P. Manfredi, "Judicial Review and Criminal Disenfranchisement in the United States and Canada," *The Review of Politics* 60, no. 2 (1998): 297.

[20]This particular argument assumes that along with the outcome of prison time, a person who is considering committing a crime also acknowledges the outcome of the loss of vote.

[21]Gonthier J. in *Sauvé 2*, *supra* note 2 at para. 157.

[22]McLachlin C.J. Ibid., at para. 47.

[23]Classical liberalists such as Hobbes, Locke, Rousseau and Kant all promoted or accepted the idea of felon disenfranchisement.

[24]It is also important to note that one's citizenship in revoked when one breaks a law under the social contract. One is not only no longer allowed to participate in the democratic process, but in extreme cases one is no longer protected by the society's laws (i.e. if one is killed, the person who committed the act is not punished).

[25]*Sauvé 2*, *supra* note 2 at 1.

[26]As per McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 31.

[27]Tribe, "The Disenfranchisement of Ex-Felons," 1307.

[28]Expatriation is used as this case referred to the consequences of military desertion. It is applicable to this paper as loss of citizenship is a worse fate than loss of the right to vote. As such, if a person were not to consider the worse consequence, it would logically follow that they would not consider the lesser. Moreover, as this case is in an American context, the possibility of the death penalty would be on the minds of potential criminals in particular states. *Trop v. Dulles*, [1958] 356 U.S. 86 [*Trop*].

[29]*Wesley*, *supra* note 17 at para. 27.

[30]All statistics were taken by Correctional Services Canada in 2006. Office of the Correctional Investigator, "Backgrounder: Aboriginal Inmates," The Correctional Investigator Canada, http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20052006info-eng.aspx.

[31]Race, Ethnicity & Health Care, "Young African American Men in the United States," The Henry J. Kaiser Family Foundation, http://usjamerica.files.wordpress.com/2010/01/7541.pdf.

[32]Tribe, "The Purity of the Ballot Box," 1311.

[33]John Stuart Mill, *Thoughts on Parliamentary Reform* (London: John W. Parker and Son, 1859). Although the previous line was not an exhaustive list of social contract theorists, they are the leading authority of classical contract theory.

[34]Mill, *Parliamentary Reform*, 22-23.

[35]The most recently deceased author previously mentioned was Immanuel Kant in 1804.

[36]Rawls, *A Theory of Justice*, 221.

[37]Ibid., at 224.

[38]Ibid.

[39]Ibid., at 222.

[40]Gender, class, race, wealth, and religion have all been reasons for disenfranchisement in the past.

[41]Tribe, "The Purity of the Ballot Box," 1301.

[42]Justice Canada Monitor, "Correctional Issues," The Justice Canada Monitor, http://www.justicemonitor.ca/correctionalissues.htm.

[43]Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981), 112.

[44]*August v. Electoral Commission*, [1999] 3 S.A.L.R. 1 [August] at para. 17.

[45]McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 38.

[46]Quoted testimony of Professor Jackson in the appellants' record. Ibid., at para. 38.

[47]Ibid., at para. 183.

[48]Ibid.

[49]Manfredi, "Criminal Disenfranchisement in the United States and Canada, 279.

[50]S.3: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[51]*Sauvé 2*, *supra* note 2 at para. 18.

[52]Tribe, "The Purity of the Ballot Box," 1315.

Bibliography

ALLEN, Francis A. The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose. New Haven: Yale University Press, 1981.

Justice Canada Monitor. "Correctional Issues." The Justice Canada Monitor, 20 Mar. 2010. <http://www.justicemonitor.ca/correctionalissues.htm>

MANFREDI. Christopher and Mark Rush. "Of Real and "Self-Proclaimed" Democracies: Differing

Approaches to Criminal Disenfranchisement." In *Judging Democracy*, 49-64. Peterborough: Broadview Press, 2008.

MILL, John Stuart. Thoughts on Parliamentary Reform. London: John W. Parker and Son, 1859.

Office of the Correctional Investigator. "Backgrounder: Aboriginal Inmates." The Correctional Investigator Canada, 20 Mar. 2010 <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20052006info-eng.aspx>

RACE, Ethnicity & Health Care. "Young African American Men in the United States." The Henry J. Kaiser Family Foundation, 20 Mar. 2010, <http://usjamerica.files.wordpress.com/2010/01/7541.pdf>

RAWLS, John. A Theory of Justice. Cambridge: Harvard University Press, 1971.

Rousseau, Jean-Jacques. The Social Contract. Translated by Maurice Cranston. New York: Penguin Books, 2004.

TRIBE, Laurence H. "The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box'." Harvard Law Review 102, no. 6 (1989): 1300-17.

MANFREDI, Christopher P. "Judicial Review and Criminal Disenfranchisement in the United States and Canada." The Review of Politics 60, no. 2 (1998): 277-305.

Cases Cited

August v. Electoral Commission, [1999] 3 S.A.L.R. 1.

Canada Elections Act, [1985] R.S.C.

Canadian Charter of Rights and Freedoms. Part I of the *Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (U.K.). 1982, c.11.

Edwards v. Attorney General of Canada, [1930] A.C. 124.

Richardson v. Ramirez, [1974] 418 U.S. 24.

Sauvé v. Canada, [2002] 3 S.C.R. 519.

Trop v. Dulles, [1958] 356 U.S. 86.

Wesley v. Collins. [1985] M.D. Tenn.

Balancing Power: The Supreme Court of Canada's Impartial Role in Federalism

Darcy Drury

McGill University

"The true natural check on absolute democracy is the federal system, which limits the central government by the powers reserved, and the state governments by the powers they have ceded."

- Lord Acton

Lord Acton. *Fasnacht, Acton's Political Philosophy.* 244 (1952).

The problem with Lord Acton's statement is that it leaves out the third essential ingredient to a federal system of government: a supreme court. In Canada, like most federations, the Supreme Court (SC) is responsible for articulating the constitution and serving as an independent mediator in intergovernmental relations. Each decision made by the SC in regards to government jurisdiction changes the dynamics of Canadian federalism, and some critics fear it can be used as a centralizing device by the federal government. This paper will discuss the nature of the SC by demonstrating its necessity, purpose, and the importance of its independence by examining its crucial role in Canadian federalism. Next, there will be a historical breakdown of the impact of2 the SC on the federal balance of powers through an examination of three essential eras: Judicial Committee of the Privy Council (decentralizing), Laskin (centralizing), and Charter (mixed), with analysis involving the attitudinal and legal theorist models of decision making in SC decisions. Finally, the SC's impartiality towards provincial and federal preferences will be evaluated to show that justices have remained immune to direct political pressures. This paper will ultimately argue TThisf that that the SC mediates the balance of power in intergovernmental relations by acting as an impartial articulator of the constitution. Its decisions, however, impact federal centralization throughout Canadian history due to a constant use of the attitudinal model in the decision-making process.

In order to understand the role of the SC as a federalist institution, it is important to begin by explaining the concept of federalism and the reasons why a nation will choose to develop a federalist system of governing. A federal system of government is one that divides the powers of government between the national (federal) government and the independent state (provincial) governments. Typically, federal governments are established if the population of a country appears to contain significant linguistic, geographical, cultural or economic differences.[1] In 1867, these four attributes, among others, were apparent in British North America, most notably in the French-speaking colony of Quebec, which maintained a uniquely Catholic view and had an agricultural-centered economy. This can clearly be contrasted with Ontario, which was mainly comprised of English-speaking Protestants concerned with developing industry. As political scientist Richard Simeon explains, "The fundamental basis for federalism in Canada [...] was and remains the need to reconcile, balance and accommodate diversity."[2] The natural issue that evolves from federations is the balance of provincial and federal authority in determining jurisdiction over key powers. The BNA Act of 1867--the original Canadian Constitution--clearly designates certain roles to the federal government (i.e. trade and commerce) and to the provincial governments (i.e. property and civil rights), as well as concurrent (shared) powers such as agriculture or immigration. To resolve discrepancies in the less clear areas of jurisdiction it is essential to have an independent body of authority.

The SC was established as the highest court of appeal in Canada not in the BNA Act, but rather as a part of legislation in 1875, in under permission of Section 101 (BNA Act). As Harvard Law professor Paul Freund notes, "Every federation has thought it necessary to establish a supreme court which performs the twofold function of interpreting the constitution and promoting the uniformity of law."[3] Without a supreme court, governments run the risk of a constitutional disagreement turning into more serious problems. An example of this is the United States' Civil War (1861-1865), which resulted from a polarization of two groups, where the Confederates' appeals against the federal government were "always on constitutional grounds."[4] An increased legitimacy of the court system could have, in theory, helped prevent this war; a case which demonstrates the importance of a universally accepted SC within a regime.

In order for the SC to remain a federalist institution rather than a federal device, it is assumed that judicial independence is necessary for the court system's legitimacy. Judicial independence is the essential provision that maintains law and order between governments, as it helps keep the judiciary outside both federal and provincial politics. It requires several elements: administrative independence from government, reasonable salaries, and tenure--all of which are found within the original BNA Act.[5] These requirements are essential "to assure the public, both in appearance and reality, that their cases will be decided, their laws will be interpreted, and their Constitution will be applied without fear or favour."[6] In the context of Canadian federalism, judicial independence remains the safeguard against illegitimate centralizing or decentralizing attempts by the governments.

Within the framework of Canada's federal system, the SC operates as an independent body that serves as the intergovernmental mediator. It is important to note that "a decision by a s.101 court applies equally anywhere in Canada,"[7] and thus the SC must ensure that prudent decisions result from their deliberations. This inherently shapes the SC into a centralizing agent, not of the federal government, but of its own prerogative, furthering the importance of judicial independence. Although sec. 101 courts may hear interprovincial and federal-provincial disputes, the SC's power of judicial review ensures its dominance over the entire judicial system due to the finality of its judgments. The final interpretation of the Constitution rests in the hands of the SC, therefore governments--as litigants--must be careful in the disputes they bring to court, since a decision may end up hurting their jurisdiction over a certain area . An example of this can be found in *R. v. Crown Zellerbach* (1988), which held the validity of the Ocean Dumping Act as constitutional because, although provinces have control of resources, environmental protection is considered to be national jurisdiction under the POGG clause (peace, order and good government). While attempting to strike down federal legislation, the finality of the SC's judgment caused jurisdiction over all water pollution to become national jurisdiction--including lakes and rivers. As is evident in this case, the role of mediator can be a burden on justices, especially with increasing media attention covering their more important decisions[8], and therefore it is important to examine the factors that are involved with such cases.

In Canada there are several theories that help explain the process of judicial decision making, most notably the attitudinal model and legal theory. Legal theorists propose that justices consider precedent and framers intent when deliberating on cases. From a conservative approach to legal studies, it appears, through justice opinions, that the intent of legislatures and constitutional framers while positing these laws is concrete and frozen. It is therefore the judge's simple task to apply the facts of the case to the law and, if necessary, to use former cases as guidance under the doctrine of *stare decisis*--"to stand by decisions and not disturb the undisturbed"[9]. The problem with the legal model is that it does not adequately account for the significant shifts in governmental power and jurisdiction. that have occurred in Canadian history .

A more comprehensive approach to judicial decision-making is the attitudinal model, which is derived from empirical evidence that justice ideology and political preference directly impact Supreme Court decisions.[10] This evidence comes from studies of both the American and Canadian SCs, and attributes the finality of judicial review as an unchecked power that allows justices to posit their opinions as law. Thus, judicial independence strengthens the argument for the relevance of the attitudinal model because, since judges have sole jurisdiction over intergovernmental relations, they are "free to simply select precedents that reflect their own point of view."[11] Although this assertion may be severe, it is

not unreasonable to recognize the impact this sort of freedom must have on the balance of power within federal relations. The attitudinal model has relevance in Canadian history; it is well documented that the Judicial Committee of the Privy Council (JCPC)--the British court that served as Canada's highest court of appeal from 1867-1960--ruled on several cases in favour of British policy objectives. The effects of these decisions created the parameters for the future of Canadian intergovernmental relations.

To discern whether the Supreme Court has exerted a centralizing tendency in its decisions, Canadian judicial history can be broken down into three main eras: the decentralizing JCPC era, the centralizing Laskin era, and the Charter era. Each of these periods represents a change in general judicial decision making, as well as a significant shift in the balance of powers within a federalist context. In regards to what is meant by centralizing, it is assumed to mean enhanced federal jurisdiction over elements of society by obtaining power from what was once considered to be provincial jurisdiction--decentralization is the contrary.

The first era in the history of the Supreme Court was the period marked by the JCPC, which shaped the first methodological approaches to reading the Constitution. It is important to note that the JCPC and the SC were very often consistent with their opinions; as Freund articulates, "there was no dramatic contest between the Privy Council and the Supreme Court of Canada."[12] A significant case that began a decentralizing trend in Canadian federalism was *Citizens' Insurance Co. v. Parsons* (1881). This was the first constitutional case to be heard by the JCPC, and it resulted in an expanded reading of sec. 92 (provincial powers) by reading in contracts as part of property and civil rights. It subsequently led sec. 91 to be read narrowly by putting a limit on the federal jurisdiction on trade and commerce.[13] Law scholar Robert Vipond describes these effects: in a broad sense, the JCPC continued in the following decades "to treat provincial claims in the generous fashion established by *Parsons*."[14] The attitudinal model was used in *Parsons* and subsequent cases, and this can be demonstrated by the fact that there were no precedents or claims to framers intent to derive these outcomes. Outcomes like that of *Parsons* were meant to be prohibited by the Peace Order and Good Government (POGG) clause; the purpose of which Sir John A. Macdonald stated was to prevent the weakening of the federal government in order to maintain parliamentary supremacy. His reasoning for this plan was to "avoid the great source of weakness which [had] been the cause of the disruption of the United States."[15] Intuition suggests that British anxiety of a Canadian revolution may have caused the British-run JCPC to implement decentralizing policy objectives until WWII due to what has been termed their "provincialist bias".[16] The JCPC's influence on Canadian federalism weakened in the twentieth century, although the initial decentralizing efforts and the use of attitudinal decisions-making had a lasting impact on the common law system.

The second major era in Canadian federalism is the Laskin Era, due to the centralization that came as a result of Chief Justice Bora Laskin's strong federal sentiments. Laskin's tenure as Chief Justice lasted from 1973 until his passing in 1984; this was a period that contained extensive debate on the nature of federalism, and eventually a new constitution. Constitutional scholar Katherine Swinton describes Laskin as a man with "firm views" on how the BNA Act should have been interpreted, mainly as a product of "the problems of the Depression". His upbringing led to him viewing provinces as "unable to provide adequate[ly]"[17] for their citizens, and one who saw "the wisdom of a strong federal government in this period."[18] His views were confirmed in his judgments as a justice[19], which suggests a strong attitudinal tendency within the SC in this era.

The issue that scholars, justices, and politicians had to face in this era was whether they should interpret the Constitution as written, now that they were not subject to the JCPC, or whether the precedents set by the last century should be maintained. The result, unsurprisingly, was a series of decisions that allowed the federal government to take back control of its originally intended jurisdictions--namely trade and commerce. In *Caloil Inc. v. Attorney General of Canada* (1971), Laskin took the opportunity to write a concurrent judgment that allowed the federal government to "regulate the local as well as international and interprovincial stages of trade."[20] The impact of this opinion, as well as several others such as *Manitoba Egg Reference*, caused Laskin to create a "new rule" that cut down on provincial barriers of goods.[21] As he encouraged centralized trade in Canada with his judgments, he took this a step further in *Reference re Anti-Inflation Act* by asserting that wage and price control were emergency federal powers under POGG.[22] The impact of the judgments from the Laskin era strongly centralized the powers of the federal government.

As exceptionally attitudinal as Laskin appeared by his judgments, his reasoning always pulled out the textualism of the constitution as a means to impartially interpret the law. His disapproval of the JCPC's interpretation of

intergovernmental relations was clearly present in many of his power-shifting judgments. Whether he was attempting to develop policy using judicial review, or fix the misinterpretations of past decisions, he was clearly a strong proponent of the "living tree-doctrine", which allows constitutional judgments to reflect the current times without contradicting the past. He used this doctrine to override JCPC judgments in order to bring Canadian federalism back to its original intent. Swinton contends Laskin's court was "wise to show restraint in taking new directions" with a strong "commitment to the rule of law".[23] To prove his impartiality between federal and provincial jurisdiction, in *Reference re a Resolution to amend the Constitution* (1981) he invoked an unwritten constitutional convention to restrict the federal government from amending the constitution without provincial consent. It is clear that there is a relationship between Laskin's conceptions of Canadian Constitutional law and his judgements; however, his attitudinal decision-making did not seek to grant extra-constitutional powers to either the provinces or the states. The legacy of Laskin's court leads directly into the modern era, which bring in a new Constitution and a written Charter of Rights.

The introduction of the Charter and the patriation of the Constitution in 1982 altered the balance of powers in Canadian politics. Due to the history of the SC being given judicial discretion, as well as the new jurisdiction in which it can decide cases, the Canadian SC now holds a significant degree of legitimate authority over the validity, impact, and implementation of laws. F.L. Morton explains this change by stating that the Charter "challenged the two institutional foundations of Canadian polity: Parliamentary supremacy and federalism." The result is what he calls "constitutional supremacy", which curtails provincial jurisdictions (dual sovereignty) and makes way for "new national standards...as interpreted by the courts."[24] The question of central concern for contemporary Canadian federalism is whether the Charter has significantly affected the balance of powers, and if so, whether this is due to an attitudinal or legalist interpretation of the Constitution by the SC.

Ostberg and Wetstein investigated the Charter's impact and its relevance to the attitudinal model, finding that it "might promote patters of attitudinal expression...but there are several interpretive clauses that might discourage justices from engaging in attitudinal policy-making."[25] Not surprisingly, "eight of the ten provinces initially opposed the Charter as a threat to provincial rights".[26] Furthermore, due to Laskin's 1981 decision to require provincial approval for constitutional amendments, several safeguards were written as Federal concessions into the Charter, in order to prevent both national centralization and the weakening of provincial sovereignty. These clauses include section 1, which allows for legislatures to waive sections of the Charter if it is deemed "demonstrably justifiable"; section 24(2), which restricts the types of evidence a court may use; and section 33, the notwithstanding clause that allows governments to override certain sections of the constitution. These clauses, however, are only effective to a degree. For example, "the Court's willingness to accept provincial differences as a legitimate basis for a 'reasonable limitations' defense under the ubiquitous Section 1 of the Charter" has helped maintain the existence of dual federalism (two spheres of sovereignty); although some important section 1 cases have been rejected; for example, there has been an "extensive nullification of various Quebec language policies."[27] It is decisions such as these that suggest the prevalence of attitudinal decisions, which increasingly adhere to a nationalistic agenda and popular--although extra-provincial--opinion. These safeguards exert neither a centralizing, nor decentralizing tendency in the federal makeup on their own, but with the prevalence of attitudinal interpretation, their impact is uncertain.

Although these safeguards exist, the implementation of the Charter has also had strong centralizing tendencies, and provinces have lost significant jurisdiction: the new Bill of Rights (1982) directly contradicts the sec. 92 provincial power of civil rights and liberties. Most notably, Quebec sovereignty has particularly come under redress; political scientist Guy LaForest considers the Charter "undoubtedly the most significant event in the evolution of Canadian political culture in the twentieth century,"[28] upon which Morton adds, "and much to the detriment of Quebec."[29] Originally, Quebec symbolically invoked the notwithstanding clause for all its laws, but after their 5-year expiration--and a new Liberal government--they were not renewed. As a result, there was a strong push for Quebec succession in the early 1990s, which nearly succeeded. This demonstrates the ineffectiveness of such federal safeguard clauses as ways to prevent the natural centralizing tendency of the Charter, and shows the direct link between the Charter and the centralizing implications it brings on the provinces.

Apart from direct legal and constitutional influences, the modern-day centralizing of Canadian federalism is not solely due to the SC and the Charter. It is in this realm that Swinton makes an astute contention: regardless of pressures from Quebec and the

West to decentralize, increasing globalization has caused Canada to become more centralized in order to play a stronger role in the international community.[30] International commitments such as NAFTA or ICESCR (Human Rights) indirectly force Canada to become more cohesive in order to strengthen its role both economically and politically. As mentioned above, the decision in *Crown* had a centralizing effect on Canadian federalism, although legalistically "the addition of ocean waters...was a modest accretion and quite defensible."[31] Swinton's main argument here is that new considerations must enter the process of decision-making, which regard federal and provincial interests equally. She does not articulate whether an attitudinal role in making these modern decisions is necessary, only that there must be a "case-by-base examination of the demand for an expanded role."[32] Swinton advocates that more deliberation is needed when making these complex decisions, and it is clear that she regards the SC as fully capable of making a mutually-beneficial, and impartial, decision.

The final issue to be discussed is the impartiality of the SC between the provinces and parliament. It is important to recognize that the SC is an independent body and, in theory, has no political ties to either the federal or provincial governments. Independence, however, refers to the SC as an isolated third party, whereas impartiality is a "state of mind or attitude...connotat[ing] absence of bias, actual or perceived."[33] Although created through an Act of Parliament, the SC became entrenched in the Constitution Act of 1982, giving Constitutional legitimacy to its existence. This legitimacy has allowed the SC to be impartial in its nature, although it is evident that individual justices throughout Canadian history have had specific preferences.

It cannot be argued that all justices of the SC have consistently remained unaffected by personal or political preference in their decisions, since this has been demonstrated by the attitudinal model's consistency throughout Canadian history. What is clear is that, until the adoption of the Charter, the balance of powers had never become too unstable that a constitutional crisis emerged in this field. Constitutionality has remained supreme in Canada throughout history, and this is proven by the fact that all major centralization decisions have been argued and resolved on constitutional grounds. The existence of the attitudinal model has caused swings in the pendulum, beginning with the JCPC's precedent of disregarding framer's intent; however, it is clear that the Laskin era brought with it a stabilizing tendency in order to bring Canada back to its initial constitutional arrangements. Although Laskin appeared to have a centralizing agenda, his decision in *Re: Amendment* demonstrates a strong impartiality towards the subject and a most severe deference to the rule of law.

The reconciliation of the attitudinal model and judicial impartiality can exist in Canada, against their seemingly contradictory natures. Ostberg and Wetstein establish several reasons that are uniquely Canadian, which help clarify this divergence from the traditional US model: a "tradition of cultural deference, a political system based on parliamentary dominance, a less politicized appointment process, and the institutional norm of consensus".[34] Reasons such as these evolve from the historical context and current existence of a monarchical presence within the law system. The existence of unwritten laws and conventions, such as the flexibility of the POGG clause, help ensure political and judicial stability. Morton demonstrates the importance of the uniquely Canadian context by noting that, although the Charter era may have garnered increasing activism on the part of judges, there is no evidence to "support the centralizing hypothesis generated by the analogous American experience."[35] The lack of evidence regarding the centralizing nature of the Charter demonstrates the impartiality of the SC between provinces and the federal government, although Morton is clear in pointing out that "Charter politics extend well beyond the courtrooms, and this is where its effects on provincial power have been most pronounced."[36]

The Supreme Court of Canada is a federalist institution that has shaped the balance of powers between the provincial and federal governments through its interpretation of the Constitution. It is clear that the attitudinal model of decision-making has consistently played a role in how justices of the SC have reached their decisions, although there is no clear evidence to suggest that the SC, through interpreting the Constitution or the Charter, has had a consistent agenda in shaping the federal makeup of Canada. As an independent and, in areas of intergovernmental jurisdiction, impartial institution, the SC has gone through three main eras in regards to its impact on centralization: JCPC, Laskin, and Charter. Each of these periods mark significantly unique directions for the federal condition in Canada, and involve distinct factors that adjust the balance of power between governments. As the prevalence of the attitudinal model alludes, the SC has never been a static body; although if history is to remain consistent, it can be stated that the SC will remain largely fair and impartial in the future.

Finding Balance

NOTES

[1] Federalism, 2010. Government of Canada. http://www.pco-bcp.gc.ca/aia/index.asp?doc=whypourquoieng.htm&lang=eng&page=federal&sub=why-pourquoi# (accessed November 16, 2010).

[2]Richard Simeon's Federalism in Canada: A Visitor's Guide, 2002 (unpublished document prepared for Intergovernmental Affairs, Privy Council Office).

[3]Paul A. Freund. "A Supreme Court in a Federation: Some Lessons from Legal History". *Columbia Law Review*. 53 (May, 1953), 598.

[4]Forrest McDonald. *States' Rights and the Union: Imperium in imperio.* (Kansas: University of Kansas Press, 2008), 117.

[5]Lori Hausegger et. al. *Canadian Courts: Law, Politics, and Process*. (Don Mills: Oxford University Press, 2009), 175.

[6] Justice Barry Strayer, Gratton v. Canadian Judicial Council (1994, para. 16).

[7]Hausegger, 59

[8]Hausegger, 135.

[9]Gabriel Adeleye et al. *World Dictionary of Foreign Expressions: a Resource for Readers and Writers*. (1999), 371.

[10]Cynthia Ostberg et. al. *Attitudinal Decision Making in the Supreme Court of Canada*. (Vancouver: UBC Press, 2007), 5.

[11]Ibid., 9.

[12]Freund, 608.

[13]Citizens' and The Queen Insurance Cos. v. Parsons, (1880), 4 S.C.R. 215. http://scc.lexum.umontreal.ca/en/1880/0scr4-215/0scr4-215.html (accessed November 15, 2010).

[14]Robert Vipond. *Libert and community: Canadian federalism and the failure of the Constitution.* (New York: SUNY Press, 1991), 170.

[15]Parliamentary Debates on the Confederation of the British North American Provinces 33 (1865).

[16]Vipond, 152.

[17]Katherine Swinton. "Bora Laskin and Federalism." University of Toronto Law Journal. 35 (1985) 356-357.

[18]Swinton, 357.

[19]Ibid., 356.

[20]Ibid., 360.

[21]Ibid., 361.

[22]Ibid., 375.

[23]Ibid., 386-7.

[24]F.L. Morton. "The Effect of the Charter of Rights on Canadian Federalism." *The State of American Federalism*. (Summer 1995), 174.

[25]Ostberg, 40.

[26]Ibid., 40.

[27]Morton, 175.

[28]Guy LaForest. *Trudeau and the End of a Canadian Dream.* (Montreal and Kingston: McGill-Queen's University Press, 1995), 125.

[29]Morton, 173.

[30]Katherine Swinton "Federalism under Fire: The Role of the Supreme Court in Canada" *Law and Contemporary Problems*. 55 (1992), 121.

[31]Ibid., 136-137.

[32]Swinton, 137.
[33] Hausegger, 174.

[34]Ostberg, 43.

[35]Morton, 176.
[36] Ibid., 177.

Works Cited:

Adeleye, Gabriel et al. World Dictionary of Foreign Expressions: a Resource for Readers and Writers, (1999).

Citizens' and The Queen Insurance Cos. v. Parsons, (1880), 4 S.C.R. 215. http://_scc.lexum.umontreal.ca/en/1880/0scr4-215/0scr4-215.html (accessed November 15, 2010).

Federalism, 2010. Government of Canada. http://www.pco-bcp.gc.ca/aia/index.asp?_____doc=whypourquoieng.htm&lang=eng&page=federal&sub=why-pourquoi# (accessed November 16, 2010).

Freund, Paul. "A Supreme Court in a Federation: Some Lessons from Legal History". *Columbia Law Review*. 53 (May, 1953).

Hausegger, Lori et. al. *Canadian Courts: Law, Politics, and Process*. Don Mills: Oxford University Press, 2009.

Justice Barry Strayer, Gratton v. Canadian Judicial Council (1994).

LaForest, Guy. *Trudeau and the End of a Canadian Dream.* Montreal and Kingston: McGill -Queen's University Press, 1995.

Lord Acton. *Fasnacht, Acton's Political Philosophy.* 244 (1952).

McDonald, Forrest. *States' Rights and the Union: Imperium in imperio.* Kansas: University of Kansas Press, 2008.

Morton, F.L. "The Effect of the Charter of Rights on Canadian Federalism."

The State of American Federalism. (Summer 1995).

Ostberg, Cynthia et. al. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: UBC Press, 2007.

Parliamentary Debates on the Confederation of the British North American Provinces 33 (1865).

Simeon, Richard. Federalism in Canada: A Visitor's Guide, 2002 (unpublished document prepared for Intergovernmental Affairs, Privy Council Office).

Swinton, Katherine. "Bora Laskin and Federalism." University of Toronto Law Journal. 35 (1985).

Swinton, Katherine. "Federalism under Fire: The Role of the Supreme Court in Canada" *Law and Contemporary Problems*. 55 (1992).

Vipond, Robert. *Liberty and community: Canadian federalism and the failure of the Constitution.* New York: SUNY Press, 1991.

Pourquoi un fédéralisme *à la française* n'est pas prêt de voir le jour

Damien Dupuy

étudiant en cinquième année de sciences politiques à Paris.

Alors que l'Espagne et l'Italie se rapprochent de plus en plus du modèle fédéraliste, sous les pressions respectives des « autonomies » (collectivités territoriales) basques et catalanes d'une part, et des régions du Nord de l'autre, la situation de la France au carrefour des influences anglo-saxonnes et méditerranéenne en Europe peut étonner. En effet, la France fait preuve d'une inflexibilité institutionnelle assez frappante : elle demeure un Etat à l'architecture éminemment unitaire en dépit de l'actuelle mode des régionalismes et des populismes locaux.

Parler de fédéralisme à un Français, ce serait un peu comme parler de liberté à un militaire : une sorte de dialogue de sourds comique qui ne pourrait pas aboutir à grand-chose, hormis des empoignades, des éclats de rire ou une profonde méprise.

Balayant l'histoire à grands traits, forcément imprécis, il peut être bon de rappeler que l'unification du pays s'est faite à grand recours de diffusion de la langue française, en particulier depuis François I^{er}. Les nombreuses langues régionales (catalan, occitan, breton, basque, corse…) n'ont d'ailleurs retrouvé un timide droit de cité qu'à la fin du XXe siècle. Alors que l'Ancien Régime avait commencé à jeter les bases d'un centralisme, le courant révolutionnaire jacobin place cette idée d'un Etat dirigé depuis Paris au centre du système politique qui émerge. Malgré quelques changements notoires, cette idée ne quittera plus la structure de l'Etat français.

Cela est également vrai dans ses colonies, où la France met en avant une politique d'assimilation… en réalité d'annexion de territoires, sans reconnaissance d'une égalité de droit pour les locaux – l'exemple le plus flagrant à cet égard fut l'Algérie, annexée à la France et où eu lieu une tragique et sanglante guerre d'indépendance de 1954 à 1962. Les Britanniques firent, eux, le choix de l'*indirect rule* et si les deux Empires reposaient sur une même idée de domination des indigènes par les Européens, la République française défendit longtemps, et défend encore dans son Outremer, l'idée d'un contrôle direct de Paris.

L'existence des collectivités territoriales aux côtés de l'Etat français pourrait faire penser que celui-ci est moins centralisateur qu'il n'y paraît. Il n'en est rien. Les 101 départements (le 101ème étant Mayotte, département d'outre-mer depuis cette année) sont une création de la Révolution de 1789 à laquelle aucune Restauration, aussi réactionnaire fut-elle, ne voulut renoncer : en effet, ils sont le symbole de l'Etat central en ce qu'ils ne sont pas de réels échelons de démocratie locale mais les terrains de chasse bien gardée des préfets, qui représentent directement l'Etat et le Ministère de l'Intérieur. Leur taille a d'ailleurs été établie en fonction d'un critère assez explicite : il fallait qu'à partir de la préfecture, les agents de l'Etat puissent se rendre à n'importe quel point du département en une journée de chevauchée. Les départements ne sont pas nés de l'idée de décentralisation mais de déconcentration du pouvoir.

A l'inverse, les 26 régions sont, elles, le fruit de la loi de décentralisation de 1982. Néanmoins, la réalité du pouvoir régional est assez limitée : malgré certaines attributions en matière d'aménagement du territoire, d'éducation, etc., elles demeurent aussi tributaires du soutien financier et politique de l'Etat que les départements. 24 ans avant même leur création officielle, les régions ont, elles aussi, été dotées d'un préfet… En créant départements et régions, l'Etat français a appliqué à merveille la maxime machiavélienne de « Diviser pour mieux régner ». En 1947, un ouvrage à succès titrait *Paris et le désert français* et force est de constater qu'il n'y a pas eu de grands changements depuis.

Si les Français ont su montrer leur attachement viscéral et quelque peu pathétique à l'identité de leurs départements à l'occasion de l'adoption du nouveau format européen de plaque minéralogique, qui prévoyait notamment l'effacement du chiffre des départements, il ne faut pas y voir un hommage à la démocratie locale mais plutôt le renouvellement du pacte tacite qui les lie à Paris. L'Etat fédéral est mort en France ? Non : l'Etat fédéral n'y est jamais né… Vive l'Etat unitaire (et donc Paris)…

FEDERALISM-E

Volume 12 May 2011

Thank You, Remerciement

Les éditrices de cette édition voudraient remercier tous les étudiants ayant osé soumettre un texte, tous les réviseurs ainsi que tous les auteurs ayant été sélectionnés pour leur collaboration qui a contribué au succès du projet de cette année. Un merci tout spécial à Monsieur Dave Tanguay pour son aide.

This years editors would like to extend our thanks to all the students that submitted a paper, all the reviewers who provided excellent feedback, and of course to the authors that were selected for this years publication. All contributed greatly to the success of this years project. Also a special thank you to Dave Tanguay for his help.

Geneviève Martel & Joycelyn Moffat

Co-Editors

Collège militaire royal du Canada, Royal Military College of Canada

-