

**JUDGING FEDERALISM: A FULL CIRCLE ACCOUNT OF THE SUPREME
COURT OF CANADA'S POST-*CHARTER* FEDERALISM JURISPRUDENCE**

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I dedicate this project to Brittany Breanne, the love of my life. Her timely and encouraging sticky note provided the boost I so desperately needed.

Abstract

In the post-*Charter* era, Canada's national high court has developed a distinct political philosophy that guides the manner in which they dispose of federalism disputes. Although adherents to the "pendulum theory" of judicial review believe that federalism "balance" is created and maintained through a series of offsetting federal-provincial "wins" and "losses," I suggest that the Supreme Court's tolerance and embrace of legislative concurrency flows out of a deeper, conscious desire to facilitate intergovernmental relations in Canada. This approach is implicit in both the doctrines they apply and the policy statements they make. The Court is reluctant to declare laws invalid and avoids application of what they refer to as the "constraining" interjurisdictional immunity and paramountcy doctrines.

The Supreme Court's decision-making philosophy in federalism cases is not value-free, however. While the Supreme Court's post-*Charter* preference for "balance" and "flexibility" reinforces the practice of intergovernmental collaboration—a political convention—it simultaneously undermines the political ideals the Fathers of Confederation intended federalism to serve. The jurisprudence of "restraint" suppresses the civic virtues that naturally emanate from a classical, originalist reading of the division of powers. In *Judging Federalism* I seek to bridge the gap by attempting to understand the Supreme Court's federalism case law vis-à-vis the moral underpinnings of our Constitution.

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Introduction

One of the primary functions of Canada's national high court is to resolve jurisdictional disputes that arise from time to time between federal and provincial levels of government. Over the past few decades, the *Charter of Rights and Freedoms* has taken center stage and come to define the political and constitutional landscape of modern Canada. Yet, lost in the aftermath of the "Charter revolution" can be found a steady and substantive flow of federalism developments. Despite the disproportionate attention given to *Charter* cases, the Supreme Court's federalism jurisprudence continues to be an important and relevant topic.

This project provides a "full circle" account of the Supreme Court's post-*Charter* federalism jurisprudence by judging the judgments of judges. This analysis is full circle because four layers of inquisition or "rotations" take place: moving from the broad to the particular, I examine the 1) nature of the judges and the institution that creates decisions; 2) the manner in which disputes over legislative authority originate; the 3) nature and substance of the decisions that are created; and the 4) impact of those decisions on government and society. The ultimate goal of this thesis, therefore, is twofold: first, to illuminate the decision-making philosophy or approach that underpins the federalism case law of the post-*Charter* era, and second, to "judge" the political implications of this philosophy according to the political ideals the Fathers of Confederation intended the federal principle to serve.

In this thesis, I suggest that the Supreme Court's tolerance and embrace of legislative concurrency—indeed, their reluctance to uphold clear jurisdictional boundaries—stems from a conscious political philosophy that aims to facilitate

intergovernmental cooperation and balance in Canada. This approach is implicit in both the doctrines they employ and the policy statements they make. On the flipside, however, the Supreme Court's approach to federalism frustrates the moral principles embedded in our constitution. While much ink has been spilled on how *Charter* decisions undermine the political mandate of elected officials—and hence, the will of the electorate—I suggest that the Supreme Court's handling of the division of powers has just as important an impact on responsible self government, only we live out the consequences without fully knowing it.

I will rely on the “circle” analogy as a means to present the structure and layout of this project. In the subheadings below, I have provided a brief summary of the four major “rotations,” or analytical layers, that take place over the course of this thesis. They are grouped according to chapters. They include “the context,” “the criteria,” “the cases,” and “the findings.”

“The Criteria”

Chapter I establishes the theoretical framework of this project by fleshing out the federal principles inherent in Canada's constitutional design. In this chapter, I discuss the instrumental benefits of federalism as understood by the Fathers of Confederation. There are four main benefits or “ends” that the founders identified. They believed that federalism would i) protect local interests, ii) increase the clarity and focus of the national legislature, iii) close the gap between individual choice and consequence, and iv) foster heightened levels of government responsiveness. However, it is not until Chapter VIII that I use these benefits as a criterion to evaluate or “judge” the implications of Supreme Court's post-*Charter* federalism jurisprudence, which I discuss in chapters V through

VII. While Chapter I establishes the criterion upon which judgments will be judged, Chapter VIII involves the application of that criterion on the case law of the Court.

However, much needs to take place before we are able to apply the insights of Chapter I to our findings in Chapter VIII. That is, if the goal of this thesis is to “judge” the jurisprudence of the Court, we need to know who the Court is, and what they create, before we are in a position to render any “judgments.”

“The Context”

Chapters II and III go hand in hand and fit into the overall picture by helping us to understand the decision-making context through which the gestation of judicial reasoning takes place. In this “rotation,” I discuss the decision-making approach of judges as well as the distinctive characteristics of the post-*Charter* era. It is important to understand the methodology of judging, because, as I contend, written decisions are the product of the political dispositions of the justices who create them. By seeing Supreme Court judgments as a political enterprise we are better positioned to investigate and draw out the overarching decision-making philosophy of the Court.

While Chapter II looks at the nature of the judiciary and the judges who staff it, Chapter III examines the academic citation patterns in federalism cases. This exercise gives insight into the intellectual arena in which the Supreme Court operates and decides. If the ultimate goal of this thesis is to understand the decision-making philosophy of the Court, we need to look to their academic citations for insight into the types of thinkers or schools of thought to which they subscribe, ignore or reject. Indeed, the authors or sources that justices incorporate reveal multitudes about their political dispositions. Do they cite and discuss political scientists, historians, and philosophers? Or do they stick to

the “nitty gritty” and confine themselves to legal scholars instead? In sum, this chapter provides insight into whether a decision-making philosophy or tendency can be discovered from the Supreme Court’s use of secondary sources.

“The Cases”

In Chapters IV and V, I move from decision-making context to docket discovery. It is in this circular “rotation” that I explore the division of powers caseload of the Court. In Chapter IV, I examine the federalism caseload frequency of the Court, the issues they encompass, and the courts of appeal from which they originate. To do this, I read through and coded each of 81 reserve judgments handed by the Court since Brian Dickson became Chief Justice in 1984. I then turn my attention to the legal positions assumed by the federal/provincial litigants in Chapter V. As part of this discovery, four steps, or determinations, are made. First, I examine the ‘dispute initiation’ process and uncover the type of litigants that are most responsible for initiating a dispute. Second, I examine the frequency at which governments intervene in the disputes that unfold. Third, I examine the nature of intergovernmental conflict contained within each dispute. Fourth, I discuss the notion of “winners” and “losers” and demonstrate the limitations of viewing federalism cases through the lens of a zero sum game.

“The Findings”

Chapter VI discusses the function of disagreement and measures the level of fragmentation or unity amongst judges in federalism cases. This chapter serves two roles. First, it identifies divides within the Court, which is where ideological divides are most likely to surface. An analysis of written disagreements is significant for our purposes because it reveals alternative perspectives, identifies the jurisdictional territory

and intellectual axis from which potential dispositions could be reached; and thus elucidates the arguments and legal positions that receive traction and the ones that do not. Second, this chapter identifies the mayor players in federalism cases, that is, the frequency at which judges contribute written reasons. This reveals the judges or blocs of judges that create the jurisprudence that is studied in the chapters that follow.

In Chapter VII, I examine the doctrinal frequencies of the Court as it relates to a traditional division of powers analysis. My research indicates that the Court is reluctant to declare laws invalid, inoperable and inapplicable. In contrast, the Court is committed a modern, flexible approach to the division of powers—one that generously interprets both heads of legislative power simultaneously. More profoundly, their doctrinal selections are informed by the Supreme Court’s underlying decision-making philosophy. No longer “umpires” that carve out specific jurisdictional lines, the approach of the modern judge is that of a “facilitator.” Supreme Court judges in the modern era facilitate intergovernmental relations through a “restrained” approach that tolerates and embraces overlapping jurisdiction and intergovernmental cooperation. This is evident in the doctrines they utilize and/or ignore and in the policy statements they make.

In Chapter VIII, I juxtapose the federalism values espoused in the Supreme Court’s post-*Charter* federalism case law with the political virtues the founders believed that federalism would serve. Despite the restraint with which their approach is lauded, the Supreme Court’s tolerance of legislative concurrency creates a new set of implications that are neither considered by judges nor the litigants that appear before them. Indeed, a “soft” jurisprudence invites the very political vices the Confederation-makers intended to combat and avoid. The Supreme Court’s approach over the past

quarter century makes government i) less responsive; ii) erodes the relationship between individual choice and consequence; iii) diminishes the focus and intent of the national legislature; and iv) weakens local autonomy.

Chapter I The Ends of Federalism

Canada owns the distinction of being the first federal parliamentary democracy, though the path to which this unique institutional arrangement took place was neither easy nor simple. The Fathers of Canadian Confederation exhibited a diversity of political persuasions across the landscape. They were Liberals and Conservatives, Catholics and Protestants, confederates and anti-confederates—politicians, in short, who represented a broad range of political values and ideals. However, despite their differences, almost all agreed that the parliamentary system, and in particular, the constitutional principle of responsible government, was desirable and indeed compatible with political liberty, individual freedom and equality.¹

In contrast, the prospect of making Canada a *federal* union produced a passionate and polarizing debate.² Unlike deliberations on responsible government, the “federalism issue” ignited responses that struck at the heart of age-old grievances and sectarian political alliances.³ Indeed, the federal principle was the ultimate “deal breaker;” the future of Canada hinged on this fundamental issue.⁴ But *why* federalism? Surely

¹ Janet Adzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal and

² Indeed, many politicians who supported the principle of responsible government were skeptical of the ability of representative institutions, in a unitary system of government, to satisfy provincial needs and desires. And while many viewed responsible government as a viable political system on a small scale, provincial level, fewer were convinced that it would work on a national level amidst a diversity of competing views and interests.

³ Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997): 101.

⁴ Marc Chevrier, “The Idea of Federalism among the Founding Fathers,” in *Contemporary Canadian Federalism: Foundations, Traditions, Institutions*, edited by Alain-G Gagnon (Toronto: University of Toronto Press, 2009): 11-19. Chevrier argues that there was little to no chance that Canada was going to adopt the legislative union Macdonald coveted, for the idea of a federal union was entertained long before the confederation proposals were debated and ratified.

everyone knew that a “legislative union” was “properly British,” and that any discussion of a federal union, which was prone to “instability and strife,” was “suspiciously American.”⁵ Yet, at the end of the day, we know that Canada became a federal union; that the central government and provinces were assigned separate and “exclusive”⁶ spheres of jurisdiction; and that Canada remains one of the longest functioning federal countries in the world. What we are not so clear on, however, is what makes our federalism “effective” despite what proponents of a unitary state contend.

In this chapter I will answer the question by analyzing the confederation debates as a means to illuminate the principles and logic underpinning the federal design of Canada’s constitution. I begin with a look at the context of the Confederation debates and dispel the common misperception that the founders were less than thoughtful pragmatists who had little regard for the federal principle. Alternatively, I submit that the founding fathers not only had important and substantive things to say about fundamental political questions, but made the conscious decision to make Canada a federal union because of the political ideals that it facilitated. To support this contention, I explain the rationale of their decision, flesh out the principles that form the bedrock of our federal constitution, and discuss the benefits of federalism that stem from the practice and logic

⁵ Moore, *1867: How the Fathers Made a Deal*, 101-104. Proponents of a central, unitary state pointed out repeatedly that federalism was the flaw that had led the United States to civil war. Not unlike today, accusations of being ‘American-minded’ were commonly used to drum up criticism for impending constitutional proposals—an *ad hominem* attack intended to cloud the reality of the issues being debated. John A. Macdonald, for example, recognized the nation-building potential of a unitary state: “I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt” (*Canada’s Founding Debates*, 279). Many others, such as D. Ford Jones, believed the federal structure of America, and in particular its principle of state sovereignty, was a principal cause of civil war (312-13).

⁶ *Ss. 91 and 92 of the Constitution Act, 1867*

of self government.⁷ At the conclusion of this chapter, we will see how and why the distribution of legislative powers in Canada is instrumental to fostering heightened levels of civic engagement, individual responsibility, government responsiveness and accountability. In addition to discussing the benefits that the founders identified, I will discuss the negative consequences that arise when federal institutions are tampered with or destroyed.

This chapter fits into the overall thesis because it makes us aware of the ideological origins and political principles that underpin the division of legislative powers in Canada. This is relevant because at the end of this project, we will be able to “judge” the implications of the Supreme Court’s post-*Charter* federalism case law and determine the extent to which it frustrates or reflects the political ideals the founding fathers intended federal institutions to serve.

A. Contextual Considerations

Before getting started, however, it is important to clarify the context in which the Confederation debates proceeded. This is an important starting point, because our

⁷ This approach draws from an insight that scholars like David Walsh have made, that liberalism in general must be understood as a unique combination of theory and practice working together, reciprocally illuminating each other. In *The Growth of the Liberal Soul*, for example, Walsh confronts the difficulty of the liberal democratic tradition to justify or explain itself by illuminating the “experiential reality” that unfolds from its practitioners. Despite its longstanding and unrivalled success, “[S]uspicious about its vacuity cannot but be reinforced when one contemplates the strange inability of virtually all exponents to identify the sustaining strength of the liberal democratic tradition,” (University of Missouri Press, 1997): 3. In short, Walsh looks to the benefits of the practice of liberalism as means to help explain its goodness.

understanding of context influences the manner in which we draw out, or make sense of, the unstated principles that stem from our historical political practices.⁸

Unfortunately, most political scientists and historians are of the belief that the federal elements of the *Constitution Act, 1867* were chosen in the absence of principle. It is not uncommon for domestic and foreign observers alike to question the federal sincerity of the framers by pointing to the centralist nature of the *Constitution Act, 1867*. Frederick Vaughan observes, for example, that “[I]f there is one feature of Canada’s constitution that has been under critical scrutiny from the very beginning it is the ‘federal’ character of the document.”⁹ Sir Ivor Jennings, a leading British Constitutional authority over the past century, referred to Canadian federalism as a “vague doctrine scarcely worthy of judicial notice.”¹⁰ K.C. Wheare, another constitutional scholar, understood Canada’s division of powers to be “quasi-federal’ in law because of the inequitable distribution of power between the federal and provincial legislatures.¹¹ There were also a few vocal delegates, on the periphery of the Confederation debates, that believed the authority granted to the central government was too great.¹²

⁸ Peter J. Smith, “The Ideological Origins of Canadian Confederation,” *Canadian Journal of Political Science* 20, No. 1 (March, 1987): 4.

⁹ Frederick Vaughan, *The Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic* (Montreal: McGill-Queen’s University Press, 2003), 91. Although Vaughan does not subscribe to this view himself, he acknowledges that it is a common and longstanding outlook among scholars.

¹⁰ As stated in Vaughan, *The Canadian Federalist Experiment*, 91.

¹¹ As cited in David E. Smith, *Federalism and the Constitution of Canada* (Toronto, ON: University of Toronto Press, 2010): 159.

¹² Robert Thomson of New Brunswick feared that by “adopting this scheme,” the rights of provinces would not be respected because the “federal government” would have a “veto power” to quash provincial legislation (*Canada’s Founding Debates*, edited by Adzenstat et al., 269). Albert J. Smith, a representative from New Brunswick, referred, indirectly, to the central government’s “residual powers,” was also concerned about the unresolved and open-ended status of provincial jurisdiction: “They have also left us the

However, if observers are predisposed to viewing federalism as a pragmatic compromise—a “concession” that was used to “get by” for the “time being”—they eschew the deeper principles and political realities that were at work prior to, and during, the ratification debates. In this section, I provide three points that help illuminate the political context and underlying principles of Confederation. I counter the suggestion that the Founding Fathers were ignorant of political philosophy, offer reasons why they were relatively mum on the subject of federalism, and provide a case for federalism as a “first practice” of Confederation.

Rationalizing Brevity

There is a lingering perception that while the American founders were distinguished philosophers who produced voluminous justifications for their institutional preferences, the Canadian founders were politicians devoid of intelligent reflections on the fundamental matters upon which they quibbled. E.R. Black remarks, for example, that “[C]onfederation was born in pragmatism without the attendance of a readily definable philosophic rationale.”¹³ In a relatively recent article, Ramsay Cook concluded: “It is well known that the Fathers of Confederation were pragmatic lawyers for the most part...more given to fine tuning the details of a constitutional act than to

power of managing our own private or local affairs, but the question may be raised what is private and local, and then who is to determine?” (*Canada’s Founding Debates*, 272). Such ambiguity led other members, like A. A. Dorian, for instance, to refer to the impending resolutions as a “Legislative Union in disguise,” in which “the Federal Parliament will exercise sovereign power inasmuch as it can always trespass upon the rights of the local governments without there being any authority to prevent it” (*Canada’s Founding Debates*, 295-6).

¹³ E.R. Black, *Divided Loyalties* (Montreal and Kingston: McGill-Queen’s University Press, 1974), 4.

waxing philosophical about human rights or national goals.”¹⁴ Philip Resnick states that “[I]t is hard to get excited about the handiwork of railway buccaneers and their kept lawyers.”¹⁵ And F.H. Underhill, who was perhaps the most blunt, concluded that the “Canadian Fathers...were ignorant of philosophy. [The] lack of a philosophical mind to give guidance to the thinking of ordinary citizens has been a great weakness of our Canadian national experience throughout our history.”¹⁶ While these sentiments represent a subset of scholars, the important question is whether Supreme Court judges, who are tasked to review federalism cases, agree.¹⁷

Upon reviewing Canada’s founding debates, I arrive at a different conclusion. The Fathers of Confederation were not ignorant of political philosophy, but brought to the discussion table vast knowledge about comparative constitutionalism, political regimes, history and political philosophers.¹⁸ Consider, for example, what George Brown had to say before the House of Assembly:

We are endeavoring to adjust harmoniously greater difficulties than have plunged other countries into all the horrors of civil war. We are striving to do peacefully and satisfactorily what Holland and Belgium, after years of strife, were unable to accomplish. We are seeking by calm discussion to settle questions that Austria and Hungary, that Denmark and Germany, that Russia and Poland, could only crush by the iron heel of armed force. We are seeking to do without foreign

¹⁴ Ramsay Cook, “Canada 2000: Towards a Post Nationalist Canada,” *Cite Libre* (Fall 2000): 81-82.

¹⁵ Philip Resnick, *Parliament vs People* (Vancouver: New Star, 1984): 16

¹⁶ F.H. Underhill, *The Image of Confederation* (Toronto, ON: Canadian Broadcasting Publications, 1964): 3.

¹⁷ In Chapter 3, I provide an exhaustive examination of the Supreme Court’s academic citation patterns. In this chapter, I discuss whether its judges pick up on the thinkers above, and if they do, whether they embrace their insights or reject them. Such an exercise helps draw out the political assumptions of judges.

¹⁸ Marc Chevrier, “The Idea of Federalism among the Founding Fathers of the United States and Canada,” in *Contemporary Canadian Federalism: Foundations, Traditions, Institutions*, edited by Alain-G Gagnon (Toronto, ON: University of Toronto Press, 2009): 26-28.

intervention that which deluged in blood the sunny plains of Italy. We are striving to settle forever issues hardly less momentous than those that have rent the neighbouring republic and are now exposing it to all the horrors of civil war (Hear, hear). Have we not then, Mr. Speaker, great cause of thankfulness that we have found a better way for the solution of our troubles than that which entailed on other countries such deplorable results? And should not every one of us endeavor to rise to the magnitude of the occasion, and earnestly seek to deal with this question to the end in the same candid and conciliatory spirit in which, so far, it has been discussed?¹⁹

Here, Brown provides an excellent comparative account of failed political institutions.

Notwithstanding the political cheers he attempted to ignite—indeed, the support he was trying to drum up—Brown demonstrates a working knowledge of international affairs.

Other members cite and discuss the works of John Locke, the American Founders, and most extensively, John Stuart Mill. As Janet Ajzenstat reminds us, “[A]lthough they seldom quote directly from the seventeenth-and eighteenth-century political philosophers, they are clearly steeped in the thought of Thomas Hobbes...Montesquieu, and Rousseau.”²⁰ This is evident in their discussions of responsible government, liberty, representation by population, and the protection of rights, especially minority rights—all of which can be found in the Legislative Debates.

So how, then, do the writers above, arrive at such dismissive conclusions? It stems from erroneous inferences that are made about the political context in which the Confederation debates unfolded. One such inference is that because there is no Canadian equivalent to *The Federalist*—nothing even close—much less thought and deliberation went into the institutions of Canada. However, a lack of commentary is not tantamount to ignorance. It is difficult to compare the Canadian and American experiences because

¹⁹ *Confederation Debates in the Province of Canada, 1865*, edited by P.B. Waite (McGill-Queen’s University Press, 2006): 36

²⁰ Janet Ajzenstat et al., “Introduction,” in *Canada’s Founding Debates*, 2.

they are not truly parallel. It is true that Macdonald, Cartier and Brown have never been, nor ever will be, idolized to the same extent as Madison, Hamilton, Jefferson and Jay, but what their circumstances tasked them to do was different. Were Canada's founders capable of coming up with the "Confederation Papers?" It is possible. But they did not need to. Much of what they knew and stood for in the British tradition was already "known." They were not embarking on a new "experiment," like the Americans, so there was no need to reinvent "first principles," such as responsible government. Their job was to clarify and explain, however delicately, the novel features of the British tradition that they were adapting, namely, federalism. I will explain the delicate nature of the "novel" features in the section below.

If the American founders were political "inventors," Macdonald, Cartier and Brown—among others—were political "modifiers." As Robert Vipond reminds us, the Fathers of Confederation "were not 'founding' a political state in the way it is often said the American constitution-makers were 'Founders.'"²¹ Unlike the circumstances that gave rise to America, there was no need for "Canada" to make the same deliberate and decisive break from its past, and therefore, "no need to expound first political principles or to weave together a set of authoritative public values in the way Publius did."²² The Canadian founders wanted greater continuity, which is why they sought to create a "constitution similar in principle to that of the United Kingdom."²³ However, it became a

²¹ Robert C. Vipond, "1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered," *Canadian Journal of Political Science* 22, No 1 (March, 1989): 6.

²² Vipond, "1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered," 6.

²³ *Constitution Act, 1867*, Preamble.

matter of how much of a break from their origins they were willing to entertain and the extent they were willing to go to explain it.

Canadians “celebrated what the Americans held in contempt: faithfulness to English political language.”²⁴ But they did not need to provide a luminous defense of responsible government, for the citizens of British North America already viewed it as an “essential principle”²⁵—a “magnificent instance” of political progress.²⁶ In Canada, fundamental political choices had already been made. Yet, because they did not have to justify their first principles of government, “the best opportunity for the Fathers of Confederation to establish themselves as self-conscious, deliberate founders”—thinkers about politics—had passed.²⁷ But it is not as though they had nothing to say; there was simply less they needed to say. There were additional obstacles that surrounded explanations of novel features like federalism.

The Wisdom of Prudence

This brings us to our second point, the role and importance of statesman-like prudence. The Fathers of Confederation understood philosophy, but they also understood the political realities and constraints they were working under. They had to be mindful of existing factions—especially those between Upper Canada and Lower Canada—as well as fears precipitated by the perceived “causes” of the American civil war. From these two reasons alone, the Fathers of Confederation had to engage in an intellectual tap dance

²⁴ Chevrier, “The Origins of Federalism in the United States and Canada,” 41.

²⁵ As stated by F.B.T. Carter, *Canada’s Founding Debates*, 59.

²⁶ As summarized by Joseph Perrault, *Canada’s Founding Debates*, 72.

²⁷ Vipond, “1787 and 1867: The Federal Principle and Canadian Confederation Reconsidered,” 6.

that was mindful of the passions and worries of its colonists.²⁸ Due to necessity, any deviation from British traditions had to be thoughtfully explained, and any similarities to America, carefully qualified. Because of these constraints—and the high potential for further discord and divide—the founders necessarily had to be cautious in what they wrote and how they presented themselves. Accordingly, two identifiable patterns emerged.

First, the Fathers of Confederation—Macdonald, Cartier and Brown in particular—attempted to trivialize their differences so as to give the illusion of unity. Prudence alone dictated the need for this strategy, otherwise it would invite opportunities for old rivalries to rekindle and flourish.²⁹ As Paul Romney reminds us, “the point of federation was to depoliticize the contentious issues that had led to sectional deadlock in United Canada.”³⁰ Vipond concurs: Macdonald, Cartier and Brown “went out of their way to exaggerate what they had in common and to abstract from or simply ignore their differences.” Given the imperative to maintain their uneasy coalition, “it was crucial to confine the discussion as much as possible to the most general level where agreement could be assured, rather than descending to a detailed examination of the proposals, where disagreement almost certainly would have surfaced.”³¹ Having the tripartite bloc of Brown, Macdonald and Cartier at the forefront was at once a great advantage and a

²⁸ Paul Romney, *Getting it Wrong: How Canadians Forgot their Past and Imperilled Confederation* (Toronto, ON: University of Toronto Press, 1999): 94. The Fathers of Confederation were up against diverse, and sometimes conflicting, backgrounds—Catholics, Protestants, English, and French—as well as important albeit problematic economic considerations. For example, some colonies, like Prince Edward Island and Nova Scotia, were prosperous and self sufficient, while others regions were discontent over the inequitable distribution of resources.

²⁹ Vipond, “The Federal Principle and Canadian Confederation Reconsidered,” 7.

³⁰ Romney, *Getting it Wrong*, 94.

³¹ Vipond, “The Federal Principle and Canadian Confederation Reconsidered,” 7.

significant liability. It was an advantage if they chose to set aside their differences to work in collaborative unity; but risky in the sense that much political carnage would ensue if they allowed debates over fundamental political differences to derail their efforts.

This intellectual avoidance strategy spilled over into how they approached the issue of federalism, the institution that was held responsible for American civil war. As Vipond reminds us, “[M]ost speakers were little inclined to explain how precisely the local was to be distinguished from the general; how conflicts of jurisdiction were to be resolved; and whether federalism was compatible with the protection of minority rights.”³² But the reluctance to make more explicit the details of their proposals was deliberate. First, they had to be careful that the federal institutions they proposed were not misconstrued as being suspiciously American. While a number of delegates were familiar with *The Federalist*, and in particular, the insights of Hamilton,³³ a “pro-American” stance in those days, like a “private healthcare” stance today, would surely quash any hope of passing a resolution. Even if the Americans got something right, it was politically imprudent for them to say so. Hence, if one were to articulate the benefits of federalism, he would, by necessity, have to work tirelessly to “distinguish” it from the American model.³⁴

Second, with idealizations of nation building at the forefront, the founders often overemphasized the strong central nature of the proposed resolutions to dampen fears that the instability created by divided jurisdiction would not jeopardize the grandeur

³² Vipond, “The Federal Principle and Canadian Confederation Reconsidered,” 7.

³³ Chevrier, “The Origins of Federalism in the United States and Canada,” 18

³⁴ As noted, a common and effective *ad hominem* attack in the legislative debates was the accusation of being too “American.”

of empire.³⁵ It is in this vein that critics of Confederation often point to the abundance of affirmation for British principles as evidence that the inclusion of federalism was secondary—a watered down “comprise” that temporarily quenched the appetites of French Canada and smaller Maritime regions.³⁶ However, this view is problematic because it fails to take into consideration the close attachment the colonists had with local autonomy and misconstrues the spirit in which multitudes of ‘centralist’ arguments were expressed. For many founders, a strong central government represented the means to achieve nation-building objectives—a new nationality, in the words of Thomas D’Arcy McGee, “bound, like the shield of Achilles, by the blue rim of the ocean.”³⁷ But as Vipond warns, the expressions of such zeal stem from nationalizing desires, and therefore, should not be interpreted as antagonism toward the federal principle. Support for nation building and federalism are not mutually exclusive. As we shall see in our analysis of the Founding Debates, a sizeable number of founders believed that federalism would facilitate, as opposed to frustrate, nation-building objectives.

The Seeds of Federalism

There are important reasons why Canada’s founders avoided philosophic discussions of federalism. But they “did not begin with a tabula rasa when they drew up their union proposal.”³⁸ They had preconceived notions about the kind of institutional mechanisms that were required to secure the “good life”—and federalism was one of

³⁵ Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto, ON: McLelland & Stewart Inc., 1997): 102.

³⁶ Vipond, *Getting it Wrong: How Canadians Forgot their Past and Imperilled Confederation*, 88-89.

³⁷ As cited in F.R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto, ON: University of Toronto Press, 1977): 7.

³⁸ Chevrier, “The Origins of Federalism in the United States and Canada,” 31.

them. Not for a moment during the rhetoric of strong, central institutions did the colonists waiver on their desire for a federal union. While talks of nation building dominated political speeches and news headlines, federalism was the forgotten certainty that prevailed from the shadows of Confederation. Before we answer the question—“why federalism?”—I will say a few words on how the “enduring existence of provinces with their own governments and powers” was a first practice of confederation in the 1860s.³⁹

The idea of federalism was non-negotiable from the start, for it was brought about by the longstanding practice of local autonomy, the roots of which predate the 1840s.⁴⁰ The fruits of what the federal principle promised to deliver did not need to be stated, because many colonies were already living it out. As Marc Chevrier notes, in “both the United States and Canada, the idea of federalism went through a long period of gestation before the birth of a federal regime as such.”⁴¹ It was a prerequisite—a protective mechanism that secured the long-standing practice of local autonomy. From Upper Canada, Lower Canada and the Maritimes, colonists were deeply attached to the practice of self-government, which is why the thought of surrendering provincial authority “was an absolute non-starter, never for one moment to be take seriously at Charlottetown or at Quebec.”⁴²

To bolster this suggestion, one need not look much further than the insights by provided by historian, civil servant and expert on parliamentary procedure, John George Bourinot. In his book *Federal Government in Canada* he discusses the importance, and

³⁹ Moore, *1867: How the Fathers Made a Deal*, 102.

⁴⁰ Moore, *1867: How the Fathers Made a Deal*, 101.

⁴¹ Chevrier, “The Origins of Federalism in the United States and Canada,” 14.

⁴² Moore, *1867: How the Fathers Made a Deal*, 102.

indeed the vibrancy, of local institutions in pre-Confederation Canada. Long before talks of Confederation had entered the minds of statesmen,

Municipal institutions of a liberal nature especially in the province of Ontario, were established, and the people of the provinces enabled to have that control of their local affairs in the counties, townships, cities and parishes which is necessary to carry out public works indispensable to the comfort, health and convenience of the community, and to supplement the efforts made by the legislature, from time to time, to provide for the general education of the country; efforts especially successful in the province of Upper Canada where the universities, colleges and public schools are so many admirable illustrations of energy and public spirit. The civil service, which necessarily plays so important a part in the administration of government, was placed on a permanent basis and has ever since afforded a credible contrast with the loose system so long prevalent in the United States....⁴³

Attachment to the way of life that control over local institutions facilitated was not something British North Americans were willing to give up. Rather, it was the strong and persistent fear that such institutions would vanish that posed the greatest difficulty for the “dealmakers” of Confederation to overcome. In fact, as Bourinot continues, “[T]he discontent that existed in Canada for so many years had the effect, not of diminishing but of enlarging the political privileges of the Canadian people.”⁴⁴ The idea that local interests could be secured by Confederation through the concept of mutual security became a critical selling point.

Confederation stemmed from the pre-existing desire of both French Canadians and Upper Canadians to “federalize” United Canada such that they may become “masters” of their “own house.” The idea of Confederation was the nation-building light

⁴³ John George Bourinot, *Federal Government in Canada*, edited by Herbert B. Adams (Baltimore, MD: John Murphy & Co., Printers, 1889): 24.

⁴⁴ Bourinot, *Federal Government in Canada*, 23.

bulb moment that came long after discussions of federalization originated.⁴⁵ As Romney reminds us, the point of federation was to “depoliticize the contentious issues that had led to sectional deadlock in United Canada....The crucial thing was to write a constitution that gave the local legislatures ample power and confined the federal authority to matters of general interest.”⁴⁶ To view Confederation as a ‘centralist’ achievement misunderstands our history and the political constraints the founders were working under. It is true that they say little about the philosophical undercurrents of federalism. But the intensity with which they defend local autonomy speaks louder than words. For decades, the colonists experienced the benefits of what the federal principle promised to secure. As we will see, it was not just the protection of local interests that drew them to federalization; there were additional benefits they envisioned.

B. The Practice of Federalism

Now that we have had the opportunity to expose common misconceptions about Confederation, we are now in a position to discuss the practical benefits that stem from federal institutions. I will refer to Canada’s founding debates and explain why the fathers believed the federal system was a superior form of government—and indeed, a better way of life. This section will be confined to analyzing the arguments the founders made in support of a federal union. That is to say, I will only address what the founders said. The unstated benefits and implications of federalism will be addressed in a later section.

⁴⁵ Paul Romney, *Getting it Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto, ON: University of Toronto Press, 1999): 88

⁴⁶ Romney, *Getting or Wrong*, 94. Christopher Moore, *1867: How the Fathers Made a Deal*, 2.

To borrow the words of Martin Diamond, federalism is “a political arrangement made intelligible only by the ends men seek to make it serve.”⁴⁷ The founders identified four ends they intended federalism to facilitate: the protection and control of local interests; heightened government responsiveness; greater unity, focus, and reflection in the national legislature; and a closer relationship between political choice and consequence. Only by understanding the connection between ends and means can one appreciate the role that federalism plays in Canadian government and society. By looking to Canada’s founding debates we are reminded of this connection.

Protection and Control of Local Interests

I will begin with the most obvious and recurring argument that was presented in support of federalization: the protection and control of local interests. Given the diversity of customs and mores across the vast landscape of British North America, it is not surprising that local autonomy was at the forefront of Canada’s founding debates. Section 92 (and to a certain extent, sections 92(A) and 93) of the *British North America Act* (as it then was) enumerates the “classes of subjects” “exclusively” assigned to the “Legislatures of the Provinces.”⁴⁸ While some representatives wished for even greater provincial authority than what was presented, several legislators pointed out the benefits and safeguards contained within it. William Henry, for example, emphasized the matters that would remain under the legislative control of Nova Scotia: “Education, roads and bridges, control of our jurisprudence, and other subjects in which we take the *deepest*

⁴⁷ Martin Diamond, *As Far as Republican Principles Will Admit*, edited by William A. Schambra (Washington, DC: American Enterprise Institute, 1992): 145.

⁴⁸ *Constitution Act, 1867*

interest are left to our own control” (emphasis added).⁴⁹ In reference to the laws and religion of Lower Canada, N.-F. Belleau found the “guarantee of all these things,” including the “control of all matters relating to its institutions, . . . its manufactures and its autonomy.”⁵⁰ George Brown, in a lengthy and eloquent speech, stated: Confederation “secures to the people of each province full control over the administration of their own internal affairs. . . . Each province is to have control over its own crown lands, crown timber, and crown minerals—and will be free to take such steps for developing them as each deems best.”⁵¹

From these statements, and the arguments identified by other delegates, it is clear that local autonomy was a principle in which the provinces were unwilling to part. Consider what Charles Tupper, a delegate and “insider,” had to say: “a legislative union was really not practically before us—for there were difficulties lying in its path such as to render its adoption impossible.”⁵² George Etienne Cartier, another architect of the legislative proposals, agreed with the status of the situation: “We had either to take a federal union or drop the negotiation. . . . There was but one choice upon us—federal union or nothing.”⁵³ He raises this point because the founders knew that a federalized system allows us to answer the question: how should we live?

In addition to possessing the constitutional authority to shape and control local affairs, a federal union *protects* local interests from the pitfalls of “representation by population.” It protects the interests of smaller provinces from the influence of larger

⁴⁹ *Canada’s Founding Debates*, 266.

⁵⁰ *Canada’s Founding Debates*, 293.

⁵¹ *Canada’s Founding Debates*, 288.

⁵² *Canada’s Founding Debates*, 262.

⁵³ *Canada’s Founding Debates*, 289.

provinces. George Howland, a representative from Nova Scotia, agreed with the proposed remedy: a “federal union” protects local interests and enclaves from having to “contend” with more populace regions.⁵⁴ T.H. Haviland echoed Howland’s support because there “would be no degradation of any of the provincial legislatures and governments....The power of the federal government to interfere with the exclusively internal affairs of any of the confederated provinces would be of the most limited and inconsiderable character.”⁵⁵ Absent a federal system, it was feared that provincial interests would be lost in the shuffle, that their “institutions and laws might be assailed,” and that the “ancestral associations, on which they prided themselves, attacked and prejudiced.”⁵⁶ With the protection and control of local issues followed a sense of security.

Heightened Government Responsiveness

Second, the founders believed that a federal union established heightened levels of government responsiveness because it provided to each province a legislative forum that dealt exclusively with local affairs. This in turn allows provincial representatives to focus their energy and attention upon matters that are of the “deepest interest”—education, infrastructure, natural resources, culture and the like—without having to contend with the interprovincial interests or the counteracting influence of representatives from other provinces. In a federal system, elected officials are less bogged down and more accessible to constituents; have a greater working knowledge of the culture, needs and habits of the province in which they are serving; and are able to process bills, and

⁵⁴ *Canada’s Founding Debates*, 323.

⁵⁵ *Canada’s Founding Debates*, 235.

⁵⁶ *Canada’s Founding Debates*, 279-80.

establish mandates, with a more efficient and decisive flair. A few words on why the Founders believed a unitary state was a poor fit for the people of Canada.

It in the Confederation debates, it was frequently pointed out that in legislative unions such as Britain, significant time is required for general assemblies to process local bills.⁵⁷ They create unmanageable workloads for elected officials and unrealized expectations for constituents. George Etienne Cartier said as much in his speech before the Assembly: “It is impossible to have one government to deal with all the private and local interests of the several sections of the several provinces forming the combined whole.”⁵⁸ The founders also realized that problems with government responsiveness worsened in countries with vast territory and cultural diversity. While Britain is geographically small and relatively homogenous, many argued that if a legislative union were “proposed for a country with the area and extent of territory that British American possesses, its realization is attended with great difficulties, if not with insuperable obstacles.”⁵⁹ The concern is that if representatives address scores of local matters while they are in session, rarely would they be “home” or available to constituents to address additional needs and concerns. To maintain the pace of requests, along with the duties associated with the “great and leading questions”⁶⁰ of the day, is neither sustainable nor good government—and the founders knew that.

However, the preoccupation of busyness under a legislative union is not the only factor that diminishes government responsiveness. It is not good practice for local

⁵⁷ Charles Tupper referenced this problem in the legislative debates: “At present, the [British] Parliament is obliged to take up and consider from five to six hundred local bills (*Canada’s Founding Debates*, 263).

⁵⁸ *Canada’s Founding Debates*, 285.

⁵⁹ *Canada’s Founding Debates*, 262.

⁶⁰ *Canada’s Founding Debates*, 263.

matters to be addressed in national legislatures because representatives who are “foreign” to the area whose interests are in question vote on matters in which they are ill acquainted. They are not attached to the issues that are presented before them, nor are they immersed in the customs of the region from which the bills originate. Political disengagement from the customs that are being affected frustrates the benefits and virtue that self-government otherwise invites. If citizens in smaller provinces are unable to influence government to reflect the needs, customs and principles that they most cherish, they will be less likely to engage on issues at the “national” level.

Perhaps a greater problem than indifference to local customs and priorities is the potential for regional strife. With but one national purse to govern the priorities of the entire country, competing interests within a legislative union would inevitably dominate and detract from the effectiveness of Parliament. The reason for this is that political representatives are predisposed to protecting the interests of their own constituency. Local issues are diverse, distinct, and at times, contradictory; and when local advocacy and competing interests cloud the objectivity and focus of political deliberation, disappointing outcomes typically arise. This is precisely why it is difficult to address competing local issues in a national legislature, for what one region desires, another opposes. As T.H. Haviland reminds us: Confederation has the “means of happily extinguishing those little waspish political feuds and jealousies which had so long acted as a drag upon our progress and been a disgrace to us as a people.”⁶¹ The same legislators making administrative decisions for French Canada should not be making education and infrastructure decisions for Western Canada. Those decisions should be

⁶¹ *Canada's Founding Debates*, 325.

left up to the provincially-elected representatives of the provinces whose needs are in question.

In contrast, a unitary state with a single parliament is inefficient, and at times, ineffective because local and general issues are addressed under the “same roof.” For example, the range of issues Britain has to address under one legislature Canada gets to address under several legislatures. As a result, the British House of Commons has less time to address matters of “great importance” because it is distracted or bogged down by multitudes of “unimportant” local issues. On the flip side, the British Parliament may focus a great deal of energy on “general issues” at the expense of local ones. It does not appear, therefore, that a legislative union is well suited for multitasking: it lacks the time and institutional muscle to simultaneously address both types of issues.

In sum, it follows that if one level of government is based exclusively on issues of a local nature, government will be more responsive to the electorate because federalism narrows the range of issues to which federal or provincial governments can legislate. Elected decision-makers would thus be from the province of the citizens they represent, and in turn, would be better equipped to handle the local issues in which they were entrusted. This has the end consequence of heightening government responsiveness and creating a closer connection between citizen and state. In light of the Canada’s diverse population, the founders wanted to avoid creating a ticking time bomb in the House of Commons. They wanted Parliament to function efficiently and effectively, not to be overrun by the passions of populist desires. In short, they wanted the representatives of the national legislature to be deliberative and focused.

National Unity, Focus and Reflection

“Focus” and “reflection” are words not often associated with parliamentary proceedings, but that is precisely the outcome the founders believed that federalism would deliver to its national legislature. They saw the creation of provincial legislatures as a means to de-clutter Parliament from having to process countless and monotonous local requests. The functional implications of this benefit are three. First, the removal of local issues from the national decision-making table enhances the focus and efficiency of Parliament. It follows that if the workloads and priorities of politicians are unencumbered by local affairs—speed limits in playground zones, or the capital funding priorities of rural municipalities—they will be better equipped to deal with the rigor demanded by issues of general or “great importance,” like national defense and international trade. Several representatives echoed this sentiment.

H.-L. Langevin, for example, pointed out that because there “will be no questions of race, nationality, religion, or locality,” Parliament will only “be charged with the great general questions which will interest alike the whole confederacy and not one locality only.”⁶² Charles Tupper also weighed in: “The difficulties in the way of a legislative union are that the legislature has not only to be occupied with the discussion of the great and leading questions which touch the vital interests of every section of the country, but to give its attention largely to matters of merely local concern.”⁶³ George Brown understood the profundity of the federal provision. He stated that it “sweeps away the boundary line between the provinces so far as regards matters common to the whole people—it places all on an equal level—and the members of the federal legislature will

⁶² *Canada’s Founding Debates*, 298.

⁶³ *Canada’s Founding Debates*, 263.

meet at last as citizens of a common country.”⁶⁴ Ambrose Shea of Newfoundland recognized its unifying elements: the “aggregate” of representatives who pontificate in the absence of local issues greatly increases the “efficacy for common purposes of public advantage.”⁶⁵ From a time management view alone, legislatures would benefit from federalism. They would have more time to concentrate on the great and leading discussions of the day instead of using their time to lobby for special interests, which brings us to our next point.

Removing local issues from national consideration removes the deep-seeded passions that typically accompany politics. As we alluded to above, no longer will provinces need to compete for ideas or a finite share of resources under a single legislature; how they deal with their local affairs is now up to them. The founders knew that when politicians try to play two conflicting roles simultaneously, neither role gets done well. Either a representative is too preoccupied with national issues to bother with local ones; or he is too caught up with local zeal to objectively and properly concentrate on national issues. Consider what George Brown had to say: “We have thrown over on the localities all the questions which experience has shown lead directly to local jealousy and discord, and we have retained in the hands of the general government all the powers necessary to secure a strong and efficient administration of public affairs.”⁶⁶ In other words, by reducing the number of opportunities for regional “jealousies” to enter the fold, politicians at the national level have less reason to be distracted. And if they are less distracted they will more thoughtfully and strategically engage in national affairs.

⁶⁴ *Canada’s Founding Debates*, 289.

⁶⁵ *Canada’s Founding Debates*, 319.

⁶⁶ *Canada’s Founding Debates*, 289.

Third, it is easier for a country to unite over issues that do not involve, alter, jeopardize or call into question the habits of its people. The founders knew that national unity would not exist if local matters were addressed under a single legislature. However, by meeting the basic needs of citizens through the principle of local authority, provinces are in a better position to unite over matters that provide a general advantage, such as national security, for the federation system “was the best and most practicable mode of bringing the provinces together so that particular rights and interests should be properly guarded and protected.”⁶⁷ As George Etienne-Cartier aptly summarizes:

It sweeps away the boundary line between the provinces so far as regards matters common to the whole people—it places all on an equal level—and the members of the federal legislature will meet at last as citizens of a common country....No man need hereafter be debarred from success in public life because his views, however popular in his own section, are unpopular in the other—for he will not have to deal with sectional questions; and the temptation to the government of the day to make capital out of local prejudices will be greatly lessened, if not altogether at an end...a most happy day will it be for Canada when this bill goes into effect, and all these subjects of discord are swept from the discussion of our legislature.⁶⁸

Indeed, it is easier for a national representative from (what would become) Quebec to collaborate with a national representative from Western Canada if they are not at odds over how best to prioritize public infrastructure projects. While they may not agree on every national issue upon which they deliberate, it follows that “waspish political feuds” over local matters will no longer derail them.

In the absence of local matters, politicians will be more focused on “high level” issues, which demand deeper deliberation and debate. In turn, this creates an environment that is conducive to reflection. And reflection is needed to make sensible

⁶⁷ *Canada's Founding Debates*, 285.

⁶⁸ *Canada's Founding Debates*, 289.

decisions. Removing the trivial and mundane lessens the level of distraction and the potential for grandstanding. When national issues get decided, it is for the country as a whole. Federalism, in short, better lends itself toward unity over issues that have far-reaching national implications.

Political choice and consequence

The fourth and final benefit that the fathers ascribed to federalism is that provincial control of local affairs bridges the gap between political choice and consequence. It was understood that if the people of a province, through the principle of representative democracy, are in charge of managing their local affairs, they must live out the consequences of their political decisions. If the ruling party of a province mismanages its finances, for example, the people of that province will hold the ruling party accountable and vote them out of office. In the alternative, if the electorate wishes to vote in a government that makes social programs a priority, they must devise a strategy on how to fund, and subsequently, sustain it. The founders understood that with local control, a greater level of responsibility followed.

Fortunately, under a federalized system, the mismanagement of affairs of one province does not affect, or take away from, the fiscal standing of another. Indeed, the founders understood that federalism protects fiscally prudent and industrious provinces from having to bailout or subsidize the political mismanagement of other provinces. George Howlan, a member of Prince Edward Island, was uneasy about Confederation because he was concerned that the hard work and enterprise of his colony would be for naught: “It is well enough for those to go into Confederation who have not been able to manage their own affairs, but for us to do so in the prosperous state of our revenue would

be but committing political suicide.”⁶⁹ Howlan was concerned that the fortune of his people would get mixed into the pot, and that the less prosperous regions would benefit. This, he said, would not be a favorable pitch to the people of Prince Edward Island.

Last, under a federal union, provinces must pay for what they wish for. That is to say, if provinces desire programs or infrastructure initiatives, they must use the local or provincial treasury to fund them. George Brown, for one, was frustrated by the inequitable distribution of resources: “We have complained that local works of various kinds...have been erected in an inequitable and improvident manner. Well, sir, this scheme remedies that; all local works are to be constructed by the localities and defrayed from local funds....Local governments are to have control over local affairs, and if our friends in Lower Canada choose to be extravagant, they will have to bear the burden of it themselves”⁷⁰ Although his comments point to the long standing hostility between French Canada and English Canada, his point nevertheless rings true: if a province wishes to administer costly social programs, they alone must pay for it. On the other hand, if one lives in a province that fails to provide adequate health care services, he or she can move to a province that does. At the end of the day, it is up to the constituents of a province to measure the success of the decisions of their elected representatives. If taxes must increase in order to pay for initiatives that are desired by its constituents, the legislature must justify a tax increase to its voters. Upon seeing the consequence of greater service levels (i.e. tax hikes), voters will have the opportunity to evaluate whether that is a political course they wish to sustain.

⁶⁹ *Canada's Founding Debates*, 323.

⁷⁰ *Canada's Founding Debates*, 288.

C. The Virtues of Federalism Rightly Understood

As we learned from the discussion above, federalism provides the institutional apparatus that facilitates the moral conversion from individualist to citizen. The growth of the liberal soul is therefore tied to the preservation of the ends that federalism is intended to serve. Since 1949, the Supreme Court of Canada has been tasked with the responsibility of federal judicial review. How they shape the division of legislative authority—as well as the type of intergovernmental arrangements they tolerate or embrace—determines whether the ends of federalism survive or perish.

Political Accountability and the Expression of Electoral Will

A moral defense of federalism thus begins with a recognition that a legitimate and distinctive division of legislative power exists. In order for responsible government to work under a federal constitution, citizens must have a clear understanding of the division of powers, because “an electorate ignorant of which order of government bears responsibility for what policy lacks the capability of expressing its political will.”⁷¹ That is to say, if the courts permit distortions to federal/provincial authority—for example, through conditional grants by way of the controversial federal spending power—citizens lose the ability to hold government accountable because it is unclear which level of government is responsible for what. Under such circumstances it is difficult for voters to evaluate the failure or success of ruling parties because track records are masked by federal contributions. Conditional grants also have strings attached to them, which contradicts the principle of local autonomy. Additional political developments, like equalization payments, also interfere with the ends of federalism. In the paragraphs that

⁷¹ Barry Cooper, *It's the Regime, Stupid: A Report from the Cowboy West on why Stephen Harper Matters* (Toronto: Key Porter Books, 2009): 185.

follow I will explain how a disregard for exclusive jurisdictional boundaries crushes the spirit of citizenship, promotes dependency, the universalization of services and standards, and the groundwork for individualism and entitlement.

A federal constitution informs citizens of the issues subject to their control. A clear understanding of provincial jurisdiction is essential, therefore, because it outlines what exactly, on the local level, is “at stake.” Through the lens of exclusivity, the mismanagement of the economy in Newfoundland, for example, is not the problem of Alberta or British Columbia; likewise, the mismanagement of local affairs by Alberta or British Columbia is not the problem of Newfoundland. Individual provinces are a reflection of their electorate; what they choose is what they get. The intent of the federal system, and in particular, the provision of local control, is that if a province desires socialized medicine, they must devise a means to pay for it without relying on the coffers of other provinces to do so. If a province wishes to invest large sums of tax dollars into arts and high culture, at the expense of education and infrastructure, they must find the provincial means to pay for it and allow the electorate to judge the merits of their decision.

It follows that, to violate provincial jurisdiction unavoidably undermines or compromises the fundamental principle of political accountability. Responsibility is not learned when a province is not subject to the consequences of the management of its local affairs. In turn, this erodes individual responsibility, which in turn, destroys liberty by creating dependency. However, it is important to realize that the ability to assert one’s will is not a good in itself. Assertion in the absence of deliberation is dangerous. On the one hand, popular sovereignty is a fundamental principle of Canadian government: the

political executive is responsible to the legislature, the legislature to the voters. The government, therefore, is a reflection of its electorate.

Educative elements of Federalism

“Local liberty is a rare and fragile thing... [T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science.”⁷² Federalism teaches one to use liberty constructively because it closes the gap between individual choice and consequence. Drawing on Tocqueville, Marvin Zetterbaum makes the insightful observation that the responsibility and communal associations facilitated by federalism transforms “the atoms of democratic society into citizens...whose first thought is not of their private interest, but of the common good....By learning to care about and cooperate on political matters that affect him directly, each citizen is to acquire the rudiments of public responsibility. The township is thus the locus of the transformation of self-interest into a species of patriotism.”⁷³

Another way of looking at it is that civic responsibility is engendered by closing the proximity between what is private and what is public.⁷⁴ In other words, the gap between public and private is narrowed because federalism teaches cooperation through necessity and mutual dependency. Using Delba Winthrop’s illustration, we can see that federal instruction begins when man sees that he “cannot meet all his needs by himself and, therefore, that his good is linked to the good of others. The others comprise the township, the community of which he is a part. In the township the link between private

⁷² Alexis de Tocqueville, *Democracy in America*, edited by Harvey Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2000): 62

⁷³ Marvin Zetterbaum, *Tocqueville*, 89-92

⁷⁴ Barbara Allen, “Alexis de Tocqueville on the Covenanted Tradition of American Federal Democracy,” *Publius* 28 No. 2 (Spring, 1998): 10.

and public good is most visible, as when one must impose a tax on oneself to pay for a new school that benefits everyone's children."⁷⁵ However, that is not to say that federal principles are inherently opposed to individual rights and liberties, nor is it a utilitarian justification of federalism.⁷⁶ Rather, through the cooperation enlarged by political and civil associations, citizens will be more inclined to direct their interests (and actions) with the welfare of the community in mind. Not only will they see the consequences of their own actions, but the actions of others.

Federalism as Means of Combating the Universalizing Tendencies of Modernity

According to Tocquevillian scholar, Harvey C. Mansfield, the "greatest danger to democracy comes out of democracy itself."⁷⁷ The Fathers of Confederation were skeptical of the tendencies of pure democracy. They believed that federal institutions were an important, though by no means exclusive, means of protecting democracy from the despotism to which it was prone. Diamond states that by its very nature, democracy "destroys the variety and strength of associations, localities, and individuals."⁷⁸ By its deepest tendency, the tendency to "individualism," Tocqueville reminds us that democracy threatens quite literally to dehumanize mankind, utterly to isolate men from one another, to render them "alike and equal, constantly circling around in pursuit of the petty and banal pleasure with which they glut their souls," leading to apathy and civic

⁷⁵ Delba Winthrop, "Tocqueville on Federalism," *Publius* 6, No. 3 (1976): 96.

⁷⁶ Barbara Allen argues that a community's wellbeing is not simply a "utilitarian calculus of the majority's interests." Rather, "in treating an individual's or group's interest, the federal principle requires [the provincial level of] government to consult the community's long-term interests without favoring one group of individuals over another," 10.

⁷⁷ Harvey C. Mansfield, *Tocqueville: A Very Short Introduction* (Oxford: Oxford University Press, 2010): 57.

⁷⁸ Martin Diamond, *As Far as Republican Principles will Admit*, 158.

disengagement, “forever thrown back on himself alone...shut up in the solitude of his own heart.”⁷⁹

Because federalism narrows the gap between choice and consequence, it works to combat individualism because it forces one to live in (and see the consequence of) his or her own actions and the actions of the whole. In contrast, in centralized democracies that address both local and general issues, everyone is in the “same boat.” At first glance, it appears that such countries are better suited to the ideals of “unity,” because they are not “fragmented” by the diversity and competing ideals of semi-autonomous units. This contention is problematic, however, because it does not take into adequate consideration the inherent individualism that is commonly found in democratic unitary states.

There is a relationship between the political institutions and the habits of its people. Because one is lost in the sea of “mass man” he becomes a number, a statistic in the latest census, losing the ability to discern what it means to be an individual. He becomes an anonymous nobody, disconnected with community not only because unitary states destroy them but because one’s personal wellbeing no longer depends on them. Although other factors are at work, it appears that the institutions of unitary states are fundamentally predisposed to centralization and universalization, which is influenced in no small part by the forces of equality.

Unity under these circumstances is only a façade; the only thing shared is that everyone is equally unimportant. In turn, there is less civic virtue and a more oligarchic structure of society. Individual actions become absorbed into the abyss. As a result, men become less social and more private, less community-minded and more self-centered.

⁷⁹ Alexis de Tocqueville, *Democracy in America*, 472.

And when the pursuit of private pleasures become the driving force behind individual actions, unity will be unattainable because shared goals and the common good are replaced by conflicting goals of pleasure and acquisition. This does not provide a strong basis for combating tyranny; it invites it.

D. Conclusion

It is important to acknowledge our founding principles because those who view the *Constitution Act, 1867* as a pragmatic compromise prematurely disregard the principles inherent in its design. That is not to say that negotiation and compromise were altogether absent, or that future change is ill advised or impossible. However, the benefits of federalism—and the fathers’ vision for it—are lost by incorrect readings of history. Although the founders’ federal perspectives are stated less directly than their American counterparts, the principles contained within them are neither absent nor a JCPC afterthought; they are intertwined in the broader assumptions and institutional mechanisms of responsible government. Therefore, an erroneous understanding of Confederation not only loses sight of our founding principles, but also the benefits they were meant to secure and the behavior they were intended to encourage.

Self government depends for its existence on individual responsibility and civic engagement; federalism facilitates these virtues. As Edward Freeman once stated, “[A] Federal Union must depend for its permanence, not on the sentiment but on the reason of its citizens.”⁸⁰ Contemporary society would be wise to ponder the significance of his statement. When the Courts apply the division of powers in a pure, plain form—that is to say, their original intention—our founding constitutional principles are naturally

⁸⁰ As cited in Vaughan, *The Canadian Federalism Experiment*, 91.

manifested throughout politics and society. However, when the Court inserts its own principles into the federation, or rely heavily on a pragmatic approach to resolving disputes, the intended design of the founding is compromised.

As we shall see in the next chapter, the modern Court does not confine itself to an originalist reading of the *Constitution Act, 1867*. Judges are policymakers who select doctrines based on consequences that are informed by “political rather than legal notions.”⁸¹ In the post-*Charter* era, Supreme Court judges have become active participants in fundamental questions of law, which, in turn, raises the question of which values or principles to expand or classify as rights.⁸² While *Charter* issues may dominate the constitutional arena of the post-*Charter* era, the same judges who settle *Charter* matters decide federalism cases. And just as *Charter* decisions involve the selection of competing values, so too, does the federalism questions that come before them. Judicial decisions are the byproduct of the political attitudes of the judges that create them.

⁸¹ Justice Deschamps in *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, [2005] 2 S.C.R. 669.

⁸² Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991); F. L. Morton and Rainer Knopff, *The Charter Revolution & the Court Party* (Toronto, ON: University of Toronto Press, 2000); Rainer Knopff, “Populism and the Politics of Rights: The Dual Attack on Representative Democracy,” *Canadian Journal of Political Science* 31 (1998).

Chapter II The Post-*Charter* Decision-Making Climate of the Court

Former U.S. Chief Justice Charles Evans Hughes once stated: “We are under a Constitution, but the Constitution is what the judges say it is.”⁸³ His statement, delivered in a speech in 1907 before the New York Chamber of Commerce, provides an excellent backdrop to post-*Charter* case law and the decision-making ideology of the justices who create it. As unelected decision-makers in an age of judicial power, the role and function of the modern judge has become closely tied to concerns about the legitimacy of judicial review. While Canadian society is governed by statutes and a constitution—documents created by politicians who are elected by the people—it is up to judges, when making decisions, to determine what they mean and how they are applied. That judges interpret laws and resolve disputes is not controversial in itself; however, it is the decision-making *determinants* of Canada’s National High Court that has sparked much research, controversy and debate.

In order to better understand judges—and the creation and impact of judicial decisions—one must first understand the climate through which the gestation of their reasoning takes place. What is the Court, who are its judges, and what do they do? What is the nature of the decision-making climate upon which they operate and decide, and by what measures are judges accountable and protected from outside scrutiny? This chapter provides a contextual overview of the post-*Charter* era. It begins by surveying the major schools of thought that attempt to understand the factors that contribute to modern law interpretation, and then examines recent developments in judicial behavior that take place

⁸³ As cited in Craig Ducat and Harold Chase, *Constitutional Interpretation*, 4th edition (New York: West, 1988), p. 3.

both inside and outside the Court. In turn, this reveals the evolving role of judges as well the liberties and securities they enjoy as unaccountable, appointed decision-makers. To be sure, if the ultimate goal of this project is to understand the decision-making philosophy that underpins the Supreme Court's federalism jurisprudence—and the subsequent impact it has on the moral purpose of federalism—one needs to gain a firm understanding of our judiciary and the judges who staff it.

A. Institutional Considerations

The post-*Charter* era is unlike that of any other in the history of Canadian Constitutional discourse. Its creation produced not simply an additional string of entrenched rights for judges to work with and apply, but ushered in a decision-making culture that significantly altered the way judicial business was conducted.⁸⁴ Gone are the days of judges as simple interpreters of the law, quiet law-finders who are heard, and usually only seen, delivering statements from the bench. On the contrary, the post-*Charter* era represents a new style of judging that involves a more broad based network of ideas and interactions which encompasses previously uncharted waters: policymaking and law creation *within* the court; academic contributions and political opinions *outside* the court. With almost complete docket control—and a level of independence unrivaled internationally—modern judges wield considerable discretionary power. While it is not inherently problematic for judges to exercise discretion, it is *how* a judge behaves in light of this discretion that is up for discussion. Indeed, what is to stop a judge from siding with the litigant or idea that most accurately aligns with his or her personal beliefs?

⁸⁴ F. L. Morton, *Law, Politics, and the Judicial Process in Canada*, edition 3 (Calgary, AB: University of Calgary Press, 2002): xi.

In light of the institutional measures that protect the judiciary from external pressures, how can one be assured that judges are acting in an impartial, objective, and, above all, an apolitical manner? Before we can look at the principles and political choices that are embedded in the Supreme Court's federalism case law, we must first look at the institutional norms and provisions of the judges who create it.

Judicial independence

Central to the rule of law in liberal-pluralist democracies is the institutional provision of an impartial and independent judiciary. In its most basic form, independence can be said to exist if judges are able to take actions, and make decisions, without fear of interference by another. It is the idea that "a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards."⁸⁵ In Canada, judicial independence is firmly entrenched in legal tradition, statutory provisions and case law, which, at its most elementary level, provides for a judge's security of tenure, a judge's financial security and independence from administration.⁸⁶ This is important, because in order for the courts to have the opportunity to adjudicate impartially, independence from citizens and government alike is a necessary prerequisite to effective lawmaking.

Traditionally, judicial independence is the primary institutional fortress by which legal decisions are protected from potential political backlash. In the post-*Charter* years,

⁸⁵ John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 72 (March, 1999): 353. For additional background, see Ruth Gavison, "The Role of Courts in Rifted Democracies," *Israel Law Review* Vol 33, No. 2 (1999).

⁸⁶ Peter McCormick, "New Questions about an Old Concept: The Supreme Court of Canada's Judicial Independence Decisions," *Canadian Journal of Political Science* 37 (December, 2004): 850.

however, significant questions about the purpose and boundaries of judicial independence have surfaced. While the Court built upon the traditional English style embodied in sections 96-100 of the *Constitution Act, 1867* it has adopted a far more expansive and nuanced application of the concept, which received its most controversial and far reaching elucidation in *Reference re: Remuneration of Provincial Court Judges*.⁸⁷ In this decision, and the ones that followed, the Court conceptualized independence in terms unparalleled in other western democracies—a decision that changed the culture of the Court as well as the relationship between judges and government.⁸⁸

In the *Remuneration* reference, the Court entered uncharted territory when it created for itself a newfound function. No longer simply the resolver of disputes, the Canadian courts became the “protectors of the constitution,”⁸⁹ which necessarily implies a more activist role. Further, this decision rested on a new institutional discovery—the “separation of powers,” an American phrase that is neither found in the *Constitution Act, 1867* nor its founding debates. Unlike the American system, however, the Court enunciated a doctrine to which the obverse—“check and balances”—was replaced by “protectors of the constitution.” This is unlike other systems, and for not so flattering reasons. With the separation of powers doctrine, the “point is not just that political

⁸⁷ 3 S.C.R. 3 [1997]. Leading up to this, the Supreme Court handled a string of other cases which helped clarify the decision-making fortress of the Courts: *Valente* (1985), *Beauregard* (1986), *MacKeigan* (1989), *Lippe* 1991), *Genereux* (1992) and *Ruffo* (1995).

⁸⁸ Judicial independence is not a provision that is beneficial to the judiciary alone, however. Elected officials often turn to judges to preside over controversial subjects or subjects to which further clarity is needed. Pragmatically, this has the added benefit of not only protecting politicians from public scrutiny, but giving them an opportunity to defer to another body before proceeding in ways that are unconstitutional or politically risky. Just as judges refer back to the Constitution, politicians refer to the courts. The institutional crossover formed by this arrangement acts as an important check on the legality of public policy ideals.

⁸⁹ 3 S.C.R. 3 [1997], para. 123.

authority is divided between the branches of government, but that each branch has the capacity to check, and suffers the frustration of being checked by, the others.”⁹⁰

As the institutional measures for judicial protection go, concerns about the conduct of judges continue to linger.

With judicial power at an all time high, what recourse does government have, say, when the Court oversteps their boundaries through policy creation? Does separation in the absence of checks and balances promote activism? In an article published in 1996, Schmeiser and McConnell spoke of “a time of unparalleled conflict between Canadian Provincial Court systems and the governments which established them.”⁹¹ This has the potential of being problematic, for today’s judges “enjoy more power over more matters, which they apply with more discretion, and in circumstances of greater insulation and immunity from negative feedback, than ever before. This carries profound implications for the future of Canadian politics; judicial power has not yet achieved its full size.”⁹² That the Court gets to determine the nature and scope of its caseload in light of this independence is the subject of the section that follows.

Docket control

In Canada, the Supreme Court maintains tight docket control, a development which stems from a 1974 amendment to the *Supreme Court Act*.⁹³ Since then, the number of cases granted leave to appeal spiked from 15 percent to 85, far surpassing the

⁹⁰ McCormick, “New Questions about an Old Concept,” 856.

⁹¹ Douglas A. Schmeiser and William Howard McConnell, *The Independence of Provincial Court Judges: A Public Trust* (Toronto: Canadian Association of Provincial Court Judges, 1996).

⁹² McCormick, “New Questions about an Old Concept,” 839-862.

⁹³ F.L. Morton, “The Canadian Judicial System,” in *Law, Politics, and the Judicial Process in Canada*, edited by F.L. Morton (University of Calgary Press, 2002): 97.

number of appeals heard by right.⁹⁴ Procedurally, almost any case can make its way from a lower court to the Supreme Court, provided said application is granted by the Court's docket review committees.⁹⁵

The emergence of such a trend can be explained by two key interrelated factors. First, a statutory change in 1975 altered the criteria underpinning the classification of appeals, where the leave to appeal process "became the central avenue to the Court's docket."⁹⁶ Prior to this revision, for example, an appeal of right existed for any civil case involving a dispute in excess of \$10,000. This had the unintended effect of bogging down the Supreme Court's docket, thus making it difficult to concentrate on more pressing concerns. Since the *Supreme Court Act* was amended in 1975 to allow the Court to filter out that which was frivolous, the "leave to appeal" process became the primary vehicle through which Canada's highest court of appeal could be reached. While appeals as of right still exist for some criminal matters, most civil and constitutional issues are up to the discretion of judges.⁹⁷

Consider what the most recently amended *Supreme Court Act* has to say:

⁹⁴ Charles Epp, "Do Bills of Rights Matter," *American Political Science Review* 90 (1996): 75-77;

⁹⁵ Ian Green et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto, ON: James Lorimer & Company, 1998): 107-112; McCormick, *Supreme at Last*, 86.

⁹⁶ Roy B. Flemming, "The Selection of Cases for Judicial Review in the Supreme Court of Canada," in *Law, Politics, and the Judicial Process in Canada*, edited by F.L. Morton (University of Calgary press, 2002): 546; James G. Snell and Frederick Vaughan *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985): 233.

⁹⁷ In criminal cases, unlike civil matters, a considerable range of appeals as of right exist; for example, this right comes into effect whenever a dissenting judge, who sits on a panel involving criminal activity, takes issue with a "question of law." There is, however, an exception: an appeal as of right exists when application for habeas corpus is denied (s. 784(3)) or when a verdict of acquittal is reversed (s.691(2)), regardless of whether a justice at the appellant level dissented (Peter Hogg, *Constitutional Law of Canada*, 253.

With respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its *public importance* or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature of *significance* as to warrant decision by it...[emphasis added].⁹⁸

And subsequent to that, Chief Justice Lamer, speaking on behalf of the Court stated his position on whether written reasons would accompany the decisions to affirm or deny requests for leave:

The ability to grant or deny leave represents the sole means by which this Court is able to exert discretionary control over its docket. In order to ensure that this Court enjoys complete flexibility in allocating its scarce judicial resource toward cases of *true public importance*, as a sound rule of practice, we do not produce written reasons for grants and denials of leave [emphasis added].⁹⁹

A few noteworthy phrases jump out from the paragraphs above. On whether a case should be appealed or not, the amendment to the *Supreme Court Act* reads that cases should be granted “leave” if they are of “public importance.” However, the *Act* does not define “importance” in any way. That is solely up to judges to determine after they weigh the merits of the leave to appeal applications that they receive. Unlike judicial decisions, the Court does not provide, nor, as Lamer reminds us, does it need to provide reasons for its decisions to grant or denial requests for leave. The energy involved to fulfill such a task would hinder the Court’s ability to focus on cases of “true public importance.” From these statements, three important considerations emerge.

⁹⁸ *Supreme Court Act* [1985] s. 40(1); also found in *Federal Court Act*, s. 31(2).
Quotation retrieved at: <http://laws-lois.justice.gc.ca/eng/acts/S-26/page-8.html#s-40>.

⁹⁹ As cited in Flemming, “The Selection of Cases for Judicial Review,” 546.

First, the Supreme Court has the freedom to “set its own agenda.”¹⁰⁰ With tremendous discretionary docket control, the Court has the ability to regulate the size of its caseload and timing of the cases it releases. Indeed, there is an implicit double message behind almost every case the Court delivers: that the case was important enough for them to hear, and second, that it was important enough for them to direct resources to produce reasons to resolve it. As we will discuss in more detail in Chapter 4, this is an important consideration when reviewing the federalism caseload of the Court: with the exception of reference questions directed from Parliament, every federalism case that appeared before the Court since 1984 was heard after leave to appeal was granted. Further, eight of the 81 federalism cases that were granted leave were dismissed at oral argument. Of course, the Court never states at the onset why they chose to hear the case that they did, which bring us to our next point.

When the Court makes the decision to grant or deny an application for leave, it does not need to justify that decision. In most cases, written applications for leave are rejected outright, or, after a brief oral hearing in the presence of a small panel of judges, a verbal decision is given, and the parties go their separate ways.¹⁰¹ While the giving of reasons would do much to clarify the direction of future litigants, it is important that one not read into leave to appeal decisions aspects that are not there. For example, “a denial of leave to appeal does not imply that the leave-denying panel of the Supreme Court thought that the lower decision was rightly decided.”¹⁰² The fact that a case is heard or

¹⁰⁰ Roy B. Flemming and Glen S. Krutz, “Repeat Litigators and Agenda Setting on the Supreme Court of Canada,” *Canadian Journal of Political Science* 35 (December, 2002): pp.811-833.

¹⁰¹ *Supreme Court Act* [1985], ss. 25 and 43.

¹⁰² Hogg, *Constitutional Law of Canada*, 221.

not says little about the merits of the case, if it is dismissed; or the probability of it succeeding, if it is allowed.

Third, the Court does not define nor does it provide any jurisprudence or hints that outline how it conceptualizes “public importance.” Former Supreme Court Justice Sopinka’s book *The Conduct of an Appeal* is the best and perhaps the only resource to consult. Although his account lacks detail, it lays out “hints” to attorneys about what constitutes “importance.”¹⁰³ Among some of his rather vague observations, importance can encompass: “novel” constitutional issues, “significant” federal statutes of general application, conflicting decisions in lower courts, the need to revisit important questions of law, and provincial statutes “similar to legislation in other provinces.”¹⁰⁴ Like the phrase “public importance,” words like “novel” and “significant” remain ambiguous. Sopinka’s book does not provide any concrete examples, which would serve to contextualize the criterion that he identified.

Interestingly, however, there are numerous researchers who attempt to uncover the variables which increase the probability of successful leave to appeal applications. One subset of research, for example, looks at the impact of “lawyer persuasion,” that is, the ability of litigators to persuade the Court to hear an appeal.¹⁰⁵ This involves analyses

¹⁰³ John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal*, (Toronto, ON: Butterworths: 1993).

¹⁰⁴ As summarized by Roy B. Flemming, “The Selection of Cases for Judicial Review in the Supreme Court of Canada,” 546.

¹⁰⁵ John Szmer, Susan W. Johnston, Tammy A. Sarver, “Does *the Lawyer Matter?* Influencing Outcomes on the Supreme Court of Canada,” *Law and Society Review* 41, No. 2. (June, 2007): 279-303; Roy B. Flemming and Glen S. Krutz, “Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses,” *Journal of Politics* 64 (2002): 232-48; Steve France, “Takeover Specialists: Why Many litigators Hand Their Cases to High Court Pros,” *ABA Journal* 84 (1998): 38-43; Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in*

of which buttons to push or which buzz words to say. In short, researchers suggest that the intellectual packaging of provocative legal arguments influences the Supreme Court's decision to hear an appeal. While the impact of such persuasion is less pronounced in Canada than in the United States, it is significant that attorneys are armed with research that guides how they craft oral argument so as to maximize its impact on the ideological compositions of the pre-hearing panels of the Court. The point that stands out from the rest is that the political attitudes of judges influence the choices they make and the arguments they are willing to consider.

B. Internal Dimensions

There are three major schools of thought that attempt to place the chief determinants of judicial decision-making into an intelligible framework. These approaches tend to fall along a legal/political continuum and can be referred to as the legal model, the attitudinal model, and the strategic or "rational choice" model. Each approach carries with it distinct presuppositions about the law in general and the factors that shape how it is created or interpreted in particular. According to one scholar, these models are divided fundamentally along intellectual or disciplinary lines, that is, between legal scholars and political scientists. "The former," Emmett Macfarlane notes, "tend to view law as autonomous from politics and consider judges as generally capable of being impartial or objective arbiters while the latter generally see law and legal interpretation as

Comparative Perspective (Chicago: University of Chicago Press, 1998); Susan Brodie Haire et al., "Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals," *Law and Society Review* 33 (1999): 667-85; Timothy R. Johnson, "Information, Oral Arguments, and Supreme Court Decision-Making," *American Political Research* 29 (2011): 331-51; Kevin T. McGuire, "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success," *Journal of Politics* 57 (1995): 187-96.

inherently political.”¹⁰⁶ In the paragraphs that follow, the main features and criticisms of each outlook will be highlighted. As we will discuss in more detail in Chapter 6, the Supreme Court is a political institution that, in the words of Christopher Manfredi, makes “policy not as an accidental by-product of performing their adjudicate function but because a majority of their members concludes that one set of legal rules is more socially beneficial than another.”¹⁰⁷ Attitudes, it can be said, inform judges, and from those attitudes judges negotiate and compromise—and form alliances or disagreements—amidst competing conceptions of the public good. In federalism cases, litigants attempt to convince the Court of one conception over another.

The Legal Model

There is an expectation in society—and in the legal profession more specifically—that judges use precedent, and rely on tradition, to justify decisions. Not surprisingly, for much of our history judging was viewed as a “mechanical” process whereby judges interpreted and applied laws that were created by elected officials. Through strict adherence to precedent, judicial decisions were assembled in an objective, scientific-like manner. The distinction between politicians and judges was clear, and the Court, it could be said, quietly went about its business. Those who believe that judges find law, and render decisions that are based upon the discovery of the pure and original intent of statutes and precedents, are said to fall under the formalist, interpretivist,

¹⁰⁶ Emmett MacFarlane, *The Supreme Court of Canada and the Judicial Role: A Historical Institutional Account*, Phd (2009): 21.

¹⁰⁷ Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: UBC Press, 2004): 196.

doctrinal, or legal tradition.¹⁰⁸ Fundamentally, decisions are said to derive from precedent, framers' intent, and a "plain meaning" of statutes and the constitution.¹⁰⁹ Formalists believe that judicial decisions are devoid from the ideological attitudes, policy preferences or personal values of judges, who, in the classic rendering of Sir William Blackstone, are tasked "to determine, not according to [their] own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."¹¹⁰ Although very few embrace the "purist" principles identified by Blackstone, the majority of those who subscribe to this model view law as independent of judicial decision-making. That is, instead of reading into statutes and creating new laws, the practice of judging is "an objective, rationally-bounded process...[where] judges apply and rationally elaborate upon the appropriate pre-existing rules, established precedents, and settled legal principles."¹¹¹

¹⁰⁸ Raymond A. Belliotti, "Is Law a Sham?" *Philosophy and Phenomenological Research* XLVIII, No. 1 (September, 1987): 25. There is a gamut of definitions and synonyms to the legal purist lens to lawmaking. For the purposes of this paper, formalism, doctrinalism, interpretivism, rationalism and positivism, can be collectively "construed to include any commitment to a method of legal justification that can be clearly distinguished from open-ended ideological and political argumentation. One such commitment is the belief in the presence of a deductive or quasi-deductive method capable of yielding determinate answers to legal questions" (cf. 28).

¹⁰⁹ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge, MA: Cambridge University Press, 1993): 33.

¹¹⁰ See, also John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), who writes: objective judging is the "insistence that the work of the political branches is to be invalidated only in accordance with an inference whose starting point, whose underlying premise is fairly discoverable in the Constitution" (cf. 2).

¹¹¹ Raymond A. Belliotti, "Is Law a Sham?", 25. See also, Charles G. Haines, "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," *Illinois Law Review* 17, No. 2 (1922): 96. Reprinted in *Judicial Behavior: A Reader in Theory and Research*, edited by Glendon Schubert (Chicago, IL: Rand McNally & Company, 1964): 40.

In light of these reasons it should come as little surprise that the legal model is most commonly embraced within the legal community. Such a framework is viewed as “correct,” because of the assumptions upon which it purports to rest, and most law professors, lawyers and judges subscribe to the “textbook” notion that judicial decisions are informed by precedent and the letter of the law. To be sure, no judge is going to boast about his personal views on same-sex marriage in a same-sex marriage decision, or her preferences for immigration reform or capital punishment in a case involving the same.

Although judges may have strong political opinions about how the law *ought* to be decided, they save such explicit elucidations for interviews or publications that happen *outside* the bench. Indeed, the failure to “mask” personal opinion in the reasons for judgment would “give the lie to the mythology that the justices, their lower court colleagues, and off-the-bench-apologists have so insistently and persistently verbalized: that judges exercise little or no discretion; that they do not speak; rather, the Constitution and the laws speak through them.”¹¹² As we shall see later, the same judges who deliver political opinions outside the bench—in interviews, publications, speeches, and the like—are the same judges making rendering decisions inside the Court. The underlying question, then, is whether judges can separate the “personal” from the “professional.”

¹¹² Segal and Spaeth, 33. Charles G. Haines, a mid nineteenth century legal theorist, provides an early articulation of this distinction, contrasting the purist “mechanical theory” (that is, formalism and strict adherence to precedent) on the one hand with the “free legal decision” (for example, contextualism and law creation) on the other. In his words, the mechanical theory “postulates absolute legal principles, existing prior to and independent of all judicial decisions, and merely discovered and applied by courts,” whereas the free legal decision embraces discretion as a central decision-making tool.¹¹²

Outside the legal community there is little support for a formalist conception of the legal model. Critics point to the fact that judges, “working with an identical set of facts, and with roughly comparable training in the law,” often arrive at conflicting conclusions, and that such divisions “grow out of the conscious or unconscious preferences and prejudices of the justices.”¹¹³ Indeed, the selection of precedent is a value statement in and of itself. While “Judge X,” writing for the majority, may cite cases “A, B, and Z” to substantiate his reasons, “Judge Y,” in dissent, may cite cases “D, E and F.” Both judges, in this case, adhere to precedent, but the cases they select, and the manner in which they are applied, is discretionary in itself.

Hence, the legal explanations contained within written reasons “serve only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”¹¹⁴ With institutional provisions like security of tenure, independence and docket control at the forefront, critics have all the more reason to doubt the merits of an interpretivist framework. The question, then, “what causes Justice A to select precedent X and conclusion Y as opposed to precedent B and conclusion C” raises a fundamental issue of judicial behavior: do the personal ideological preferences of judges dictate or influence in any manner the precedents they select and/or the decisions they deliver?

In the early 1920s, well-known American legal scholars Karl Llewellyn and Jerome Frank raised very similar questions. Aware of the changing nature of society, both thinkers emphasized the “conception of law in flux, of moving law, and of judicial

¹¹³ C. Herman Pritchett, “Divisions of Opinions Among Justices of the U.S. Supreme Court, 1939-1941,” *American Political Science Review* 35 (1941): 890.

¹¹⁴ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, MA: Cambridge University Press, 2002): 53

creation of law.”¹¹⁵ While they were not interested in hypothesizing whether or not judges had underlying ideological motives or political agendas (that came later), they were some of the first to point to law creation as an “inevitable fallout from an ever-changing society.”¹¹⁶ Not long after, the behaviouralist revolution took hold within the social sciences, which led to the creation of a testable, methodological framework that allowed political scientists to measure the policy preferences and voting patterns of Supreme Court justices.¹¹⁷

Attitudinal Model

Over the past half-century, “attitudinalists” have dominated the theoretical landscape of our judiciary.¹¹⁸ Drawing on the intellectual origins of “legal realists” and behaviorists, attitudinal scholars begin with the assumption that written reasons and adherence to precedent serve to rationalize or mask a judge’s advancement of his own beliefs. Moving from an understanding of decisions as “self-evident or self-enforcing logical deductions,” J.R. Mallory was one of the first who articulated the other important, dimension to judicial decision-making: personality and ideology. As Gerald Baier summarizes, attitudinal “observers have come to disassociate the reasoning in decisions from their political impact.”¹¹⁹ By examining the voting patterns of judges in relation to the ideological outcomes of decisions, behaviorists have created theories and complicated

¹¹⁵ Karl Llewellyn, “Some Realism About Realism—Responding to Dean Pound,” *Harvard Law Review* 44 (1931): 1237.

¹¹⁶ As cited in Segal and Spaeth, *The Supreme Court and the Attitudinal Model*, 66.

¹¹⁷ C. L. Ostberg and Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver, BC: UBC Press, 2007).

¹¹⁸ Ostberg and Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada*, 2007; Segal and Spaeth, 1993, 2002; Jack Knight and Lee Epstein, *The Choices Justices Make*, 1998.

¹¹⁹ Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver, BC: UBC Press, 2006): 3.

quantitative models to substantiate their hypotheses. To add context, breadth and validity, they explore other areas, such as the judicial appointment process,¹²⁰ profile of the pre-judicial careers, policy-preferences and worldviews of current judges;¹²¹ the role and impact of interveners and interest groups;¹²² the impact of law clerks on the assembly of materials; a look at judicial citation practices, and the like. Understanding the decision-making psychology of judges, as well as the institution through which they channel this psychology, is crucial.

The fundamental issue for attitudinal subscribers is the factors that inform law creation. Written reasons, while important for accountability reasons, simply serve as a guise for a more personal agenda. “Political outcomes are better explained by the behavioral and attitudinal characteristics of judges than by the post hoc justifications found in judicial decisions.”¹²³ As Rohde and Spaeth note, “the primary goals of Supreme Court justices in the decision making process are policy goals...and when the justices make decisions they want the outcomes to approximate as nearly as possible their

¹²⁰ See Jeffrey Simpson, “Patronage in Judicial Appointments,” in *Law, Politics and the Judicial Appointment Process in Canada*, edited by F.L. Morton 3rd edition (Calgary, AB: University of Calgary Press, 2002); and F.L. Morton, “To Bring Judicial Appointments Out of the Closet,” in *Law, Politics, and the Judicial Appointment Process in Canada*, edited by F.L. Morton 3rd edition (Calgary, AB: University of Calgary Press, 2002).

¹²¹ See Ian Green et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto, ON: James Lorimer & Company Ltd., 1998), for a discussion on judicial personalities and backgrounds.

¹²² For example, Gregory Hein, “Interest Group Litigation and Canadian Democracy,” in *Choices: Courts and Legislatures* (Montreal: IRPP 6:2 (2000)); See also, Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (State University of New York Press, 2002).

¹²³ Baier, *Courts and Federalism*, 4.

own policy preferences.”¹²⁴ Walter Murphy, who is less subtle about the matter, says that law creation is conducted by a “Justice who is aware of the impact which judicial decisions can have on public policy, realizes the leeway for discretion which his office permits, and is willing to take advantage of this power and leeway to further particular policy aims.”¹²⁵ Attitudinalists thus “find the key to judicial behavior in what the justices do, [rather than] what they say.”¹²⁶

While the attitudinal model correctly acknowledges the reality of policymaking on the Courts, there are validity concerns inherent in the reductionist methodology of the approach. Critics argue that it is difficult to quantify ideology into simple categories like “liberal” or “conservative;” for such ambiguous terms are too simplistic a measure to capture the complexity and individual motivations that underpin the outcome of decisions.¹²⁷ Indeed, who gets to define “liberal” and “conservative?” To list but two examples, there are libertarian “liberals” who emphasize both social and economic freedom, and there are socialist “liberals” who may embrace the welfare state in the economic sphere but may be more socially conservative in the moral sphere. Further, behavioral predictor models have been shown to produce spurious findings because, as McFarlane notes, a “judge’s *legal* consistency could produce results that attitudinalists interpret as *political* consistency,” falsely attributing the underlying intent of a

¹²⁴ David W. Rohde and Harold Spaeth, *Supreme Court Decision Making* (San Francisco, CA: W.H. Freeman, 1976): 72.

¹²⁵ Walter F. Murphy, *Elements of Judicial Strategy* (University of Chicago Press, 1964): 4.

¹²⁶ Harold J. Spaeth, “Jurimetrics and Professor Mendelson: A Troubled Relationship,” *Journal of Politics* 27 (1965): 875, 879.

¹²⁷ Frank B. Cross, “Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance,” *Northwestern University Law Review* 92 (1997).

decision.¹²⁸ Three additional criticisms are well founded in the literature. First, the attitudinal model has difficulties explaining the impressive lengths to which justices go to write separate concurrences and dissents. As Cross writes, “a concurrence is exclusively a legal model activity, because the ideologically favored result is reached, yet the judge expends her resources to write an additional opinion. The pure attitudinal model fails to explain why a judge would prefer any particular legal rationale for a given result.”¹²⁹ To say that judges only make decisions that are purely consistent with their worldviews, oversimplifies the complexity and “behind-the-scenes” component of judging. Second, given the impressive length and depth of most written reasons—the number of doctrines, principles and issues of law that are in handled in a single decision—it is difficult to determine which aspects of a decision that a judge agreed or disagreed, and/or which items, in the spirit of collegial negotiations, were “deal breakers” and which ones were “compromises.” Indeed, attempting to correlate votes with political preferences oversimplifies the behind-the-scenes discussions that occur throughout the gestation of a decision.

A third criticism, first developed by J. Woodford Howard, is that the attitudinal model does not adequately account for, nor take into consideration, judges who alter their strategy or approach throughout the course of a decision. Such a gap led Howard to ask: “If a vote or an opinion has changed in response to a multiplicity of intra-court influences before its public exposure, how reliable is that vote of opinion as an indicator of attitude,

¹²⁸ Emmett McFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver, BC: UBC Press, 2013): 24.

¹²⁹ Cross, “Political Science and the New legal Realism,” 303-4.

ideology, or, if one pleases, predilection?”¹³⁰ With ideological motivators at its core, the attitudinal model fails to account for “group interaction” as a viable decision-making determinant.¹³¹ Political ideology is more complex than pitting liberal versus conservative, and public policies are complex and involve a mish mash of social and economic dimensions. While it is outside the scope of this paper to discuss the attitudinal model any further, the relevance of our discussion thus far lies in the fact that judges make decisions with policy implications in mind.¹³²

Strategic Model

The strategic or rational choice account of judicial decision-making acknowledges many of the conceptions held by attitudinalists, but present judges as rational actors who strategically wager personal policy preferences against the (perceived) aims of colleagues, external actors and other branches of government.¹³³ Walter Murphy’s seminal work, *Elements of Judicial Strategy*, is said to have been the first to postulate that judges often strategically maneuver behind the scenes and temper what is “most desired” so as to avoid an outcome that is “least desired.” Thus, the strategic model grants that the end produce of judicial decisions “cannot be exclusively attributed to justices’ strict reading of the law, simple accounting of justices’ policy preferences, or strategic calculation about the response (or non-response) of political actors exogenous to the

¹³⁰ J. Woodford Howard, Jr., “On the Fluidity of Judicial Choice,” *The American Political Science Review* 62 (1968): 44.

¹³¹ Howard, “On the Fluidity of Judicial Choice,” 49.

¹³² It is important to note that this chapter is not so much concerned with uncovering the type of political ideology that leads to outcome X or outcome Y, but that political attitudes inform decisions. It is from this discovery that an examination of the Supreme Court’s federalism jurisprudence will be made.

¹³³ Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: Congressional Quarterly, 1998): 10.

Court.”¹³⁴ More accurately, judges are the business of forming coalitions, which are created after some level of negotiation and compromise has taken place. Indeed, judges may not always vote according to ideals if it means avoiding an outcome that contradicts the very essence of their decision-making philosophy.

That judges make compromises as a means to garner the support of colleagues, or in return for signing onto the reasons of another, is well founded in both theoretical and anecdotal research. Many scholars believe that the process of giving reasons in Canada and the United States—“the collegial game”—demands at least some level of strategizing: “because outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process.”¹³⁵ As we will discuss in more detail in our disagreement section in Chapter 6, the collegial game involves various stages of strategies to which judges typically engage.¹³⁶ Some observers believe that various draft “decisions” are circulated amongst members of a panel, and through internal memos and the subsequent circulation of drafts, judges show their support and/or voice their concerns with one another. From this stage, the author of the initial draft judgment must weigh the substance of the final product vis-à-vis the feedback received by others, which, in the pursuit of a majority coalition, necessarily involves at least some level of accommodation, bargaining and compromise.¹³⁷ While the strategic

¹³⁴ Forrest Maltzman, James F. Spriggs II and Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York, NY: Cambridge University Press, 2000): 19-24

¹³⁵ Maltzman, Spriggs and Wahlbeck, *Crafting Law on the Supreme Court* (New York, NY: Cambridge University Press, 2000): 8.

¹³⁶ Maltzman et al., *Crafting Law on the Supreme Court*, 8.

¹³⁷ Maltzman et al., *Crafting Law on the Supreme Court*, 17.

model is well established in the social sciences, a similar school of thought is emerging in the legal field.¹³⁸

The primary criticism of the strategic model is that there is little “empirical evidence” to support it. There are no “systematic studies,” as critics contend, that explore “the patterns underlying such interdependent behavior.”¹³⁹ Most related research is anecdotal in nature and based on case studies, interviews with current and former judges, and internal memorandums of the Court. While little research has been conducted on the Supreme Court of Canada, Maltzman, Spriggs and Wahlbeck contend that the collegiality or dialogue that is apparent in a national high court’s reasons for judgment reveals more about judicial behavior than does the simple correlation of judicial votes with political ideology:

Supreme Court opinions are crafted in a collaborative environment among the justices, and thus justices act strategically in order to get opinions that as closely as possible mirror their policy orientations. Our findings that justices spend the time and energy trying to influence the shape of the final opinion is consistent with these postulates. Justices care about more than just the disposition of a particular case. Although case outcomes are important, the strategic model also

¹³⁸ “Judicial strategizing” is a phrase not often used by legal scholars to explain the nature and practice of judging. While it is not unusual for one to speak of strategizing as it pertains to litigators, the same cannot be said to judges. However, there is a growing body of legal researchers who incorporate the study of judicial strategy into their publications. “Positive political theory” is the name used in the legal community to describe research that focuses on judicial strategy and the influence of political institutions on the creation of decisions. See, for example: William N. Eskridge, Jr. and Jenna Bednar, “Steadying the Court’s ‘Unsteady Path:’ A Theory of Judicial Enforcement of Federalism,” *Southern California Law Review* 68 (1995); John A. Ferejojn and Barry Weingast, “A Positive Theory of Statutory Interpretation,” *International Review of Law ad Economics* 12 (1992); Frank B. Cross and Emerson H. Tiller, “Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals,” *Yale Law Journal* 107 (1998).

¹³⁹ Maltzman, Spriggs, and Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game*, 25; Lee Epstein and Jack Knight, “Toward a Strategic Revolution in Judicial Politics: A Look back, A Look Ahead,” *Political Research Quarterly* 53 (2000).

suggests that justices – as rational actors – put considerable care into their choice of tactics for shaping the Court’s final opinions.¹⁴⁰

As rational actors, judges strategically temper their sincere policy preferences in order to avoid worst possible outcomes. They make compromises, vie for signatures and, at times, appear to contradict themselves because no ideology can be reduced to a common, predictable denominator. Judges adapt to create majorities or, in the alternative, to split votes to prevent one from happening. In short, “the strategic focus moves beyond the narrow focus of vote outcomes,”¹⁴¹ and when institutional analyses are:

...placed within the logic of rational choice, not only can theoretically sound hypotheses be generated, positing relationships which explain a significant amount of variance in judicial dissent behavior, but the rather disparate finding in the judicial literature on dissent behavior can be comprehensively integrated. Quite simply, the neo-institutional perspective bridges the gap between traditional institutional analysis and attitudinal theory.¹⁴²

Despite these insights, critics maintain that contemporary rational choice studies are problematic because they are unable to predict outcomes before they actually happen. While both approaches offer insight into the psychology of lawmaking, for federalism cases I contend that the best way to predict an outcome is to understand the decision-making climate of the Court and to identify the decision-making philosophy that unpins its disposal of a specific subset of decisions.

Doctrines have consequences and policy implications. For federalism cases, some lend themselves to greater levels of centralization while others have a more middling effect. The doctrine the Court chooses in the past is an excellent predictor of the ones they will use in the future. As we will discuss at length in Chapter 7, the Supreme

¹⁴⁰ Maltzman, Spriggs and Wahlbeck, *Crafting Law on the Supreme Court*, 93.

¹⁴¹ Macfarlane, *The Supreme Court of Canada and the Judicial Role*, 39.

¹⁴² Melinda Gann Hall and Paul Brace, “Order in the Courts: A Neo-Institutional Approach to Judicial Consensus,” *The Western Political Quarterly* 42 (1989): 392.

Court's decision-making philosophy as it pertains to federalism matters directs the doctrines that are used to dispose of disputes. In Chapter 6, this observation is reinforced by the finding that while judges may share similar policy goals, the path they envision to attain those goals differ at times. Although these differences are not often significant, Supreme Court judges sometimes write as if they are.

In reflecting upon the departure of Justices La Forest and Sopinka, McCormick's summary is insightful:

Is La Forest or Sopinka a Canadian version of Lewis F Powell, Jr., the U.S. Supreme Court's quintessential "swing voter" whose cautious preferences frequently dictated the overarching direction of the Court? Of a Canadian William J. Brennan Jr., in the sense of being a wily strategist who fashioned enduring voting coalitions despite major ideological cleavages? Or a Canadian Thurgood Marshall, stubbornly and passionately championing a cause (capital punishment, affirmative action, whatever) so relentlessly as gradually to draw the entire Court in his direction? Or a Canadian Rehnquist or Scalia, doggedly committed to an ideological position, his relative influence waxing and waning as the vagaries of the appointment process reinforce or deplete the ranks of his allies? Or a Canadian Burger, transparently tactical in his voting so as use to the maximum the power his seniority gives him to write the words of the majority opinion, or on the basis of crafty calculation to assign the writing to someone else?¹⁴³

That judges develop decision-making tendencies, noteworthy strategic behavior and, above all else, "reputations," reinforces the notion that judging is neither scientific nor mechanical but a task performed by individuals who exercise the freedom to incorporate personal preferences into the decisions they craft. While judicial decisions possess a much more formal flare than would a regular newspaper article or interview on CBC, the tendencies of judges are revealed by both their vote patterns and doctrinal preferences. In written decisions, the attitudinal preferences of judges are more discreet, for no judge is

¹⁴³ Peter J. McCormick, "The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991-97," *Dalhousie Law Journal* 22, No. 93 (1999): 120.

going to explicitly say, “I will therefore allow the appeal because I am a staunch supporter of movement X.” Although a judge may still “allow the appeal,” he cannot do so on conviction alone; he needs to select and incorporate the necessary precedents and doctrines to support it. The same rules do not apply outside the bench, however. Supreme Court judges give speeches and write articles, which are far more pointed than what their more “formalist” institutional constraints would otherwise allow. They have opinions, and when delivering speeches or writing articles, they possess the freedom to unapologetically and indiscreetly present positions that support their worldview and political assumptions.

C. Judicial Behavior Outside the Court

Perhaps more so than any other study on judicial behavior, what judges say outside the bench provides a far more explicit picture of what they believe than do close examinations of the decisions they author. But are judges able to separate from their decisions what they write about outside the Court? While judicial independence is an important institutional safeguard that allows judges to “interpret the law regardless of the extralegislative preferences of the legislature, the executive, or the people,” it does not guarantee sound lawmaking nor does it eliminate the “contaminants” inherent in one’s opinions.¹⁴⁴

We know from previous research that judges have difficulties distinguishing personal preferences from established common law.¹⁴⁵ That judges disagree and that

¹⁴⁴ Eric Rasmusen, “Judicial Legitimacy as a Repeated Game,” *The Journal of Law, Economics & Organization*, Vol 10, No 1, (1994), 63.

¹⁴⁵ Duncan Kennedy, “Toward a Critical Phenomenology of Judging,” in *The Rule of Law: Ideal or Ideology?* Edited by Albert Hutchinson & Patrick Monahan eds (Toronto, ON: Thomson-Carswell, 1987).

appeals are overturned—that lawyers dread some judges while secretly hoping for others—goes to show that decisions vary, and vary according to the person charged with giving the decision. Why is this? Should it be reason for concern? Is there a way to separate the “personal” from the “professional?” The section below shows that just as judges have “reputations” inside the Court, they have strong political opinions outside the Court. As we shall see, the opinions they espouse in their academic writing conflate policy desires and political concerns in the context of legal doctrine.

Backgrounds and Opinions of Judges

The book *Final Appeal* provides an excellent primer to the practice of judging.¹⁴⁶ In it, a chapter is devoted to addressing the personality of judges and their outside-the-bench behavior. However, the focus of that chapter is not so much concerned with biographical factoids—like whether justice Y was introverted or extroverted, a jokester or a straight-laced professional—but whether the backgrounds, work experience and formal training of judges “might dispose them to use discretion differently than elected officials.”¹⁴⁷ This raises an interesting question: to what extent does a judge’s gender, ideological stance or legal specialization infiltrate judicial decision-making?

The issue of “gender bias” is worthy of note, not because it is an issue to which one should become overly fixated or worried, but because of how certain prominent female judges see the issue of gender and admit how it colors the way they decide or approach certain issues of law. After being appointed to the Supreme Court in 1982, for example, Bertha Wilson wasted little time before discussing the issue of “gender bias” in

¹⁴⁶ Greene, Baar, McCormick et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto, ON: James Lorimer & Company, 1998).

¹⁴⁷ Green et al., *Final Appeal*, 24.

the courts. Relying on anecdotal evidence and the research findings of University of California sociologist Norma Wikler, Wilson made the case that gender differences play a large role in the decision-making tendencies of judges.¹⁴⁸ Not long after, Justice Beverly McLachlin (as she then was) came under fire after she delivered a speech that criticized the male bias in “gender-related” issues such as prostitution and abortion. She faced criticism from several groups, most notably REAL women.¹⁴⁹ In yet another example, Justice L’Heureux-Dube delivered multiple speeches urging judges to strike down laws that, in her mind, discriminated against homosexuals. Surely, it would be difficult for either her or justice McLachlin to rule against such matters in light of their publicly stated convictions.

Subsequently, F. L. Morton’s blasted Justice L’Heureux-Dube for her comments and asserted that her comments violated the ruling of the Canadian Judicial Council—that judges ought not “speak out against politically controversial issues of great public importance.”¹⁵⁰ Chief Justice Lamer, in a speech delivered to an audience at the University of Toronto in 1992, alluded to the fact that democracy was not conducive to “human flourishing” and acted, at times, as an impediment to “progress.”¹⁵¹

A few years later, after a candid interview with “Lawyers Weekly,” Justice Bastarache found himself in the media hot seat after he stated his long held preference to “persuade” the court to “revisit” Charter decisions in which criminal law was greatly

¹⁴⁸ Bertha Wilson, “Will Women Judges really Make a Difference?”, *Osgoode Hall Law Journal* 28 (1999)

¹⁴⁹ Ian Greene, *The Courts* (Vancouver, BC: UBC Press), 2006: 97.

¹⁵⁰ Morton, “Judicial Independence, Ethics and Discipline,” 179.

¹⁵¹ As cited in Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined our Law and our Democracy* (Montreal, QC: McGill-Queen’s University Press): 83.

expanded. Bastarache even went as far to say that previous criminal matters that were settled by the Court were “result-oriented” and driven by “policy,” not “principle.” In short, he disagreed with his colleagues’ self adopted “mandate to...define a whole social policy for Canada.”¹⁵² In that same interview, Bastarache inflamed those sympathetic to aboriginal land claims when he asserted that the legal system was “not the right forum” to settle such matters. Referencing the Court’s *Marshall* [1999] decision, he reiterated his disagreement with the majority and further indicated “that the Court was very result-oriented and was inventing rights that weren’t even in the treaties that were brought before the court in that case.” While his initial comments called for judicial restraint, it is how he responded to another question that led to public outcry: “the court was maybe seen as being unduly favourable to the native position in all cases, and that it sort of has an agenda for extending these [aboriginal] rights and that it has no concerns for the rights of others.”¹⁵³

From this statement followed a myriad of criticisms, one such being a formal complaint lodged by the Atlantic Policy Congress of First Nations Chiefs (APCFNC) who, among other things, declared: “We strongly feel we could never have a fair hearing in front of a court in which he was a member.”¹⁵⁴ Although Bastarache did not receive any formal discipline for his comments—the complaint by the APCFNC was rejected—the Canadian Judicial Council warned that judges should “exercise restraint when

¹⁵² “The Bastarache Interview: reasoning to results at SCC,” by Cristin Schmitz, *The Lawyers Weekly*, Jan. 26, 2001, p.19.

¹⁵³ As cited in F.L. Morton, “Judicial Independence, Ethics, and Discipline,” 179; “SCC wrong forum for native land claims: Bastarache,” by Cristin Schmitz, *The Lawyers Weekly* Jan. 19, 2001, p. 20.

¹⁵⁴ As cited in Morton, “Judicial Independence, Ethics and Discipline,” 179.

speaking publicly...particularly on issues that are likely to come before their court in the future.”¹⁵⁵

The examples listed above are just a few in a list of many. Although they do not make speeches about their federalism preferences off the bench, the point to be made is that judges have opinions and policy preferences. And the same preferences or convictions or legal principles that they speak about outside the bench follow them to their formal role inside the Court. Despite such liberties, little can be done by non-judges to confront perceptions of bias. Ian Greene touches on the issue in his discussion of “judicial discipline.”¹⁵⁶ With the prevalence of judicial independence, and the professional expectation for judges that were outlined in the Berger case, it has proven to be a challenge to “strike the right balance between allowing judges to speak out publicly on important issues affecting justice, and encouraging them to refrain from comments that could cause us to question their impartiality.”¹⁵⁷ It is clear that judges are political actors who behave strategically within the institutional rules of the game. How they behave plays an important role in the decisions that are made and the manner in which they are implemented.

It seems like eons ago that the use of academic literature in the courtroom was discouraged. In 1950, for instance, Chief Justice Rinfret of the Supreme Court of Canada reprimanded a lawyer for citing a recent article in the *Canadian Bar Review*.¹⁵⁸ In this

¹⁵⁵ As cited in Morton, “Judicial Independence, Ethics and Discipline,” 179.

¹⁵⁶ Ian Greene, *The Courts*, 93.

¹⁵⁷ Greene, 93.

¹⁵⁸ Gordon Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada,” 49. See also Nicholls, “Legal Periodicals and the Supreme Court of Canada,” *Canadian Bar Review* 28 (1950); and McCormick, “The Judges and the Journals,” 4.

case, Maurice Wright, counsel for the Canadian Congress of Labor in *Reference Re the Wartime Leasehold Regulations*, cited Vincent C. MacDonald's article, "Constitutional Interpretation and Extrinsic Evidence," to which Rinfret snidely replied: "The *Canadian Bar Review* is not an authority in this Court."¹⁵⁹ Although this statement does not appear in the written reasons, subsequent reports "indicate that the Chief Justice said 'he was not going to accept the opinion of the *Canadian Bar Review*—a lawyer's magazine—as authority for the court."¹⁶⁰

D. Conclusion

In this chapter, much was made about the evolution and impact of judicial power and discretion. But the discussion did not go into length about how the Court utilizes the discretion it is given. In the next chapter, I build on our discussion by providing an exhaustive account of the Supreme Court's academic citation patterns in federalism cases. This chapter is important because it discusses the role and significance that written reasons play in the case law of the Court and enables us to use citations as a tool to trace the academic disciplines upon which they confer, and the thinkers with whom they associate. While written reasons justify the outcome of a decision, academic citations help to reinforce ideas, or distinguish them from, the views of others. They also reveal to readers the political and theoretical assumptions of the judges who are writing.

Indeed, if the "Authors Cited" list within a federalism decision revealed, for example, that a significant share of a judge's references came from Alexis de Tocqueville, Canada's founding debates, and political historians Paul Romney, Robert

¹⁵⁹ As cited in Bale, "W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada," 50.

¹⁶⁰ Bale, 50.

Vipond, and Janet Azenstat, one could infer that the issues of provincial autonomy, civil association, subsidiarity, and the philosophical underpinnings our Constitution weighed heavy in their reasoning. On the other hand, if the Court relied on the cynical historians we discussed in Chapter 1—Edwin Black, Peter Waite, Ramsay Cook and Donald Creighton—one would expect that the Court operated on the assumption that Confederation unfolded in the absence of principle.

Likewise, were the names of Donald Smiley, Alan Cairns, and Richard Simeon to surface frequently, one could expect to find more of a public policy flare—with a mind toward navigating through the implications and operations of intergovernmental relations—within the reasons for judgment. Although a bibliography says nothing about the extent to which a source is utilized, or whether its authority is rejected or embraced, a list of authors provides an excellent starting point for further discovery—and that is basis upon which the research for Chapter 3 began. If the ultimate goal of this thesis is to uncover the decision-making philosophy of the Court—and the subsequent impact this philosophy has on the “ends of federalism”—a systematic look at the thinkers upon which the Court relies is an important first step. Upon looking to the academic citations for insight, we will be in a position to examine the caseload of the Court.

Chapter III Reasons, Citations and Authority

The use of academic citations in judicial decision-making is a recent but significant phenomenon that has emerged in particular in the post-*Charter* era. Those who study the Canadian (or the American or Australian) judiciary, for example, will have observed that “in the course of expressing reasons for the decisions they reach,” judges at both the appellate and Supreme Court level frequently cite “books and articles written by academics.”¹⁶¹ In 1985, the format of the Canadian *Supreme Court Reports* was amended to reflect these changes.¹⁶² This is significant.

At first glance, this observation might seem inconsequential and trivial, the result of handy secretarial work—or perhaps an attempt by the Court to make decisions more readable and accessible to the general public. However, this trend reveals much about the nature of our judiciary and its decision making process. It shows that references to academic literature is consistent and frequent enough for the Court to amend the format of the *Reports* and to list them under a separate heading, “Authors Cited,” located

¹⁶¹ Vaughan Black and Nicholas Richter, “Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990,” *Dalhousie Law Journal* 16 (1993). See also, Peter McCormick, “The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985-2003,” *Canadian Bar Review* 10 (2003); McCormick, “Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96,” *The Supreme Court Law Review* 9 (1998); Gordon Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada,” *Queen’s Law Journal* 19 (1993). For an international or comparative focus, see for example Russell Smyth, “Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court,” *University of Tasmania Law Review* 17 (1998) and Chester A. Newland, “Legal Periodicals and the United States Supreme Court,” *Midwest Journal of Political Science* 7 (1959).

¹⁶² In addition to the list of judicial citations, “which had long been provided between the case summary and the first of the reasons for judgment, the *Reports* now included a list of statutes and regulations referred to, and a list of “Authors Noted” (*cf.* McCormick, “The Judges and the Journals,” 1).

beneath the summary notes and “Cases Cited” and “Statutes and Regulations” list.¹⁶³

Second, and perhaps more importantly, it reflects willingness on the part of judges to “branch out” and incorporate a broader range of ideas into the reasons they provide and the oral arguments they consider. Like any essay, book or article, citations within a judicial decision help locate the origins of an outlook or idea. It connects the written reasons of judges to a broader intellectual horizon, and reveals the sources on which they deliberate or rely.

Studying the academic citation patterns of the Supreme Court is particularly relevant for the weighty public policy arguments that unfold in federalism cases. Like any publication, the authors the Court cites as authority in their written reasons—and to a similar extent, the sources that they dismiss or ignore—reveals multitudes about the intellectual arena upon which they operate and decide. As we discussed in Chapter 2, the decision-making climate of the post-*Charter* era is unlike that of any of the periods that preceded it. It is characterized by heightened levels of academic participation, both in terms of what is done on the bench and off. Not surprisingly, judges in the modern era share many of the traits that one would expect to find in a researcher or professor. They cite academic literature in their reasons for judgment, publish articles, and deliver public speeches on major policy and social issues. Their evolving decision-making style, coupled by the fact that there is a wealth of literature on Canadian federalism, raises the obvious question: which sources does the Supreme Court cite in the federalism decisions they deliver?

¹⁶³ McCormick, “The Judges and the Journals,” 2.

More precisely, in judgments involving the division of powers, which authors and publications do Supreme Court judges cite in particular, and from which discipline(s) do they prefer to draw? Do they dabble in philosophy journals and converse with political scientists and historians, or do they stick to the “nitty gritty” and focus instead on legal sources published by law professors and judges? It goes without saying that who the Supreme Court cites reveals a great deal about their decision-making philosophy.¹⁶⁵

We know from previous studies¹⁶⁶ that Supreme Court judges cite scholarly publications at a much higher frequency now than they did 25 years ago, but the *type* of literature they cite and discuss—the authors and books titles, the academic disciplines and publishing medium, the age of an citation as well as the extent of its use—remains, up until this point, a mystery. This chapter builds on the insights of Chapter 2 by examining the academic citation patterns of the Supreme Court in division of power cases. While Chapter 2 looked at the decision-making conventions and liberties that

¹⁶⁵ This holds true for any discipline, where even a cursory look at a works cited page says a great deal about the assumptions of an author.

¹⁶⁶ In chronological order: G.V. Nicholls, “Legal Periodicals and the Supreme Court of Canada,” *Canadian Bar Review* 24 (1951); Black and Richter, “Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990,” *Dalhousie Law Journal* 16 (1993); Gordon Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada,” *Queen’s Law Journal* 19 (1993). McCormick, “Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96,” *The Supreme Court Law Review* 9 (1998); McCormick, “The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985-2003,” *Canadian Bar Review* 10 (2003). For a comparative focus, see: Russell Smyth, “Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court,” *University of Tasmania Law Review* 17 (1998); Chester A. Newland, “Legal Periodicals and the United States Supreme Court,” *Midwest Journal of Political Science* 7 (1959); W. Daniels, “Far Beyond the Law Reports’: Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978,” *Law Library* 76 (1983); and L. Siroco and J. Marguiles, “The Citing of Law Reviews by the Supreme Court: An Empirical Study,” *U.C.L.A. Law Review* 131 (1986).

modern era judges enjoy, this chapter takes a systematic look at the collection of their choices—that is, their academic citations—in light of these decision-making liberties. In the post-*Charter* era, there is no reason for a judge not to cite a particular author or source; indeed, there is no law or convention saying that a judge is prohibited from citing author X or author Y. Judges have the freedom to cite whomever it is that they desire and believe to “fit” within a particular dispute. That is why it is important to uncover the academic citations of the Court, because they are the result of conscious choices made by judges who possess the freedom to make such choices. Like any publication, however, a citation must make some “sense,” otherwise it weakens the credibility of an attempt to convince an audience. In sum, the academic citations that appear within a judgment are a persuasive tool intended to reinforce a judge’s argument.

This analysis is divided into three component parts. The first section will examine the phenomenology of judicial decision-making and will discuss in particular the functional significance that written reasons, citations and authority play in the formation, clarification and expansion of modern case law. The second section provides an exhaustive and systematic quantitative account of the authors and scholarly literature employed by the Court in federalism cases. I will also examine the age of citations and the frequency of federalism articles published in leading Canadian law journals. The final section of this chapter will serve as the interpretive lens of the other two and will attempt to explain the absence of non-legal periodicals in Supreme Court bibliographies.

A. Methodology

Understanding where the Supreme Court gets its ideas is a task that requires investigation from multiple angles. Fortunately, there is a method to this chapter’s

madness. What I have attempted to do in this short time is to employ the best of both the quantitative and qualitative worlds. In the first part of this paper a series of frequencies and cross-tabulations will be generated from a database that provides an exhaustive account of the academic citations used by the Court in federalism cases since 1984 (with *Tessier Ltée v. Quebec (C.S.S.T)* [2012] being the most recent¹⁶⁷).

The academic citations recorded in the database were retrieved from the Supreme Court's bibliography—the “Authors Cited” section—which is provided in the online version of the *Supreme Court Reports*.¹⁶⁸ In almost every decision, the academics that are discussed or even casually mentioned appear in the citation list mentioned above. Indeed, the “Author's Cited” list is an exhaustive attempt by the Court to list the authors and sources that it employs. However, in going through the cases, I did manage to find one (rather recent) exception: in *Consolidated Fastfrate Inc. v. Western Canada* [2009]¹⁶⁹, an article by W.R. Lederman was quoted and discussed but did not appear in the “Author's Cited” list.¹⁷⁰

¹⁶⁷ 33935 SCC 23 [2012].

¹⁶⁸ I accessed these reports through “Lexum,” an electronic resource which carries every judgment of the Supreme Court of Canada. It is a service provided through a collaborative effort by the Supreme Court of Canada and the Lexum laboratory of the University of Montreal's Faculty of Law. It can be accessed by visiting:
<http://scc.lexum.umontreal.ca/en/>

¹⁶⁹ 3 S.C.R. 407 [2009].

¹⁷⁰ The reference to Lederman appeared in Justice Binnie's dissent, who states, in short: “W.R. Lederman in his illuminating article, ‘Telecommunications and the Federal Constitution of Canada’ in H.E. English, ed., *Telecommunications for Canada* (1973), 339 at 360, puts much greater stress upon the effect of s. 91(29) in converting these exceptions to an exclusive head of federal power and thus supports a broader reading of federal authority.” Of course, this omission is the exception to the Supreme Court's tracking system, not the rule. Fortunately, this was the only omission I was able to uncover.

During this period of study, academics have been cited 451 times in total; roughly six times per case, on average.¹⁷¹ However, what distinguishes this file from that of other studies on academic and judicial citation patterns is that it is “issue specific” and spans more than a quarter of a century. That is to say, it focuses exclusively on federalism cases—and nothing more. This approach is both beneficial and incomplete: beneficial because it resembles more of a “case-study” and longitudinal approach and is therefore more in-depth and historically representative; incomplete because it does not account for the citation trends and patterns of non-federalism issues which makes comparison to a broader body of jurisprudence difficult to determine. Although secondary material was used to “fill the gap,” the types of thinkers, publications and academic journals the Court relies on for other issues—*Charter* cases, for example—was not factored into this analysis. Before we get started, however, a few words on the theoretical and functional role that written reasons, precedence and citations play within our judiciary is needed.

B. Reasons, Citations and Authority

Reasons

The expression “to the victor go the spoils” is a misleading depiction of Canadian jurisprudence. For both litigants and political and civil society, the written reasons surrounding judicial decisions are often more important than who “wins” and who “loses” because they represent a “discursive explanation intended to persuade the

¹⁷¹ This number drops slightly when government reports, parliamentary proceedings and legislative debates—95 citations in total—are omitted from calculations. In the tables that follow, I will define the criteria of the categories that I included.

relevant audience that the outcome is justified.”¹⁷² Reasons form an important link between general, established legal principles on the one hand, and particular factual circumstances on the other. As Lord Denning of Britain observes, the giving of reasons is “the whole difference between a judicial decision and an arbitrary one.”¹⁷³ Giving reasons forms an important check on judicial power and future decision-making. Three points are pertinent here.

First, the reasons requirement prevents (or limits) arbitrary decision making because it forces judges to justify their conclusions and to make their line of reasoning transparent. It causes them to show how they arrived at their decision and why, and from which sources in particular. This in turn constrains judicial power because it limits, at least theoretically, the interpretational range from which judges may venture. This is why for instance the lawyer of a client who cheers for the New York Yankees need not fear a judge that happens to love the Red Sox. Although the statement “I find the appellant guilty because he cheers for the Yankees” is a reason—perhaps a noble one for some—it is a poor reason because it is unconnected to an established legal framework. Having to explain the connection between “sports preferences” and “guiltiness” would be a monumental task, to be sure. However, as we will recall from our discussion in Chapter 2, judges select doctrines to substantiate the political outcomes they desire. Therefore, the Red Sox-loving judge may still convict the Yankees fan because he is a Yankees fan, but he will provide other (non sporting) reasons for doing so. Of course, this is an extreme example, but the point is made.

¹⁷² Peter McCormick, “What Supreme Court Cases does the Supreme Court Cite?: Follow-up Citations on the Supreme Court of Canada, 1989-1993,” *Supreme Court Law Review* 7 (1996): 452.

¹⁷³ Alfred Denning, *Freedom Under Law* (London: Stevens, 1949).

An acceptable decision therefore is one that grounds itself in precedent. In his landmark article “Toward a Theory of ‘Stare Decisis,’” Martin Shapiro notes the dual significance of our precedential legal tradition. He argues that the redundancy of our legal system is its most readily definable feature because it establishes norms and principles by highlighting the citation patterns associated with well worn paths of legal doctrine. Indeed, precedent makes it easy to identify deviation and error.¹⁷⁴ Shapiro’s application of communications theory on the logic and structure of precedent is insightful:

The more probable the transmission of a given sign, the less information its actual transmission conveys. “Redundancy” is the opposite of information. It is the introduction of repetition or pattern into the message. If the telegrapher sends each message twice, his second sending is redundant and contains less information than the first. If we establish the convention, rule or pattern that two dashes will always be followed by a dot, then the actual transmission of the dot after the two dashes will be redundant and contain no information because the dot placement in the sequence could always be predicted without actual transmission.¹⁷⁵

Similarly, when an established pattern of jurisprudence is broken or altered—the reintroduction of the death penalty, say, or the recognition that sexual orientation is a form of discrimination¹⁷⁶ under Section 15 of the *Charter*—it is because there is an established standard (i.e the death penalty is illegal) from which to compare. Anytime the Court hands down a new precedent, lawmakers and legal counsel will surely take note, for it is on the basis of this deviation that the dispositions of future similar factual circumstances will hinge.

¹⁷⁴ Martin Shapiro, “Toward a Theory of ‘Stare Decisis,’” *Journal of Legal Studies* 1 (1972): 125-27.

¹⁷⁵ Shapiro, 125-26.

¹⁷⁶ *Egan v. Canada*, [1995] 2 S.C.R. 513

Second, while the act of giving reasons—legitimate or otherwise—creates both individual and institutional transparency, the expectation to provide *good* reasons necessitates accountability. That is to say, written reasons provide opportunities for internal and external criticism, which can form the grounds for further review.¹⁷⁷ The simple reason for this is that when reasons are provided, one can assess their soundness and legitimacy because the path of legal logic to which a conclusion was reached is spelled out by the judge responsible for delivering the judgment.

Another reason why written justification is important is that it provides a “promise” to future litigants that the Court will rule similarly under parallel factual circumstances, for “precedent is forward looking as well as backward looking.”¹⁷⁹ Indeed, *stare decisis* is the guiding principle from which our judiciary is organized. Consequently, the reasons handed down for a decision in the present carry implications for similarly situated cases in the future. Reasons strengthen law by repetitiously upholding it on the one hand and by gradually building upon it on the other. Although exceptions sometimes occur, “adherence to precedent,” as one justice put it, “must be the rule rather than the exception if litigants are to have faith in the evenhanded

¹⁷⁷ This point is particularly important for judges sitting on lower levels, because in cases of “poor reasoning,” their decisions can be appealed, and as such, their reputation and chances of advancement diminished. However, although this constraint may work at the lower level, reacting against the quality of the reasons released by the Supreme Court is a bit more problematic because, since 1949, it represents the highest Court of appeal in Canada. At this level, written reasons that are perceived to be of inferior quality or contain erroneous reasoning are usually identified by a judge in a separate concurrence or dissent.

¹⁷⁹ McCormick, “Do Judges Read Books, Too?”, 464.

administration of justice.”¹⁸⁰ Other experts, such as Frederick Schauer, for example, take it a step further and suggest that a decision in the present is really an “advisory opinion” for the future:

If a court is constrained by the reasons it gives in addition to the result it reaches, and if reasons are results taken to a greater level of generality and so include a wider class of acts, then under a commitment model a court giving reasons *is* deciding a class of cases not now before the court, and class of cases for which the supposed crucible of experience is missing. Thus every time a court gives a reason it is, in effect, giving an advisory opinion.¹⁸¹

Thus, with the giving of judicial reasons comes the implicit, normative expectation of consistency. At the Supreme Court level, this factor is particularly important because it sharpens the uniformity and clarity of the law by signaling to lower courts the appropriate doctrines and outcomes with which to adjudicate similar disputes in the future.

Additionally, the provision of reasons within the lower courts facilitates the Supreme Court’s “advisory role” for the simple fact that with written judgments it is able to monitor and assess the basis upon which law is administered throughout the country.

Written justifications carry importance because the judiciary is honest about binding itself to sound and transparent reasoning. But this is not all. Academic and judicial citations are a specific and important feature entrenched within the reasons judges provide. Citations ground ideas in authority, and provide a frame of reference to those who read or review a decision.¹⁸² Not surprisingly, judges use citations in a manner similar to academics. Citations draw “the attention of the reader to a broader background

¹⁸⁰ These words came from Justice Benjamin Cardozo, as cited in Jeffrey A. Segal and Harold J. Spaeth, “The Influence of *Stare Decisis* on the votes of United States Supreme Court Justices,” *American Journal of Political Science* 40 (Nov., 1996): 971.

¹⁸¹ Schauer, 655.

¹⁸² Merryman, “Towards a Theory of Citations: An Empirical Study of the Citation Practices of the California Supreme Court in 1950, 1960, and 1970,” *California Law Review* 50 (1977): 381.

against which to locate the immediate arguments” and, in turn, identify “specific passages in other such works for expansion or containment.”¹⁸³ There is a distinction to be drawn between the authority that stems from judicial and academic citations, however. While citations help to substantiate written reasons, it is judicial and not academic citations that are mandatory. As discussed, academic citations are optional, are the result of carefully selected choices of individual judges, and have only become incorporated into Canadian judicial decisions over the past quarter century.

On the other hand, more than few eyebrows would be raised if a judicial decision were composed without reference to previous decisions; it is an expectation—a necessity. Judicial citations are the bedrock or lifeblood of a judicial decision; academic materials are secondary and merely supplemental. A disposition, in short, cannot hinge on what “so and so” said in “such a such” an article; the nucleus of a judicial decision must necessarily stem from judicial precedent. Lastly, whereas there is almost unlimited freedom in terms of which academic materials a justice is permitted to ignore or employ—no set standard or preconceived expectation as to how a source be used or which one(s) in particular—the same operational liberality is not so with judicial citations. There are cases that “must” be cited; cases that one expects to appear in certain topics, which would result in shock if it were absent. As a comparative illustration, if a case involving a divorce settlement and spousal support failed to incorporate, in any fashion, the foundational precedent of modern family law—*Moge v. Moge* [1992]¹⁸⁴—serious questions would arise. On the other hand, if a judgment neglected to include a

¹⁸³ McCormick, “What Supreme Court Cases does the Supreme Court Cite?: Follow-up Citations on the Supreme Court of Canada, 1989-1993,” *Supreme Court Law Review* 7 (1996): pp. 454-55.

¹⁸⁴ 3 S.C.R. 813 [1992]

certain academic—let us use well-known legal scholar Peter Hogg, for example—critics would not flinch. The difference, here, is that the jurisprudential range and expectations that govern legal citations is significantly more narrow than the role and expectations that accompany the use of academic authority.

Citations

When something is cited, it is intended to “convince the relevant audience of the appropriateness of the outcome.”¹⁸⁵ To begin, citations demonstrate a basic understanding of a subject matter and its relation to the case at hand. For instance, if one were to write an article on the history of political parties in Canada, one would expect to see in the bibliography household names like R.K. Carty, Alan Whitehorn and Escott Reid. Similarly, if one were writing a paper on Canadian federalism, it would be expected that leading researchers in the discipline (Donald Smiley, Alan Cairns, Richard Simeon, and J.R. Mallory, to name a few) would be acknowledged and discussed, if not for the bulk of the analysis, then at least as its starting point.¹⁸⁶ Likewise, if the Court were to rule on a division of powers dispute involving environmental legislation and the protection of natural resources, one would expect *Crown Zellerbach*¹⁸⁷ and *Friends of the Oldman River Society*¹⁸⁸ to figure prominently into a judge’s analysis.

Second, citations provide the intellectual coordinates—or starting point—from which to build an analysis. A citation, therefore, locates the “immediate analysis in the

¹⁸⁵ McCormick, “The Supreme Court of Canada and American Citations, 1945-1994: A Statistical Overview,” *Supreme Court Law Review* 8 (1997): 529.

¹⁸⁶ See, for example: Robert E. Goodin and Hans-Dieter Klingemann, “Political Science: The Discipline,” in *The New Handbook of Political Science*, edited by Robert E. Goodin and Hans-Dieter Klingemann (Oxford: Oxford University Press, 1998), 15.

¹⁸⁷ *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1 S.C.R. 3 1992].

¹⁸⁸ *R v. Crown Zellerbach Canada Ltd* [1 S.C.R. 401 1988].

context of established principles and standards.”¹⁸⁹ However, one cannot indicate agreement or disagreement if there is no recognizable standard from which to agree or disagree. Indeed, agreement or disagreement presupposes a preexisting standard, and the degree of agreement or disagreement cannot be clear unless the standard from which it deviates is established and understood. In his article on the Supreme Court’s use of American citations, McCormick summarizes the role and function of judges—what they do, and how they operate—by stating: “judges distinguish past decisions to show how far (but no further) a legal principle should be extended, or they clarify ambiguities or incompleteness from prior decisions, or they try to resolve apparent (or real) disagreements or divergences within the existing case law, or they try to pull a variety of sources together for an original and creative synthesis.”¹⁹⁰ None of these functions are possible, however, without a preexisting standard. In other words, deviation and clarification, affirmation and disagreement, stem from something that is previous. And that which is previous is marked or referenced by citations.

Third, citations add credibility and legitimacy to the interpretations judges advance. However, it is important to keep in mind that there are marked differences between academic disciplines and the judiciary. Whereas judges strive for plausibility, the role of academics is less constrained and more open to theorizing, testing and experimentation. Typically, judges uphold standards and conventions; they do not go out of their way to change or to challenge institutional norms as an end in itself. Although deviation from precedent is sometimes necessary and happens from time to time, the

¹⁸⁹ McCormick, “The Supreme Court of Canada and American Citations, 1945-1994: A Statistical Overview,” 529.

¹⁹⁰ McCormick, 529.

judiciary, as a whole, does not seek to change things for “sport.” Unlike academia, provocation is not the basis of judicial identity; getting it “right,” in light of factual circumstances and existing case law, is, at least theoretically, the ultimate goal.

As we learned in Chapter 2, however, the factors that contribute to “rightness” have become the subject of intense debate. In an age of unprecedented judicial power, some prominent schools of thought, such as the attitudinalists, posit that modern case law is the product of the ideological attitudes and values of the judges creating the decisions. In other words, even though objectivity and adherence to law are fundamental principles of our judiciary—the *prima facie* identity of the Court—judges are fallible and not always able to disassociate personal beliefs from their decisions.

Academics, on the other hand, are convention-challenging professionals, often making contrarian arguments intended to provoke and challenge established patterns of thought. Of course, the nature of academic discourse varies from discipline to discipline, but as a whole, academia fundamentally differs from our judiciary. Political scientists, for example, construct paradigms to explain concepts and to categorize observable phenomena. They develop models and hypotheses that identify emerging trends between citizen and state, and they follow certain methodologies, within different subfields, when doing so. As one writer casually though perceptively observed: “It is probably fair to say that we all carry around in our heads ‘ways of looking at things’ which will help us to evaluate and interpret data and events.”¹⁹¹

Another difference is that academics outwardly *seek* to contribute a deeper understanding of uncharted territory. Unlike judges, they are not constrained by the

¹⁹¹ Lewis A. Froman, “On Paradigms in Political Science and Economics,” *Public Choice* (1967): 91.

doctrine of precedent; academics, especially tenured ones, are free to explore and to write about what they want, when they want, how they want. In many respects, the approaches of two “disciplines” represent each other’s inverse: while researchers pride themselves on nuance and originality, the Court emphasizes and encourages tradition; while “plagiarism” and “redundancy” serve as the methodological rudder for judges on the one hand, it leads to academic suicide on the other. Therefore, the type of citations judges employ is significant. Although citations demonstrate to the immediate litigants, and to the causal or serious observer the authority observed or the principles enunciated, the nature of the authority is quite different. The fact that the Court in recent years has cared to incorporate both types of authority is revealing.

However, since the emergence of the Charter, judges use academic citations at a much higher rate than before.¹⁹² Whereas it was unusual (and even frowned upon) for them to be cited in the past, academic citations have become “business as usual.” But this was not always the case. As late as 1981, for example, Justice Berger of the British Columbia Court of Appeal received harsh criticism from the Canadian Judicial Council for criticizing the *Constitutional Agreement* on behalf of aboriginal peoples and women.¹⁹³ McCormick points out that at that time, “the reigning tradition of judicial decision-making, emphasizing a mechanical process tightly bound to authoritative precedent... severely constrained the way judges could communicate even within the courtroom.”¹⁹⁴ In the past, the role of judges was confined to addressing the legal issue at

¹⁹² To be elaborated upon below.

¹⁹³ McCormick, “Judges, Journals and Exegesis,” 44.

¹⁹⁴ McCormick, 44.

hand—and little more. If this were the case today, this chapter would serve little purpose in the overall analysis of this thesis.

Authority

The Canadian Judiciary reinvented itself in the post-Charter era, beginning with the appointment of Bora Laskin, a law professor, to the Supreme Court. James G. Snell and Frederick Vaughan pick up on this trend and describe the Trudeau/Turner appointments of which Laskin was a part as “the most learned and scholarly group of justices ever to join the Supreme Court.”¹⁹⁵ As we discussed in Chapter 2, there was a new brand of judges dominating the benches; they were academics and law professors prior to becoming judges, and not only had they “published, sometimes extensively, in the same journals that are now being cited,” but continued “to publish such articles even while sitting on the bench.”¹⁹⁶ Indeed, over the past quarter century, a new relationship between judge and society had emerged. Judges have adopted more of a social leadership role, allowing them to exercise their freedom by speaking out against controversial subjects or on behalf of disadvantaged groups. For better or worse, their

¹⁹⁵ James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (University of Toronto Press, 1985): 236. John Saywell adds: “Of the twenty-two puisne judges who sat on the court between 1980 and 2000, eleven were or had been full time law professors at one stage of their careers and many others had lectured part time” (cf., *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, (University of Toronto Press, 1985), 276.

¹⁹⁶ McCormick, “The Judges and the Journals,” 5. It can be said that the changes in the role and decision-making process of our judiciary stem from the appointments of the judges who staff them.

role goes beyond, or even transcends, the legal technicalities and parameters of the courtroom.¹⁹⁷

C. Academic Citation Patterns in Federalism Cases

The academic citation patterns of the Supreme Court in the “Laskin and beyond” years reflect these changes. We know for example from Black and Richter’s work, that from 1985 to 1990, two out of every five judgments contain academic citations, and that the average number of academic cites per judgment containing citations is just over five (5.3).¹⁹⁸ We also know that the Lamer Court has the highest academic citation frequency of the past three chief justiceships (166 citations per year on average), followed by the McLachlin (117/yr) and Dickson Courts (82/yr).¹⁹⁹ More specifically, in federalism decisions alone, there are 423 academic citations that span 200 different publications and 222 different authors.²⁰¹ These figures, when translated into a per/case average (5.3 citations per federalism decision)²⁰², are right on par with the frequency of academic citations in non-federalism cases. While the authority for the Supreme Court of Canada wears “a judicial robe far more often than an academic gown,” the numbers confirm that academic citations have become a “steady and persisting element of the Supreme Court’s explanatory practices.”²⁰³ It also reveals that there is ample room for analysis.

¹⁹⁷ McCormick, “Judges, Journals, and Exegesis,” 44: “The most recent and striking examples of this is perhaps Justice Cory publicly countering the suggestions of the Reform Party of Canada about possible changes to the *Young Offenders Act*” (cf., 44).

¹⁹⁸ Black and Richter, “Did She Mention My Name,” 382.

¹⁹⁹ McCormick, “The Judges and the Journals,” 6. Only the first four years of the McLachlin Court were calculated in this analysis.

²⁰¹ The reason that there is a difference in the number of authors and the number of publications is that some publications were coauthored or involved multiple authors.

²⁰² This number includes government sources.

²⁰³ McCormick, “The Judges and the Journals,” 6. In 2003, for example, the judicial share of the Court’s total citations in 2003 was roughly 80 percent, suggesting that, while

Authors, Disciplines and Judges

This section starts off by looking at the authors that are cited in federalism decisions, the subject matter of the sources that are utilized, and the academic citation patterns of individual judges. Before we can examine how a source is utilized—that is, how prominently it figures into a judge’s analysis—it is important to first get an understanding of what the sources are as well the nature and background of the authors that produce them.

As the data below indicates, the Supreme Court cites a diversity of authors, with more than 200 different thinkers incorporated, to some degree, within their decisions. Of course, some authors are cited more often than others. Peter Hogg, for example, is clearly the Supreme Court’s favorite author to cite, having appeared in more than half of the Supreme Court’s federalism judgments.²⁰⁴ From Hogg, there is a significant drop-off, although the next highest citation frequencies come from former Supreme Court justices Gerard La Forest (9) and Bora Laskin (9); while Dale Gibson (8), W.R. Lederman (7), and Joseph Magnet (5) round out the middle of the pack. But what do these numbers tell us? Are there any surprises or unfulfilled expectations? Is there a common thread that emerges?

judicial citations are clearly the norm, academic citations are frequent and consistent enough to worth noting.

²⁰⁴ In forty six cases, one of Hogg’s publications is cited. Because of his influence, his impact will be analyzed in a separate section below.

Table 1: Citation Frequency of Academics in Federalism Cases: 1984-2012

Author	Frequency	Occupation
Peter Hogg	46	Law professor
Gerard V. La Forest	9	Law professor
Bora Laskin	8	Law professor
Dale Gibson	8	Law professor
W.R. Lederman	6	Law professor
Joseph Magnet	5	Law professor
F.R. Scott	4	Lawyer/writer
Jean Leclair	4	Law professor
Pierre Carignan	4	Law professor
Henri Brum	4	Law professor
Guy Tremblay	4	Law professor
Paul Emond	3	Law professor
Colin McNair	3	Lawyer
Elizabeth Edinger	3	Law professor
Pierre Issalys	3	Law professor
David Beatty	3	Law professor
Paul Weiler	3	Law professor
Other authors ²⁰⁵	155	-
Total	222	-

A few initial observations stick out. First, it is significant to note that two of the top three authors cited are former Supreme Court judges, while the other, Peter Hogg, has appeared on the short list of potential Supreme Court nominees. It is also telling that the occupation of the most frequently cited authors stems, exclusively, from the legal profession. Indeed, every author that appears in the list above is either a law professor or lawyer. That is not to say that other disciplines are deliberately excluded, or that they are absent from the 155 authors that remain, but it does give an early indication of the type of thinkers Supreme Court judges are most likely to gravitate toward. Second, the brevity of

²⁰⁵ This category includes every author, or string of authors, that were cited two times or less.

authors suggests that, although the Supreme Court cites some authors significantly more than others, it is not afraid to branch out and explore the publications of other academics. On average, the Court has incorporated an average of 2.5 publications for every federalism decision in the post-*Charter* era. Although these figures do not come close to the average number of citations that one would expect to find in, say, a legal periodical or political science journal, over time they capture a diverse sample of the academic literature that is available.

However, given that the “top five” represent 80 of the 200 publications that have been cited in total, it is worthwhile to conduct a more in-depth investigation of their contributions. Specifically, are these authors cited for the same “landmark” publication, time and time again; or does the Court pick up on a variety of their publications? Hogg, Laskin and Lederman, for example, have all produced well-known constitutional texts or, as they are sometimes called, “horn” books. Hogg, however, like Laskin and the others in the list, has published multiple works and has written on a variety of Constitutional matters, including federalism. It is reasonable to ask, then, for which publication(s) are they being cited? Is *Constitutional Law of Canada* the only work of Hogg’s that the Supreme Court is citing or are some of his articles being cited as well? How many of Dale Gibson’s many articles have they picked up on? The table below breaks down the publications of the five most frequently cited authors. Books and articles are indicated by italics and quotations, respectively.

For all intents and purposes, the table shows that the sources involving the authors who were most frequently cited span multiple publications. That is to say, it cannot be said that Hogg was only cited because of his textbook, although, at 40 citations, that is no

small feat; and it cannot be said that Laskin was only cited because of his textbook. On the contrary, each author had multiple publications that were cited by the Court. Gibson, for example, had six different articles that were cited; Hogg, four; and Lederman and Laskin, three. That the Court picked up on these authors multiple times in multiple publications shows that these authors were referenced not simply because of the classic works that they had produced. Although “classic” works are significant because their relevance stands the test of time, they are sometimes referenced for the sake of being a “classic,” that is, a title to which many can relate and/or expect to see in works involving constitutional matters.

Table 2: Publication list of most frequency-cited authors in federalism cases: 1984-2012

Author	Publication	No.
Hogg	<i>Constitutional Law of Canada</i>	40
	“Federalism and the Jurisdiction of Canadian Courts”	1
	“Constitutional aspects of Federal Securities Legislation”	1
	“The Constitutionality of the Competition Bill”	1
	<i>Liability of the Crown</i> (coauthored)	2
	“The Charter of Rights and American Theories of Interpretation”	1
La Forest		
	<i>Water Law in Canada</i>	4
	<i>The Allocation of Taxing Power Under the Canadian Constitution</i>	4
	<i>Natural Resources and Public Property under the Canadian Constitution</i>	1
Laskin		
	“An Inquiry into the Diefenbaker Bill of Rights”	2
	<i>Canadian Constitutional Law: Cases, Text and Notes on...</i>	3
	<i>The British Tradition in Canadian Law</i>	1
	“Tests for the Validity of Legislation: What's the ‘Matter’?”	1
“Provincial Marketing Levies: Indirect Taxation and Federal Power”	1	
Gibson		
	“The ‘Federal Enclave’ Fallacy in Canadian Constitutional Law”	1
	“Interjurisdictional Immunity in Canadian Federalism”	2
	“Constitutional Jurisdiction over Environmental Management in Canada”	2
	“The Firearms Reference in the Alberta Court of Appeal”	1
	“Freedom of Commercial Expression under the Charter...”	1
“Measuring ‘National Dimensions’”	1	

Lederman	“Unity and Diversity in Canadian Federalism: Ideals and Methods...”	2
	“Telecommunications and the Federal Constitution of Canada”	1
	“The Concurrent Operation of Federal and Provincial Laws in Canada”	1
	<i>Continuing Canadian Constitutional Dilemma’s</i>	2

At this point, we can say that the Supreme Court cites a diversity of authors, and that the authors they most frequently cite are either law professors or lawyers. But what about the remaining citations? What subject matters or disciplines do they cover? Do they branch out and explore publications that fall outside the legal arena? Returning to our original question: does the Supreme Court cite political scientists or philosophers? As the data below suggests, the short answer is “no.”

While judges possess considerable freedom when it comes to the use of academic literature, it appears they are cautious to exercise that freedom as they tend to shy away from non-legal authority.

Table 3: The Frequency of Academic Subject Matter in Federalism Cases: 1984-2009

Subject/discipline	Number	Share of Total Number
Law	291	68.8%
Government/administrative	73	17.4%
Environment/Science	17	4.0%
Business/Economics	10	2.5%
International	9	2.1%
Dictionary/Encyclopedia	7	1.7%
Philosophy	8	1.9%
History	5	0.9%
Health/medical	3	0.7%
Total	423	100%

Of the various disciplines the Court’s citations encompass, legal literature is by far the most frequent (68.8%); and when government publications are omitted (one in five citations), the proportion of legal material increases to 83.1%. That the Supreme Court

cites legal authority far more than any other discipline is not surprising at first glance. Legal sources are most directly related to the pursuit of judging, and often serve to contextualize the doctrines that are applied to resolve a dispute. But the Supreme Court still cites non-legal publications. Although they are significantly less common, they are not absent, and make up about a third of the citation total (31.2%). Of the remaining citations, reference to government documents—legislative debates, parliamentary proceedings, departmental reports or advisory studies—are the second most common source of authority, making up 17.4% of the citation total.

However, reference to government-created material is fundamentally different from reference to law journals. While the former is more “matter of fact” or record-oriented in nature—assembled, at times, by researchers who are given a specific mandate established by another—the latter is more “free lance” in nature and is the product of whatever path the writer chooses to embark. In the case of *Reference re: Firearms*,²⁰⁶ for example, there are fundamental differences in the approach taken by the government-authored “The Government’s Action Plan on Firearms Control”²⁰⁷ and the article written by David Beatty, “Gun Control and Judicial Anarchy.”²⁰⁸ One is written by bureaucrats and is “matter of fact”—this is what our legislative policy will look like if it passes in the House of Commons—while the other is written by an outside observer and is more opinionated—in short, a forecast on the constitutionality, as well as the lower courts’ handling, of the government’s impending proposal. The point to be made is that it takes

²⁰⁶ *Reference Re: Firearms (Can.)* 1 S.C.R. 782 [2000].

²⁰⁷ “The Government’s Action Plan Firearms Control.” *Canada*. Minister of Public Works and Government Services, 1994.

²⁰⁸ David Beatty, “Gun Control and Judicial Anarchy,” *Constitutional Forum* 10, No 2 (1999).

less creativity for a judge to cite government reference material than it does for a judge to sift through law journals and incorporate the insights of academics.

It is worth noticing that judges cite government material at a far higher rate than other disciplines. Together, law journals and government documents make up 86.2% of all non-judicial citations in federalism decisions. Of the remaining disciplines, close to five percent are represented by environmental matters (4.3%), followed by business/economics (2.5%), international reports (2.1%), philosophy (1.9%), history (0.9%), and medical sources (0.7%). These findings confirm the fact that overwhelmingly, the Court confines its secondary research to legal sources and government material. They do not cite political scientists—a discipline that has produced a wealth of material on federalism—and only rarely do they make reference to literature produced by philosophers or historians.²⁰⁹

However, the absence of political science literature is curious, for a number of reasons. First, judges are the intellectual gatekeepers of the Court; they choose which authors to cite and how often, and whether or not to expand their explanatory net. For now, and for whatever reason, they choose not to cite political scientists, even though there is nothing formally preventing them from doing so. Therefore, the absence of political science material is a matter of choice. Judges choose not to use it. Second, federalism is a focal topic of discussion in the political science community. From many angles, spanning a diversity of approaches and schools of thought, federal-provincial relations in Canada have been scrutinized by political scientists. Some thinkers, like Robert Vipond and Paul Romney, take more of a theoretical or philosophical-historical

²⁰⁹ In the section that follows we will examine the extent to which each resource factors into a judge's analysis.

approach, while other well known scholars, like Richard Simeon, Donald Smiley, and David Cameron have taken more of a public policy / institutional approach. Regardless of background, many scholars have produced books and articles containing leading research, insight, and opinion on the state of the Canadian federation.

On the one hand, it should be expected that judges focus on legal literature when composing a legal decision; the two go hand in hand. On the flip side, however, judges in the post-*Charter* era have incorporated a certain public policy “flair” into their federalism decision-making. As will see in our analysis of doctrine in Chapter 7, they do not simply, as an end itself, apply the law and assess the legal standing of a legislative statute; they also factor into their decisions the end consequence their judgments will bring about. Regardless of what one thinks about the appropriateness of their approach, Supreme Court judges think through the public policy implications of their decisions. They examine the competing interests and legal arguments that come before them, and, when circumstances permit, prefer to render “softened” decisions or “compromises” that preserve the legislative capabilities of both levels of government. In short, the nature of their decision-making philosophy has evolved to the point where it involves a fair level of law creation.

In the expanded explanatory universe in which they now operate, it is reasonable to ask the obvious but important question: why is the Supreme Court ignoring the insights of political or policy experts when they are making policy decisions? It is one thing if the Court, entrenched in legal formalism, confined itself to legal citations exclusively, but as we discussed in Chapter 2, they have expanded their roles and become more “contextual” in nature, which would make the incorporation of political science literature consistent

with, and perhaps complimentary to, their modern decision-making philosophy. If the emerging focus for judges is to make sound policy decisions, it seems sensible to call on the expertise of political scientists and policy analysts to best understand the implications of an impending judgment.

But not all judges embrace the use of academic material as widely as others. Although judges do not explicitly state their opinion on the institution's usage of non-judicial materials, almost all have done so at one point, indicating both broad and longstanding acceptance of the practice. Although the frequency of academic citations varies from one justice to the next, the underscoring point is that the use of academic material is systemic, not the result of a select few judges. In viewing the table below, one can see that while there is significant range in the frequency in which judges employ academic material, almost every judge who authored a reason in a federalism judgment made the list.

Table 4: The Academic Citation Patterns on Federalism Issues According to Supreme Court Justice: 1984-2012

Judge	Total Cites	Total Number of Reasons²¹⁰	Average # Cites per Reason Delivered
La Forest	59	13	4.5
Gonthier	33	4	8.25
Iacobucci	31	10	3.1
Lebel	36	7	5.14
Dickson	21	11	1.9
Bastarache	16	3	5.3
Beetz	14	8	1.75
Binnie	12	4	3.0
Sopinka	10	3	3.3
Lamer	11	4	2.8
Wilson	8	11	0.7
Rothstein	8	2	4

²¹⁰ This includes the total number of written reasons provided by a judge, be that a majority or unanimous decision, a dissent or a concurrence.

Deschamps	5	1	5
L-Heureux Dube	4	1	4
Estey	4	5	0.8
Le Dain	2	2	1.0
McLachlin	12	2	6.0
Abella	1	1	1.0
Cromwell	27	2	13.5

As the numbers show, Justice La Forest cited academic material more times than any of his colleagues (59), but he also authored the greatest number of written reasons. This explains why his “average number of cites per reason” (4.5) is lower than that of Gonthier (8.25) and Cromwell (13.5). However, some judges, like Wilson and Dickson, authored a number of written reasons but only rarely did they include academic citations. From these variations it can be said that the use of secondary literature in judicial decisions is a luxury and choice—widely accepted by judges and never criticized—but one that some expressed in their reasons more readily than others.

Utilization and Dominance

At this point, we have only discussed the authors and disciplines that are cited, and the judges who are citing. But we have said nothing about what the sources look like or how they are utilized within a decision. Indeed, does the Court actually quote and discuss the authors they list? In other words, just because a source is cited does not mean that it is discussed at length or that its ideas helped inform the author of the reasons. Sometimes a source is listed in a string of citations at the end of a paragraph—“See Hogg, *Constitutional Law of Canada*”—with no discussion of the content whatever. But this type of reference says nothing about what Hogg said or what the Court thought of his work. In other instances, the Court has been known to “name drop,” as was the case for example when Justice Gonthier cited John Stuart Mill in *Reference re: Quebec Sales*

Tax.²¹¹ Although Mill was neither quoted nor discussed, his book, *Principles of Political Economy*, appeared in a string of citations at the end of paragraph. Of course, it would be erroneous to conclude that because Mill appeared under the “Authors Cited” header, that Gonthier’s decision hinged on his political philosophy. These are but two examples, but they show that the mere existence of a citation does not guarantee that it was discussed. Therefore, looking at the frequency of citations in isolation is a limited exercise that only takes us so far. If the goal is to uncover the origin of the Supreme Court’s ideas, and to see which types of authority they consider when assembling a judgment, we must measure the respective impact that each source has within a decision.

The first attempt to accomplish this goal is to assess how a source is incorporated within a decision. The table below lists the frequency of how a source is used by assessing whether it was quoted, mentioned in passing, or discussed at length. Six categories were created to describe this phenomenon; they are described below and ordered according to their intensity.

“Discuss” is the most significant or intense designation because it refers to sources that are discussed at length and appear throughout a judge’s analysis; this includes sources which are referenced repeatedly and/or quoted multiple times throughout a decision. “Paragraph” represents the second most significant category, referring, as the name suggests, to authors who are quoted at paragraph length. This category is more substantive than the third category—“quote”—because a paragraph is significantly longer than a quote which is usually only a few words or a single sentence. On the other hand, if a source was quoted multiple times it fell under the “discussion”

²¹¹ [1994] S.C.R. 715

category. This distinction was used when determining which category a citation most accurately belonged. “List/mention,” the fourth category, includes citations which are neither quoted nor discussed, but simply a solo citation or a string of citations that are included at the end of a sentence or paragraph (usually in parentheses). An “iconic” citation is one that is based not so much on necessity, but (presumably) for the significance of a name and what it represents (i.e. Shakespeare, Aristotle, David Hume, John Stuart Mill, and the like). Lastly, the “secondary” category refers to an author that is mentioned, quoted or discussed by a judge only because they were discussed in a prior decision, and the judge in the present is attempting to understand or recapitulate the analysis of the judge who discussed an author in a previous decision.

Table 5: The Use of Citations in Federalism Cases: 1984-2012

Citation Type	Frequency	Proportion (%)
Discuss	49	14.8
Paragraph	47	14.2
Quote	36	10.9
List/mention	184	55.6
Iconic	3	1.0
Secondary	12	3.6
Total	331	100%

In essence, Table 5 can be divided into two main sections. On the one hand, there are those citations that are either quoted or discussed (discuss, paragraph and quote) while the other citations are simply mentioned or referring to a citation made by a previous justice (list/mention, iconic, secondary). As the data indicate, most academics that are cited in a decision are rarely quoted or discussed. Most commonly, judges simply refer to a source at the end of a paragraph. Indeed, more than half of all citations (55.6%) fall under the “list/mention” category, and this number increases when “iconic”

citations, a more specialized subset of the list/mention category, are included. On the other side of the equation, 14.8% of citations are discussed and an additional 25.1% are quoted to some extent. In commonsensical terms, there is nothing unusual about these findings, for these numbers are likely comparable to the citation patterns and tendencies contained within academic publications at large. Not every name or resource that appears in the bibliography of a book or journal is used extensively. In both academic publications and Supreme Court judgments, many references are included “for more information,” and only a fraction of the works that are cited are debated or discussed at length.

On the flipside, the fact that the Court either quotes or discusses two out of five of its citations reveals that the “Authors Cited” header is not simply a list of names, but a list that includes authors who factor prominently into a decision’s analysis. It is the “two fifths”—the citations which are quoted and discussed—that will become the subject of further investigation. Indeed, we need to focus upon the type of sources the Court quotes or discusses at length if we need want to uncover the thinkers that influence the outcomes of decisions. Who are the authors, how “old” are the citations, and from what kind of publishing medium do they originate? Further, how contemporary are the sources they discuss, and to what extent does the age of a citation correspond with the publishing medium of the source that is being cited?

As we saw from the table above, there are various ways a source is incorporated into a decision. While Table 5 contains categories that are explanatory in nature—paragraph, discuss, quote, list/mention—Table 6 uses a numeric ranking to correspond to the extent to which a source factors into a decision’s analysis. Table 6 uses a 1-5 scale,

with “1” representing the sources that are the least utilized and “5” representing the sources that are the most utilized. In this table, government citations were omitted from analysis.

Table 6: The Significance of Academic Resource Utilization: 1984-2012

Significance	Frequency	Percentage
1	158	33.6
2	72	17.6
3	48	12.5
4	24	6.1
5	12	2.5

As the table shows, a significant number of sources fall under the “1” category, that is, a third of citations are mentioned only in passing—be that string or spot citation at the end of a paragraph or sentence. On the other hand, less than 10 percent of citations (8.6%) are discussed at great length. To frame the findings in slightly different terms, only one out of every three citations factor prominently into the Court’s decisions. The remaining citations (62.5%) were used only once, be that a single-sentence quote, a reference in passing, or simply one citation in a list of many. From a broader perspective, only 1.9 citations for every federalism case are prominent while the remaining sources (3.8 citations per case) exist in “name only.” However, these numbers in and of themselves do not take us very far. Indeed, two additional factors will come into play here: first, we will examine the relationship between the medium of a publication and its age; and second, the age of a publication in relation to the extent to which it is used. The intensity rankings will be used to facilitate a series of cross-tabulations.

D. Judges, Journals and Dialogue

The information contained in academic journals is generally or at least potentially more recent than that of the information contained in books. Although articles are usually less substantive and rigorous, their recency is perhaps their greatest asset. Not surprisingly, because they are less in-depth but more cutting edge and nuanced than voluminous books, articles better lend themselves to quick and timely responses. In the aftermath of the 9/11 terrorist attacks, for example, articles attempting to explain the motives of such an atrocity were published much sooner than books attempting to elucidate the same. Another distinction between book and articles is that articles tend to be more “preemptive” than books; that is to say, because they are written and published sooner, they are able to forecast and provide commentary on a dispute, legal issue or lower court decision before the Supreme Court is able to hear it. Books do not often get composed, and subsequently published, in time to influence an impending judicial outcome.

On the other hand, while books are better for adding context and breadth, detailed forecasts that fit within a larger framework, rarely are they published in time to serve as a resource for a specific case.²¹² There are also fewer books published per year than academic journals, which means that there is a greater likelihood that topical information will be published in a journal than in a book. Indeed, the likelihood that a book is written specifically to influence an impending decision is altogether rare and unlikely. When it comes to journals, however, it is worth asking the question: to what extent does “dialogue” exist between judges and journals? That is to say, how contemporary are the

²¹² In most cases it is too laborious to write a book that predicts the outcome or implications of the Court’s decision.

Court’s citations, and to what extent do sources they cite make direct reference to the case(s) at hand? Further, how many articles on federalism are there to choose from?

As we learned from the Dale Gibson illustration in *Reference re: Firearms (Can.)*, the Court makes reference to articles that address the precise dispute over which they are presiding. In this particular instance, the Attorney General of Canada referenced Gibson’s work during oral argument. The Court recorded this reference in its analysis: “The Attorney General of Canada argues that the 1995 gun control law meets these three requirements, and points to commentary on this legislation which supports its position: D. Gibson, “The *Firearms Reference* in the Alberta Court of Appeal” (1999), 37 *Alta. L. Rev.* 1071.” While the Court did not discuss Gibson’s article directly—referring, instead, to source uncovered by the Attorney General—this illustration is nevertheless important. It shows the potential of contemporaneity and reminds us that non-legal sources are referenced during oral argument.

As the data below indicate, the Court is just as likely to cite journal articles (29.1%) as it is books (25.1%), followed by government publications and international reports (24.2%), textbooks (19.4%), and dictionaries (2.1%).²¹³

Table 7: Format Frequency of Academic Material in Federalism Cases: 1984-2012

Format	Number	Proportion
Journal Article	123	29.1%
Book	106	25.1%
Government/International	102	24.2%
Textbook	83	19.4%

²¹³ From hereinafter, however, government publications and dictionaries will be omitted from analysis. The age and utilization of journal articles will become a source of emphasis.

Dictionary	9	2.1%
Total	423	100%

To translate these figures into broader terms, the Court cites 1.5 journal articles per federalism decision. Articles make up the highest proportion of the Court's citations, creating ample opportunities to assess the extent to which they interact with the authors that produce them. In the paragraphs above, we discussed the differences between books and articles and determined that articles have a higher capacity to be "preemptive" as well as the type of publication dialogue is most likely to be found.

The "Age Factor"

However, if the goal is to assess whether there is a dialogue between judges and journals, we must examine the respective age of the Court's publications. To do this, I will measure the age of an academic citation by subtracting its publication date from the year it was cited in a Supreme Court decision. From there, I will perform a series of crosstabs between the 1) age of a citation and its publication medium, and the 2) age of a citation and the extent to which it is utilized within a decision. Together, these factors will help to uncover the respective impact publications have on Supreme Court decision-making.

The age of a source that is cited is important for a number of reasons. To begin, it reveals the longevity and relevance of an author's work as well as the publications stand the test of time and which ones do not. The recency of a publication also allows us to pinpoint whether a source was published in time to address a specific dispute. As the data in the table below suggests, more than a third (36.2%) of the Supreme Court's total citations are five years of age or less, and more than two thirds are 10 years of age or less (68.6%). Publications that fall in the 11-15 category make up one fifth of the Supreme

Court's citations (20.6%). In contrast, publications that are 16 years of age or older make up less than 10 percent of the Court's academic citation total (6.9%). There are only 17 cited publications written more than fifty years ago.

Table 8: The age frequency of non-legal publications in federalism cases: 1984-2012

Age	Number	Percentage
Very current (1-5 years)	153	36.2
Current (6-10 years)	137	32.4
Slightly Dated (11-15 years)	87	20.6
Dated (16-50 years)	29	6.9
Very dated (50+)	17	4.0
Total	423	100

While an exhaustive listing of citations is useful in its own right, it is also limiting. It includes textbooks, which are updated every couple of years, as well as government and international publications, which, more times than not, include legislation or studies that are directly pertinent to the facts of the case at hand. On the other hand, books and articles are sources which, almost exclusively, are “optional” materials that are found and selected by judges. Indeed, books and articles are distinguishable from textbooks and government publications in a number of important ways. Whereas books and articles are “nonessential”—works that are included for background purposes or opinion, analytical nuances or discoveries—textbooks and government resources tend to relate directly to a background or facts of a specific dispute or to the doctrine that is being used to resolve a dispute. In addition, textbooks tend to serve as resources that articulate the history of precedents, the stages or steps involving the application of legal tests, and a summary of the Supreme Court's handling of cases. But as content becomes outdated, new volumes, with minor changes under the same title, are released every couple of years.

Examining the citation of government publications are also limiting in terms of what they reveal about the Court, though for different reasons than textbooks. Often, they are referenced under the “factual” section of a decision as a way to better understand the purpose or intent of a specific statute, including the legislative debates or parliamentary proceedings under which their gestation took place. They are not, as is often the case with books and articles, cited because they offer a nuanced or progressive approach to adjudicating. On the contrary, they are usually cited to bolster the factual background of a dispute and/or the history of a statute. “Just the facts, ma’am” is an expression that most accurately describes the use of government material. Books and articles on the other hand are a stronger indicator of judicial choice. There are many articles and schools of thought from which to choose while there is only one federal legislature, and one version of government documents, that exists. For these reasons it can be said that books and articles reveal more about where a judge gets his ideas—and the thinkers and schools of thought to which he subscribes—than government reports and textbooks.

Because of these differences, I have created a table that looks at the age of books and articles exclusively—a table where all other publication mediums have been removed from analysis. As the data indicates, the Court cites a significant number of books and articles that are “very current” (68). They cite an additional 44 books and articles that fall between the age of six and 11. These two categories combined one can say that Supreme Court judges incorporate “current” materials an average of 1.34 times per case.

Table 9: The age of books and articles that are cited in federalism cases: 1984-2012

Age	Book	Article	Total
Very current (0-5 years)	26	40	66
Current (6-10 years)	16	23	39
Slightly Dated (11-15 years)	8	19	27
Dated (16-30 years)	20	41	61
Very dated (31+)	17	12	29
Total	87	135	224

The next factor to uncover, then, is the respective impact “current” materials have within federalism decisions. If a book or journal is “hot off the press”—and its contents referenced in either oral argument or a written decision—it is prudent to ask about the extent to which said references factor into the Court’s decision-making. That is, how intensely are they utilized? Are these sources tucked away in a footnote and mentioned in passing, or are they discussed at length? The paragraphs below attempt to shed light on these unknowns.

A cross tabulation using the intensity of the book/article sub sample is reflected in Table 10, below. As the numbers suggest, the more “intense” a citation the more likely it is to be an article as opposed to a book, and vice versa.

Table 10: Publication utilization according to publication medium: 1984-2012

	5	4	3	2	1
Book	0	6	12	27	44
Article	4	10	22	26	76
Total	4	16	34	53	120

Building on that point, a second modest discovery is that the more recent a citation is, the more likely it is to factor prominently into a decision. In other words, recent material—especially citations five years of age or younger—is more likely to be “discussed” than dated material. Ostensibly, one of the reasons for this is that a recent publication may

have direct relevance to the case at hand. It may, for example, contain pertinent information about the application of relevant doctrine, or commentary on how a dispute was settled in the courts below. Recent material may contain nuanced ideas or newly published research data. While reference to a longstanding doctrine or idea—a classic article or research study—may sufficiently satisfy its audience through a simple spot citation or quote, a new concept may require a more in-depth discussion so as to better link the relevance of its content to the disposition at hand.

Table 11: Correlating the age of a citation with the intensity of its use: 1984-2012

	5	4	3	2	1
Very current	11	9	16	26	56
Current	0	5	9	13	22
Slightly dated	0	5	6	10	14
Dated	1	4	17	14	50
Very dated	0	1	0	6	4
Total	12	24	48	69	146

Nor surprisingly, as the data in Table 11 indicate, almost every citation that was scored a ‘5’ on the intensity scale was “very recent.” With the exception of one citation, the sources that factor most prominently into a decision are not more than five years of age. On the other hand, a disproportion number of publications that are determined to be “dated” or “very dated” scored a “2” or a “1” on the intensity scale. While there are various sources that fall between ratings “3” and “4,” a close examination of Table 11 shows a strong correlation between the recency of an academic source and the intensity of its use.

From previous tables we learned that in Supreme Court decisions, articles are the most frequently cited publication medium. They surpass the proportion of textbooks, government documents and books. They are also more likely to be discussed “at length”

than books. With these factors combined, it can be said that some evidence exists to support the idea that the communication bond between judges and journals is a two-way street. While articles offer a medium through which academics may influence the “reasoned elaboration”²¹⁴ of judges, written judgments provide the Court with opportunities to respond to scholars through discussion. Given that journals represent the intellectual pulse of the academic community, it appears that judges are undoubtedly influenced by the academic community of which they have become a part.²¹⁵ That being said, however, which journals are they citing? Do they confine their research to Canadian periodicals, or do they cite international journals as well? Further, when it comes to issues that involve Canadian federalism—what does the intellectual “talent pool” look like? How many articles on Canadian federalism are published each year, and what proportion of these publications do Supreme Court judges pick up on? To use but one example, if a constitutionalist were to publish an article on Canadian federalism in the *Canadian Bar Review*, what are the chances it would end up in the written reasons of Canada’s National High Court?

The “Talent Pool”

Between 1984 and 2012, the Supreme Court cited 121 journal articles in its federalism decisions, and of those articles, 64 had something to do with Canadian federalism. The federalism articles that were cited spanned 41 academic journals—some Canadian, some international. A breakdown of the citation frequency of articles

²¹⁴ Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, eds (Massachusetts: Harvard University Press, 1994).

²¹⁵ See Peter McCormick, “Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship,” *University of New Brunswick Law Journal* 139 (1996), an article which discusses the “phenomenon of judicial participation in legal scholarship, primarily through contributions to the university and professional legal journals” (cf. p.44-45).

published in federalism decisions is contained in the table below. For the purposes of this table, every article—regardless if it was cited multiple times—factored into analysis.

Table 12: Ranking of Canadian Legal Periodicals Cited in Federalism Decisions

Periodical name	Number of times cited
<i>Canadian Bar Review</i>	25
<i>University of Toronto Law Journal</i>	12
<i>McGill Law Journal</i>	6
<i>Osgoode Hall Law Journal</i>	6
<i>Alberta Law Review</i>	5
<i>Dalhousie Law Review</i>	4
<i>University of British Columbia Law Review</i>	4
<i>Manitoba Law Journal</i>	3
<i>Ottawa Law Review</i>	3
<i>Queen's Law Journal</i>	3
<i>Canadian Business Law Journal</i>	2
<i>Canadian Law Review</i>	1
<i>Canadian Journal Criminal Law</i>	1
<i>University of Western Ontario Law Review</i>	1
<i>Saskatchewan Law Review</i>	1
<i>Supreme Court Law Review</i>	1
<i>University of New Brunswick Law Journal</i>	1
<i>American Law Journals</i>	20
<i>International Law Journals</i>	4

While it is clear that some journals are cited more frequently than others, the most revealing factor is the diversity of journals from which the Supreme Court engages. Granted, the frequency in which some journal appear is inflated somewhat by articles, within those journals, that were cited in multiple decisions. But one cannot allow the qualification of such numbers to diminish its significance. The Court cites multiple articles in multiple periodicals. But what percentage of the articles in Table 12 are related to Canadian federalism?

Table 13: Number of federalism articles cited according to periodical: 1984-2012

Periodical name	Number of different federalism articles cited per journal
<i>Canadian Bar Review</i>	23
<i>University of Toronto Law Journal</i>	6
<i>McGill Law Journal</i>	6
<i>Osgoode Hall Law Journal</i>	2
<i>Alberta Law Review</i>	3
<i>Dalhousie Law Review</i>	2
<i>University of British Columbia Law Review</i>	2
<i>Manitoba Law Journal</i>	2
<i>Ottawa Law Review</i>	2
<i>Queen's Law Journal</i>	3
<i>Canadian Business Law Journal</i>	1
<i>Canadian Law Review</i>	1
<i>University of Western Ontario Law Review</i>	1
<i>Supreme Court Law Review</i>	1
<i>University of New Brunswick Law Journal</i>	1
<i>American</i>	2
<i>International</i>	0
Total	58

Of the 121 article citations by the Court, 58 were related to Canadian federalism. In compiling the data for this table, articles that were cited multiple times were only counted once, for the purpose of the table is to see how many *different* publications there and what journals they come from in particular. As [Table 12](#) suggests, the *Canadian Bar Review* is by far the most frequently cited journal that is associated with the articles the Court references. Although we are unable to determine whether it is the name and reputation of the journals that draws judges to its article—or whether it is the authors who publish in them—the fact remains that the *Canadian Bar Review* is the most frequently cited Canadian legal periodical when it comes to publications related to Canadian federalism. The next two commonly cited periodicals include the *University of Toronto Law Journal* (6) and the *McGill Law Journal* (6). From there, the frequencies of the

remaining drop off significantly. However, it is peculiar that one of Canada’s leading law journals is nearly absent from the list above. Indeed, while the *Supreme Court Law Review* has published a sizable number of federalism articles over the past quarter century (17), the Court has only cited it once in its federalism decisions over the past quarter century. It is possible that the federalism articles being published had little to do with the federalism cases appearing before the Court, but such a scenario raises an interesting comparative question: how many Canadian federalism articles were published in relation to the number of Canadian federalism articles that were cited?

I have attempted to answer this question in the Table 14, below. Because some journals have been around longer than others, it is not possible to compare apples to apples in every instance. Some journals are longer standing than others, and some journals publish more frequently than others. I confined the list to Canada’s “major” law journals as well as the journals the Court most frequently cites in its reasons for judgment. Accordingly, many provincial journals—such as the *Alberta Law Review*—were omitted from analysis.

Table 14: Frequency of Federalism Articles in leading Canadian Legal Periodicals

Journal Name	Range	Federalism Articles	Total Articles	Proportion (%)
<i>Canadian Bar Review</i> ²¹⁶	1984-2012	26	318	8.2
<i>Osgoode Hall Law Review</i> ²¹⁷	1993-2012	7	402	1.7

²¹⁶ Contains one very recent publication: Ian B. Lee’s case comment in the *Canadian Bar Review*, “The *Assisted Human Reproduction Act* Reference and The Federal Criminal Law Power” (July, 2012). Of the journals we surveyed, only three federalism articles have been published over the past three years. One from the *Canadian Bar Review* (above) and two from the *Queen’s Law Review*.

<i>McGill Law Review</i>	1999-2012	5	260	1.9
<i>Queen's Law Review</i> ²¹⁸	2000-2012	21	212	9.9
<i>University of Toronto Law Journal</i>	1997-2012	4	306	1.3
<i>University of Toronto Faculty of Law Review</i>	1995-2012	4	112	3.6
<i>Supreme Court Law Review</i>	1999-2012	17	427	4.0
<i>Ottawa Law Review</i>	1978-2012	6	453	1.3
Total	-	90	-	-

Of the nine journals we profiled, for example, less than five percent of the total number of articles were federalism related (3.6%). This is significant, because when a federalism article is actually published, there is a high probability that it will not only be read by judges but potentially cited and incorporated into their reasons for judgment. In some journals, such as the *McGill Law Review*, 50% of its federalism publications since 1984 (3/6) have been cited by the Court. In other instances, two out of six federalism articles that were published in the *Ottawa Law Journal* since 1984 have been cited, and three out of seven federalism articles published in the *Osgoode Hall* journal have been cited.

²¹⁷ The number of articles related to federal/provincial jurisdiction published in the *Osgoode Hall Law Review* can be counted on one hand: 5. One of those articles is based on the Australian federation, and another on the work and impact of Brian Dickson, of which the issue of federalism is discussed at length. Not once does the word “federalism” or the phrase “division of powers” appear in the title of an article published in *Osgoode* between 1993-2009.

²¹⁸ The spike in federalism articles can be explained by a federalism “special edition” published in 2009, where 12 federalism articles appeared. If history is any indication, one would expect the Court to pick up on these recently published articles in the division of power cases it addresses in the next couple of years.

On the other hand, the article/citation ratio in other leading journals tends to move in the opposite direction. Only one out of 17 federalism articles that were published in the *Supreme Court Law Review* were cited, and only three out of 21 federalism articles published in the *Queen's Law Review* were published. Despite the range of journal citation ratios, these numbers are surprising. To begin, federalism articles are uncommon, and the disparity between federalism articles and non-federalism legal articles intensified in the post-*Charter* era. The fact that federalism articles have been cited as much as they have suggests that they have a moderate influence on the federalism jurisprudence of the Court. It also suggests that when the Supreme Court embarks on new federalism precedents, they make a real effort to stay current with the scholarship. While it is unclear whether the articles influence their position—or whether they find articles to substantiate their opinion—judges participate in academia. While they may not always “discuss” them, they cite them, and more times than not, read them or hear about them in oral argument.

At the end of the day, it appears there is a disparity between the number of articles on federalism that are published in comparison to the number of non-federalism articles that are published. In the legal academic community, federalism has taken a back seat to other topics, including the Charter, aboriginal issues, the environment, and the legality of social-moral issues like doctor-assisted suicide, safe-injection sites and human reproductive technology. Chapter 4 will examine the Supreme Court's federalism docket and shed some light in this area.

Political Scientists and Indirect Infiltration?

Over the past number of pages we explored the frequency and application of scholarly material in Supreme Court decision-making. We learned that while the use of academic literature is common, it is largely confined to *legal* authority. Indeed, both political scientists and public policy experts are absent, which is a matter of judicial choice. That is, there is nothing formally preventing judges from expanding the boundaries of their intellectual arena. They cite legal academics—and not political scientists—because they choose to cite legal academics and to ignore political scientists.

Yet, ironically, as we will see more fully in Chapter 7, the Court's decision-making philosophy blurs the legal function of judicial review with the political function of policy-making. While the Supreme Court refrains, for whatever reason, from citing public policy experts, they sometimes behave like them and/or make decisions that are based on policy arguments that are presented by the litigants that come before them. The question, "where does the Supreme Court get its ideas," becomes a tenuous pursuit because one cannot rely on academic citations alone to trace the origins of their outlook or ideas. While bibliographies are an excellent starting point, every author or judge is influenced by assumptions that were shaped by something. And these assumptions are not often displayed in an "Authors Cited" list. Assumptions are implicitly revealed through the work of a judge, through the application of doctrine and the creation of jurisprudence. Supreme Court justices may not cite Donald Smiley, Alan Cairns or J.R. Mallory—to list but a few examples—but they may be indirectly influenced by their research, paradigms and views on Canadian government.

Interestingly, what is noteworthy about Hogg's textbook—aside from the fact that it is cited so often—is that his chapter on federalism discusses the contributions of political scientists. For example, in providing a definition of federalism, he uses K.C. Wheare's classic text *Federal Government* as his starting point. Moreover, in discussing the history of Canadian federalism, he discusses Saywell's book, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. And in discussing the relationship between federalism and judicial review, he cites Ted Morton and Ranier Knopff's book, *The Charter Revolution and the Court Party*. Additionally, his bibliography contains seven Donald Smiley publications, as well as numerous books and articles by Richard Simeon and J.R. Mallory. It is difficult to imagine the Court using only the "legal" sections of Hogg's textbook—skipping over the parts where he includes references to the "tainted" insights of political scientists. This leaves open the possibility that political scientists have an indirect influence on the Court. That is, while the Supreme cites Hogg and his work, Hogg cites political scientists and their work.

Our review of the Supreme Court's academic citation patterns revealed little about the decision-making philosophy of the Court. The Court did not make reference to political scientists or historians; therefore, it is not possible for us to align them with a particular thought camp or framework. They did not cite the revisionist historians we discussed in Chapter 1—Romney, Vipond, Moore and Ajzenstat—nor did they rely on the cynical outlooks of Waite, Cook, Black or Resnick. The point to be made is that the Supreme Court's bibliography left us with no identifiable thought camp from which to align them. It is largely made up of legal sources, government publications and textbooks, and rarely did it include provocative arguments. While they very well may

subscribe to the “pragmatist” school of Waite, Cook, Black and Resnick—or the revisionist school of Romeny, Vipod, Moore and Ajzenstat—we will have to look to other means than citations to find it.

Moving forward, if we cannot identify (or glean insight into) the Supreme Court’s decision-making philosophy by analyzing their academic citations, we must look to the structure and content of the federalism cases for deeper insight. In the chapter that follows, I provide an exhaustive account of the Supreme Court’s post-*Charter* federalism docket and use it as a springboard for the analytical chapters that follow. If the docket of the Court is largely a collection of the judicial discretion, it is worthwhile to examine the cases that were important enough for consideration.

Chapter IV Docket

In Canada, it is not uncommon for publications dealing with federal judicial review to point out the lack of interest in the topic. Indeed, federalism cases in the modern era have been largely overshadowed by the emergence and predominance of the *Canadian Charter of Rights and Freedoms*, and the focus of political scientists and legal scholars has simply followed suit. Given the impact that the *Charter* has had on our understanding of rights in particular—and the increased role and purview of the courts in general—one could argue that such attention is warranted.

However, the lack of attention paid to the Supreme Court's handling of the division of powers is not reflective of a shortage of developments. Since Brian Dickson took over as Chief Justice, the Supreme Court has handed down 81 decisions related to the distribution of powers.²¹⁹ This figure not only represents a consistent and sizeable portion of the Supreme Court's docket, but contained within these cases are landmark decisions with far-reaching precedential implications. Yet, while one will almost always find federalism articles that deal with the doctrinal nuances of a landmark decision, surprisingly very little has been said about the Supreme Court's division of power cases

²¹⁹ This figure includes every federalism reserve judgment over the past three chief justiceships (1984-2012). There were nine oral judgments throughout this period; they were omitted from analysis due to their lack of substance. For interest, they consist of: *Goldway v. Montreal (City of)* [1984], 2 S.C.R. 525; *Ontario (Human Rights Commission) v. National Dental Examining Board of Canada* [1991], 3 S.C.R. 121; *Canada (Human Rights Commission) v. Sun Life Assurance Co. of Canada* [1991], 3 S.C.R. 689; *Life Underwriters Assn. of Canada v. Provincial Assn. of Quebec Life Underwriters* [1992], 1 S.C.R. 449; *Téléphone Guèvremont Inc. v. Quebec (Régie des télécommunications)* [1994], 1 S.C.R. 878; *Ontario v. Canadian Pacific Ltd.* [1995], 2 S.C.R. 1028; *Germain v. Montreal (City)* [1997], 1 S.C.R. 1144; *Nutribec Ltée v. Quebec (Commission d'appel en matière de lésions professionnelles)* [2004] 1 S.C.R. 824; *UL Canada Inc. v. Quebec (Attorney General)* [2005], 1 S.C.R. 143.

as a whole. How many federalism cases are there, one wonders? What issues do they encompass, and from which courts of appeal do they originate?

This chapter answers these questions by providing an exhaustive and contextual overview of the Supreme Court's federalism caseload. In the end, this chapter reveals that federalism cases in the modern era are constant and relevant, span a variety of issues, and come from a number of provinces.

A. Caseload

Understanding the nature and composition of the Supreme Court's docket is an important prerequisite to understanding the role the Court plays in shaping the distribution of powers in Canada. While various factors alter the federal-provincial landscape, the type of cases to which the Court grants leave to appeal—and the various actors and interests that are represented by the litigants and interveners who are opposed—speaks volumes to the sphere of influence the Court maintains in federalism matters. Indeed, the Court cannot influence that which does not come before it; as an institution, it cannot pass laws, offer opinions or go out of its way to render legally binding decisions on matters that do not frequent its chambers. All Supreme Court judges can do is maximize or minimize their opportunities to clarify jurisdictional issues that are presented by way of reference or appeal; they cannot pass laws with the same liberty, nor with the same directness, as elected officials.

However, what the Supreme Court can do is determine the nature and scope of its docket. As we discussed in Chapter 2, the majority of cases that are heard at the Supreme Court level are the result of carefully selected choices that come at the hands of judges who sit on docket selection committees. On these panels, judges weigh the merits of

each application and look *inter alia* for opportunities to speak to an issue that requires direction—be that disagreement or inconsistency in the lower courts or confusion or uncertainty at the political level. The paragraphs that follow are about identifying the federalism cases that made it through the Supreme Court’s screening process.

Interestingly, the complexion of the Supreme Court’s post-*Charter* federalism docket is not far off the frequency of division of power cases observed by the Laskin, Taschereau, Cartwright, or Fauteux courts before it. While the federalism case list in the modern era does not compare with the intensity of federalism matters under Laskin, this long range finding challenges the idea that federalism became irrelevant after the passing of the *Charter*. Both the volume and the significance of the cases that follow reinforce this assertion.²²⁰ Using the per decade approach of Monahan, I have combined his findings with my own to paint a complete picture of the Supreme Court’s federalism caseload over the past half century.²²¹ Notwithstanding a few noticeable spikes and dips, from a pure numbers perspective the frequency of federalism cases over the past five decades is similar, with the proportion of federalism cases in each decade being within five percent of the ones that it preceded.

²²⁰ The frequency of federalism cases is not an accurate measure in and of itself. That is to say, if 90% of the federalism decisions were comprised of two sentence dispositions, there would be little use studying the content and impact of the decisions. The lack of time invested into these decisions would communicate the lack of significance in the eyes of the Court. Significance and frequency create an accurate measure of relevance.

²²¹ Patrick Monahan, *The Charter, Federalism, and the Supreme Court of Canada* (Toronto, ON: Carswell, 1987).

Table 1: Proportion of federalism cases decided per decade: 1950-2012

Decade	Federalism cases	Total cases²²²	Proportion
1950-59	30	651	4.6%
1960-69	36	1161	3.1%
1970-79	54	1464	3.7%
1980-89	81	1017	8.0%
1990-99	19	1119	1.7%
2000-09	27	741	3.6%
2010-12*	9	173	5.2%
Average/decade	36	1025	3.51%

As the data above indicates, from 1950 to 1990 the number of federalism cases appearing before the Court is gradual and steady, and moving in a linear fashion. Thirty cases were heard in the 1950s, thirty-six in the 1960s, and fifty-four in the 1970s; notably, the number of cases handed down in the 1980s was twice the average number of cases handed down in the three decades before it. In the 1980s, federalism was booming. However, looking at the numbers in slightly different terms, if one divides the caseload into two thirty-year chunks—1950 to 1980, 1981 to 2011—the frequency of federalism cases in each category is right on par: 132 to 120, respectively. Aside from a dramatic spike in the 1980s, from a longitudinal perspective federalism cases are a caseload mainstay; their persistence has not decreased or increased, with any predictability, over time; and the Court is showing no indications of an impending docket extinction.²²³

Viewed in a broad light, the constancy of the Supreme Court's federalism docket stands the test of time. But to what extent are there variations from one year to the next? Has

²²² This number includes both oral and written judgments. This is the approach Monahan adopted; and for this table, consistency was sought. In the tables that follow, however, oral judgments are removed from further analysis.

²²³ The notable caseload drop of the 1990s will be addressed in the paragraphs below.

the *Charter* augmented or diminished the frequency of federalism cases? What do the latest trends suggest about the future of federalism?

Despite the increased profile of the *Charter*, the Court continues to render a steady stream of division of power decisions. Although the frequency of these cases represent less than five percent of the Supreme Court’s total annual caseload (4.03%), this proportion is significant because it underscores the fact that federalism cases make up a steady portion of the Supreme Court’s post-*Charter* docket. Such a proportion is also consistent with the past half-century’s historical average.

Table 2: Federalism case frequency per Chief Justiceship: 1984-2012²²⁴

	Federalism Cases	Total Cases	Proportion
Dickson (1984-1990)	31	550	5.63%
Lamer (1990-1999)	17	649	2.62%
McLachlin (2000 -)	33	811	4.10%
Total	81	2010	4.03%

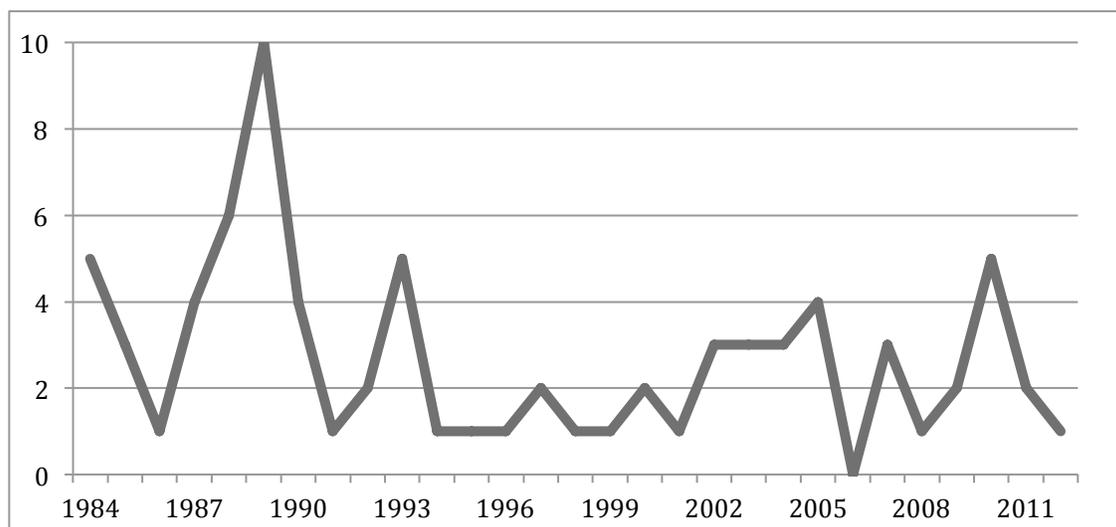
General trends and averages aside, there are noticeable differences in the caseload frequency from one chief justiceship to the next. Whereas a federalism dispute appears in roughly one out of every 20 cases in the Dickson Court, it surfaces only once out of every forty cases under Lamer. This is true for both the total number of federalism decisions and the proportion of the caseload those decisions represent. To put it in slightly different terms, under Dickson the Supreme Court handed down an average of six federalism cases per year while the decade under Lamer produced a yearly average of slightly less than two.

²²⁴ It is important to note that both the “federalism cases” and “total cases” columns contain reserve judgments only.

Viewed in isolation, it appears there is some credence to the suggestion that the *Charter* contributed to the federalism caseload drop of the 1990s. While this may be true to a certain extent, the permanency of this slump was short lived. Under McLachlin, federalism experienced a moderate resurgence. In this period, the Court has rendered more federalism judgments than either the Dickson or the Lamer eras (33 decisions compared to 31 and 17, respectively), although part of this resurgence can be explained by the extensive length of McLachlin's term as chief justice. Still, the proportion of federalism cases in this era (4.10%) is less than that of the Dickson Court (5.63%) but higher than the historical average (3.51%).

As the graph below indicates, there are significant variations in the number of division of power cases decided from one year to the next. While [Table 4](#) addresses the collective caseload average according to chief justice, the graphs below plot the number of federalism cases according to year. Because the sample size is relatively small, some annual spikes should be expected. However, there are a few trends in particular that require a deeper level of explanation.

Figure 1: Frequency of Division of Power Cases Handled According to Year: 1984-2012



First, 1989 stands out as the “big year” for federalism. In that single year, ten cases were decided, which is more than half the total number of federalism cases handed down during the Lamer court. As Chief Justice Dickson was slated to retire in 1990, it is reasonable to suggest that he sought to make as big a footprint on the subject as possible. Although there is not way to prove this conclusively, three factors contribute to the reasonability of this musing. In 1989, Brian Dickson was 74 years of age; and with imminent mandatory retirement, he knew in advance that he would have had to leave the bench on May 28, 1991

With almost complete docket control, it is not difficult for chief justices to steer the Court toward issues they find important. Under Laskin, Dickson was a major contributor to federalism decisions, so much so that in Swinton’s book on the subject, he was among the “big three” who were most inclined to weigh in on the division of powers.²²⁵ In his final two years as Chief Justice, multiple landmark federalism decisions were handed down, and of these decisions, Dickson authored of five. In total, Dickson rendered 10 federalism judgments and one separate concurrence as Chief Justice.²²⁶ The *Charter* had reached eight years of existence by the time Dickson had retired; but it does not appear that it had much of an impact on the federalism caseload of the eighties, for that came later.

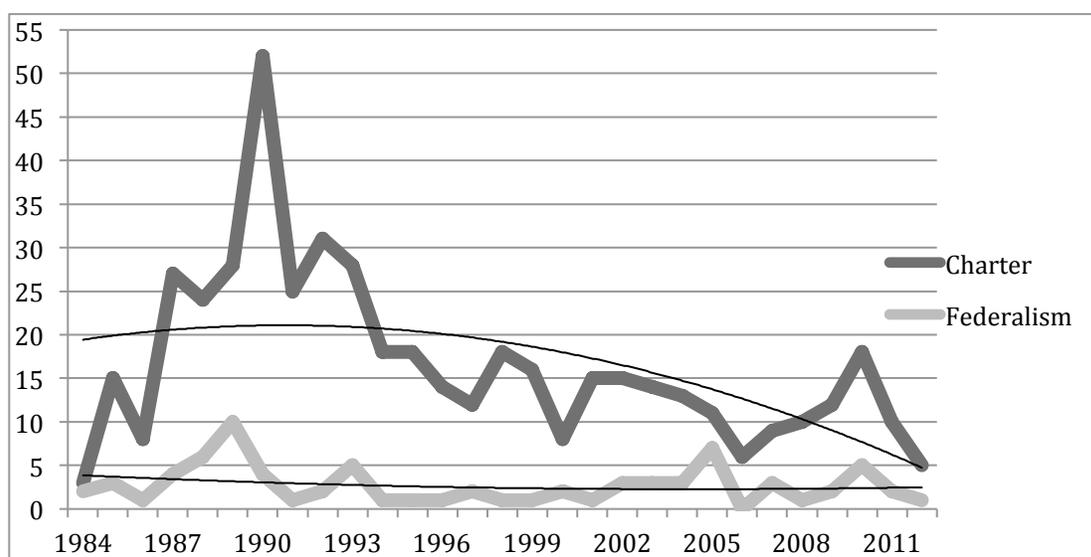
Second, one cannot ignore the federalism dearth of the 1990s. Under Dickson, it was not uncommon for the Court to hand down five, sometimes six, federalism cases per

²²⁵ The other two judges were Laskin and Beetz; see, Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*, 1990.

²²⁶ Although a introduction to the major cases will be touched on below, among some of the notable examples include: *Crown Zellerbach* [1988], *General Motors v. City National Leasing* [1989], *Bell Canada* [1988], *Alberta Government Telephones* [1989], and *Sobeys Stores v. Yeomans* [1989].

year. Under Lamer, however, the proportion of federalism decisions dropped by half; and this disparity only increases when judgments from the bench are included in the total case list.²²⁷ As discussed, it is often acknowledged that the *Charter* displaced federalism as the major constitutional issue in Canada. As the numbers below indicate, it is difficult to deny this assertion. The Supreme Court, in every year since 1985, hands down more *Charter* decisions than federalism. But whereas the number of *Charter* decisions increased steadily from 1984 to a historical high in 1991, they also decreased steadily between 1991 to 1997, where the annual frequency seems to have plateaued.

Figure 2: Comparative graphing of *Charter* and federalism decisions per year: 1984-2012



Also telling from Figure 2 is that *Charter* cases are most numerous under Lamer; and as *Charter* decisions were handed down at an unprecedented rate, federalism cases were at an all time low. Because the *Charter* significantly altered the nature and function of judicial review, a surge in *Charter* cases should be expected. However, the point of

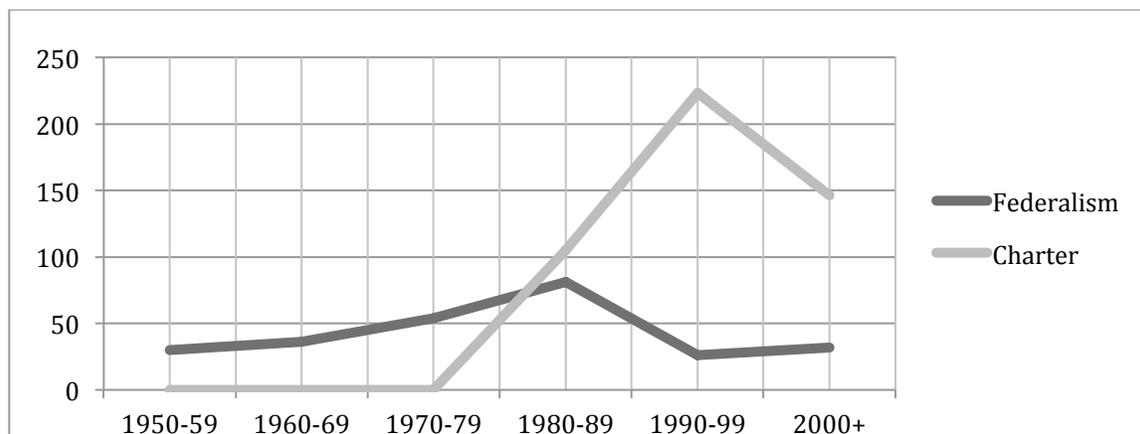
²²⁷ Under Lamer, the Supreme Court handed down a disproportionate number of oral decisions. Of the 1119 total decisions that were rendered, only 649 were reserve (written) judgments.

this exercise is not to determine whether the *Charter* permanently suppressed the frequency of federalism cases. While there is not enough information in the graph to declare a causal relationship, it is unclear what, exactly, precipitated a drop-off in federalism cases under Lamer. One possibility is that the Court reprioritized its workload as a way to adapt to the more pressing rights-based landscape that the *Charter* inevitably created. Or perhaps heightened levels of intergovernmental peace limited the need for litigation to play out before the Court. Whichever the case, [Figure 2](#) demonstrates the “resilience” of the federalism caseload.

Under Lamer, the number of division of power cases dropped as the number of *Charter* cases rose, but the *Charter* did not create a permanent diminution on the federalism docket. As the polynomial trend lines indicate, the gap between *Charter* and federalism decisions have stabilized. Since 1991, the frequency of *Charter* cases has experienced a downward regression while the proportion of federalism decisions under McLachlin (4.1%) has exceeded the past half-century’s historical average (3.5%). A long-term comparative historical mapping of federalism and charter decisions bolsters this finding.

In [Figure 3](#), the total number of federalism and *Charter* decisions are grouped according to decade. The graph reinforces what we learned from the previous table. While [Figure 2](#) used 1984 as its starting point, this table starts with 1950 as a way to contextualize the modern federalism caseload with its historical average.

Figure 3: Comparative graphing of *Charter* and federalism cases per decade: 1950-2010+



As the data reminds us, the 1980s was the decade of federalism, and the 1990s was the decade of the *Charter*. However, after the dust of the *Charter* boom had settled, the number of federalism cases appears to be increasing. Federalism cases have not dropped off the map, nor have they continually declined from each passing year. In fact, the number of *Charter* decisions has never returned to its peak in the 1990s. As the trend lines indicate, the average number of *Charter* decisions has steadily declined and stayed under 20 cases/year ever since 1994. On the other hand, there have been some recent “spikes” in federalism matters. In 2005, for example, the Supreme Court handed down seven federalism decisions; and in 2010, an additional five.

At this point, we know that federalism decisions are constant, but we know very little about the content of these cases. Do some division of power topics arise more frequently than others? Do these cases represent landmark precedents or mundane technicalities? In short, do federalism cases even matter? If the vast majority of federalism decisions were simply composed of two line dispositions, there would be little point in studying the precedents of these decisions. However, the majority of decisions are accompanied by lengthy and discursive reasons. It turns out that Supreme Court

judges spend great lengths of time on federalism matters, and litigants continue to call on the Court to resolve disputes that stem from jurisdictional disagreements over how legislative powers are distributed. The section below will provide a broad overview of some of the major developments in federal judicial review. Its contents speak to the sustained relevance of our case list.

B. Issue Frequency

The Supreme Court handles a diversity of federalism issues across the topical spectrum. Such diversity is contained within the dockets of each of the past three chief justiceships, indicating both a broad and longstanding pattern of influence on the part of the Court. After reviewing the case list, it is clear that judges do not confine themselves to dealing with “new” or trendy topics, such as clarification over environmental jurisdiction, the criminality of assisted reproduction,²²⁸ or the latest developments in safe injection sites.²²⁹ While the Supreme Court deals with nuanced and unprecedented issues on a regular basis, they also continue to (re)address classic issues related to “trade and commerce,” “property and civil rights,” “transportation and communication,” “natural resources,” and “taxation.” Such issues are ongoing; they were never settled “once and for all”; and there is no reason to suggest that they will fall off the Supreme Court’s docket. The Supreme Court’s ongoing engagement of the topic is also underscored by the fact that they have changed long-standing precedents on “age-old” issues.

Nine categories were used to classify each of the 81 division of power cases in question. In viewing the data below, one should note that some cases fit into more than

²²⁸ *Reference re Assisted Human Reproduction Act*, 3 S.C.R. 457 [2010]

²²⁹ *Canada (Attorney General) v. PHS Community Services Society*, 3 S.C.R. 134 [2011].

one category, which explains why the total number of issues exceeds the total caseload number.²³⁰

Table 3: Issue frequency per Chief Justiceship

	Dickson	Lamer	McLachlin	Total (n)	Total (%)
Trade and Commerce / Property and Civil Rights	13	4	13	30	37.0%
Transportation and Communication	8	4	4	16	20.0%
Criminal / Regulation	6	2	9	17	20.3%
Natural Resources	4	3	3	10	11.3%
Taxation	2	4	3	9	11.3%
Social Services	-	3	1	4	5.0%
Education	3	2	-	5	6.3%
Section 95	-	-	2	2	2.5%
Indians	-	-	2	2	2.5%
Total²³¹	36	22	36	97	-

Trade and Commerce / Property and Civil Rights

As the numbers above indicate, more than a third of federalism cases since 1984 (37.0%) are related to “trade and commerce” and “property and civil rights.” This category represents the most common federalism issue, with well-known landmark decisions handed down in the past three eras. This is not unlike the historical frequency, which was predominated by attempts to distinguish the federal government’s trade and commerce power from the property and civil rights jurisdiction of the provinces. In the Dickson Court, the defining trade and commerce decision, no doubt, is *General Motors v.*

²³⁰ (*Bell Canada v. Quebec* [1988], for example, was coded as both a “transportation and communication” and “trade and commerce” issue.)

²³¹ In some cases, more than one issue would arise. Therefore, the total number of issues exceeds the total number of division of power cases handed down by the Court.

City National Leasing [1989]²³², a case that is referenced repeatedly in subsequent cases.²³³

In this decision, a unanimous court refined and applied a five step criteria for establishing the validity of a statute falling under the “second branch” of the trade and commerce power. Here, the Court held that an application of the *Combines Investigation Act* was *intra vires* the federal legislature because its effects on provincial legislation were incidental, invoking the “ancillary doctrine.” While *City National Leasing* is perhaps the most influential federalism decision in the post-*Charter* era, it can be argued that the major trade and commerce decision of the Lamer Court is *Ontario Hydro v. Ontario*.²³⁴

In a divided decision the Supreme Court applied the much avoided “declaratory power” under section 92(10)(c) of the *Constitution Act, 1982*. They found that because Ontario Hydro, a nuclear power plant, was an undertaking for the “general advantage of Canada,” all necessary incidental operations, including labor relations, fell within the jurisdictional control of Parliament. While the Attorney General of Ontario vehemently opposed this decision, labor relations for nuclear power plant workers continue to be governed by Parliament. This illustration is important because it reminds observers of the Court’s authority and its subsequent impact on government. In the McLachlin era, *Canadian Western Bank*²³⁵ is by the far the most important precedent in the trade and commerce / property and civil rights arena. The Court held that Banks, which fell under

²³² *General Motors of Canada Ltd. v. City National Leasing* 1 S.C.R. 641 [1989].

²³³ See Chapter 3 on Judicial Citation Patterns for a listing of academic citation frequencies.

²³⁴ *Ontario Hydro v. Ontario (Labour Relations Board)* 3 S.C.R. 327 [1993]

²³⁵ *Canadian Western Bank v. Alberta* 2 S.C.R. 3 [2007]

the exclusive jurisdiction of Parliament, were subject to a provincial licensing scheme that served to regulate the promotion of insurance. They based their unprecedented ruling on the principle that the promotion of insurance products—an area of exclusive provincial legislation—was not central to the activity of banking.

Although it is outside the purpose of this section to provide an in-depth analysis of these decisions, it goes to show that the modern Court continues to render important precedents on a subject with a longstanding and checkered past. In *City National Leasing*, the Court established weighty precedent, which colored the manner in which subsequent trade and commerce issues were handled. In *Ontario Hydro*, the Court made a binding and contested decision that affected the governance of labor relations, and in *Canadian Western Bank*, the Court enunciated a new precedent that allowed the provincial government to subject banks to regulation of its insurance products.

Criminal and Regulation

Criminal matters represent a significant portion of the Supreme Court's docket, and in some instances, they involve the division of powers. Since 1984, the Supreme Court has handled 17 federalism cases (20.3%) that involve criminal or regulatory issues. A few notable trends in each of the chief justiceships emerge. In the Dickson era, one would be hard pressed to find a “landmark” decision in this category, or even a “head to head” battle between the federal and provincial government. Instead, there are a variety of issues involving disputes between non-government actors, including the disturbance of religious worship,²³⁶ arbitrary arrest and detention contrary to a provincial human rights

²³⁶ *Skoke-Graham v. The Queen*, [1986] 1 S.C.R. 106

code,²³⁷ the vires surrounding the provincial regulation of nude entertainment,²³⁸ and the validity of a provincial board of inquiry involving a criminal matter.²³⁹

While six criminal and regulatory matters were addressed in the Dickson era, only two were handed down in the Lamer Court. However, *R. v. Morgentaler* [1993]—the federalism branch of the infamous “abortion case”—turned out to be a transformative decision. Morality arguments notwithstanding, the division of powers issue in this decision hinged on the finding that the pith and substance of Nova Scotia’s *Medical Services Act* was legislation in relation to criminal law falling within the exclusive legislative jurisdiction of Parliament. Justice Sopinka, writing for a unanimous Court, found that together, the *Medical Services Act* and *Medical Services Designation Regulation* “constitute an indivisible attempt by the province to legislate in the area of criminal law.”²⁴⁰ These two pieces of provincial legislation were struck down by the Court.

The McLachlin Court on the other hand dealt with a significant number of criminal law cases that had far-reaching social and federalism implications. Such developments have led some scholars to worry that the Federal Government’s “criminal law power has become a proxy for national concern.”²⁴¹ In 2000, the Supreme Court made a bold statement in its reference decision regarding firearms.²⁴² The unanimous panel ruled that the registration and licensing of all types of firearms was a federal criminal matter and not, as the Attorney General of Alberta and other provincial interveners had suggested, a matter falling under the

²³⁷ *Scowby v. Glendenning*, [1986] 2 S.C.R. 226

²³⁸ *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, 1987 2 S.C.R. 59

²³⁹ *O’Hara v. British Columbia*, [1987] 2 S.C.R. 591

²⁴⁰ [1993] 3 S.C.R. 463, para. 16.

²⁴¹ Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver, BC: UBC Press, 2006): 141.

²⁴² *Reference re: Firearms Act Can.* [2000] 1 S.C.R. 783

provincial header, property and civil and rights. Some critics, like Justice Conrad of the Alberta Court of Appeal, argued that the *Firearms Act* “represents a sweeping intrusion on the right of law-abiding citizens to have decisions about their property informed by local values, without exposure to criminal sanction or loss of property.”²⁴³

After a major decision on the recovery of health care costs incurred by provincial governments in treating individuals exposed to tobacco products,²⁴⁴ the Supreme Court handed down two leading decisions with important social implications: first, a reference on Assisted Human Reproduction²⁴⁵ in 2010; and second, a ruling on the regulation of safe injection sites.²⁴⁶ Both precedents sent shockwaves through the media, and both decisions, while attempting to provide jurisdictional clarification, confronted controversial ethical matters. We will discuss the doctrines with which these cases were handled in the chapter that follows.

Transportation and Communication

With 16 cases comprising twenty percent of the federalism docket, the third most common issue that comes before the Court is transportation and communication. Although the words “transportation” and “communication” are nowhere to be found in the *Constitution Act, 1867*, several examples are contained within the enumerated powers in Section 92(10), which confers upon the provincial legislatures the authority to make laws in relation to:

Local works and undertakings other than such as are of the following classes:

²⁴³ Para 523, *Reference Re Firearms Act*, [1998] ABCA 305 (CanLII)

²⁴⁴ *British Columbia v. Imperial Tobacco Canada Ltd*, [2005] 2 S.C.R. 473

²⁴⁵ *Reference re: Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457

²⁴⁶ *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134

- (a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
- (b) Lines of steam ships between the provinces and any British or foreign country;
- (c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.²⁴⁷

The Dickson era handled as many transportation and communication cases (8) as the Lamer and McLachlin Courts combined (8). Indeed, a number of important precedents emerged from this era, beginning with the *Bell Canada*²⁴⁸ trilogy which also includes *Alltrans Express*²⁴⁹ and *Courtois*.²⁵⁰ The three appeals were heard consecutively. In *Bell Canada*, Justice Beetz relied on the interjurisdictional immunity doctrine to declare that the impugned provincial law was constitutionally inapplicable to a federal undertaking, rejecting as an alternative the “double aspect theory”—the view that concurrent provincial jurisdiction could coexist. The implications of this decision placed a significant blow to provincial legislative authority.

In 1989, the Dickson Court released a string of decisions that dealt with aircraft²⁵¹ and taxation, and telecommunications.²⁵² In *Alberta Government Telephones v. CRTC*, for example, the Supreme Court shocked the nation when it held that AGT was an interprovincial undertaking, despite the intraprovincial nature of its operations. In

²⁴⁷ *Constitution Act, 1867*.

²⁴⁸ *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1998] 1 S.C.R. 749

²⁴⁹ *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897

²⁵⁰ *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868

²⁵¹ *Canadian Pacific Airlines Ltd v. British Columbia*, [1989] 1 S.C.R. 1133; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161.

²⁵² *Alberta Government Telephones v. Canada (Canadian Radio-television and telecommunications commission)*, [1989] 2 S.C.R. 225; *Ibew v. Alberta Government Telephones*, [1989] 2 S.C.R. 318.

contrast to the Dickson era, transportation and communication cases were relatively quiet under Lamer, both in terms of numbers and case significance. Recently, however, the McLachlin Court appears to be picking up the pace. Having been silent on the issue for the first seven years of her tenure, Chief Justice McLachlin's Court has rendered four transportation and communication decisions over the past five years.

Natural Resources

Non-renewable natural resources fall within the operational authority of the provinces. Section 92A(1) outlines some examples and applications of this provision. However, section 3 states: "Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of parliament prevails to the extent of the conflict."²⁵³ From these two poles of jurisdiction flow disputes between different levels of government. Under Chief Justice Dickson, two major cases stand out: *Reference re Upper Churchill Water Rights Reversion Act* [1984] and *R v. Crown Zellerbach Canada Ltd* [1987]. In *Upper Churchill Falls*, the Court addressed the issue of extraterritoriality, ruling that Newfoundland's *Water Rights Reversion Act* was a colorable intrusion on the operations and contractual relationship between Churchill Falls Labrador Corporation and Hydro-Quebec.

In *Crown Zellerbach*, the Court released a blockbuster decision. With the pollution of inland ocean waters as its subject, Justice Le Dain advanced the "national concern" doctrine of the peace, order and good government power of Parliament as a means to mitigate the inability of provinces to address the pollution of cross-provincial

²⁵³ *Constitution Act, 1867.*

waters. The magnitude of this precedent spilled into the Lamer Court four years later in *Friends of the Oldman River Society v. Canada*.²⁵⁴ In this case, the Supreme Court upheld the validity of the federal government's *Environmental Assessment and Review Process Guidelines Order* on the basis that provincial immunity would "undermine the integrity of the essential navigational networks in Canadian waters," including such areas of federal jurisdiction as "navigable waters, fisheries, Indians and Indian lands."²⁵⁵

Five years later, in *R v. Hydro-Quebec*,²⁵⁶ the issue of environmental protection reared its head. Unlike *Crown Zellerbach*, however, where the national concern doctrine was being advanced, the Supreme Court upheld dumping charges against Hydro-Quebec under the federal government's criminal law power. Acknowledging that environmental responsibility, and jurisdiction over the environment, falls under both the federal and provincial legislatures, La Forest, in his majority reasons, stated: "Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of parliament and has obvious impact on the balance of Canadian federalism."²⁵⁷

From these string of decisions, it is clear that the Supreme Court does not avoid weighty philosophical discussions. They factor in public policy implications as well as public safety and the overall impact a decision has on the balance of the federation. Natural resource issues have been largely quiet and inconsequential under McLachlin.

²⁵⁴ *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3

²⁵⁵ *Friends of the Oldman*, para 13.

²⁵⁶ *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213

²⁵⁷ *Ibid*, para 52.

Taxation

There are separate constitutional provisions for both the federal and provincial governments to levy taxes from citizens and businesses. In Section 91(3), the Federal government is authorized to raise “money by any mode or system of taxation.” The provincial counterpart to this provision, in section 92(2), reads: “direct taxation within the provinces in order to the raising of a revenue for provincial purposes.” With only nine taxation cases handed down over the past 25 years, two of the most prominent are reference questions regarding direct taxation referred to the Court by the Governor in Council during the chief justiceship of Lamer.²⁵⁸ The Dickson era handled two cases pertaining to the taxation of liquor and fuel on airlines, while the McLachlin Court handed down three decisions that carried little jurisprudential significance.

Education

Five education decisions were handed down between Dickson and Lamer, with none coming through under McLachlin. Four of these decisions involved a heated dispute between the provincial government and a school board. In all but one instance the Supreme Court upheld the provincial government’s power to amend the Education Act and impose changes onto its subordinate school boards. In only one instance was the provincial government told that it had operated outside of its legislative boundaries. In *A.G. (Que.) v. Greater Hull School Board*,²⁵⁹ the Supreme Court reminded the Government of Quebec how difficult it is to pass universal funding changes to education without factoring in special administrative protections and rights enjoyed by nondenominational schools. Because the

²⁵⁸ *Reference re Goods and Services Tax* [1992], 2 S.C.R. 445; *Reference re Quebec Sales Tax* [1994], 2 S.C.R. 715.

²⁵⁹ *A.G. (Que.) v. Greater Hull School Board* [1984], 2 S.C.R. 575

provincial government attempted to create a new system of school financing based on government grants, which would apply to all public schools—including nondenominational ones—the Supreme Court found the impugned provisions to be “*ultra vires* and void” for such changes carried the potential to “prejudicially affect a right or privilege” affecting nondenominational schools. Interestingly, the Federal government did not become involved in any of the education cases that appeared before the Court.

Social Services

The “social services” umbrella includes issues related to welfare benefits, funding for the disabled, retirement plans, employment insurance and the like. Although only three cases fall under this category, each involves a major funding or jurisdictional dispute between the federal and provincial government. The first major breakdown in cooperative federalism played out before the Court in *Reference re Canada Assistance Plan*.²⁶⁰ As means to reduce its budgetary deficit, the federal government enacted the *Government Expenditures Restraint Act*, which limited the growth of payments made to fiscally stronger provinces under the *Canada Assistance Plan*. In response, the Lieutenant Governor in Council of British Columbia solicited advice from the British Columbia Court of Appeal to determine “whether the Government of Canada has any authority to limit its obligation under the Plan and its agreement with British Columbia,” and if it did, whether the consent of British Columbia was required. The British Columbia Court of Appeal answered the first question in the negative and the second question in the affirmative. The Attorney General of Canada appealed the ruling of the appellate court to the Supreme Court of Canada. While justiciability was a central component of oral argument, the Court upheld the vires of the federal legislation, and,

²⁶⁰ *Reference re Canada Assistance Plan* [1990], 2 S.C.R. 525

in response to whether the federal government possessed the authority to limit funds administered through this amended agreement, stated: “If a statute is neither *ultra vires* nor contrary to the *Canadian Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power.”²⁶¹

*Findlay v. Canada*²⁶² is a case involving a disabled person (the respondent) who brought action, as a public interest litigant, against the Government of Manitoba. Here, the government made deductions to a disabled person’s monthly assistance payments as a means to recover overpayments it had made previous. In response, the respondent sought a declaration that the “federal contribution payments to the Manitoba social assistance scheme under the *Canada Assistance Plan (CAP)* are illegal so long as the *Manitoba Social Allowances Act (SAA)* continues to authorize reducing an allowance below the level of basic requirements or so long as Manitoba permits its municipalities to establish their own rates of assistance.”

At issue was the scope of provincial authority to administer an intergovernmental social-welfare scheme. The Court ruled that given the nature of the spending statutes involved, “the federal government’s contributions are not designed to dictate the precise terms of the provincial legislation, but rather to promote legislation which achieves substantial compliance with the objectives of CAP.” They found that the Manitoba government was within its authority to recover excess payments so long as the total payment remitted did not fall below the “basic requirements” established in the CAP. In many ways, this decision softened the blow of the CAP reference while still upholding the federal government’s power to place conditions on the funds it contributes.

²⁶¹ *Reference re Canada Assistance Plan* [1990], 2 S.C.R. 525, para, 62.

²⁶² *Findlay v. Canada (Minister of Finance)*, [1992], 1 S.C.R. 1080

The third and final social services case is *Reference Re Employment Insurance Act*.²⁶³ The Quebec government queried whether ss. 22 and 23 of the federally enacted *Employment Insurance Act*—which dealt with maternity leave—was constitutional. They argued that maternity and parental benefits are distinguishable from unemployment insurance because the former is intended to support families, and to assist parents, as a social security measure while the latter establishes a plan to mitigate the effects of unemployment. The Attorney General of Canada, on the other hand, argued that maternity benefits is a form of employment insurance because it “provides temporary income for pregnant women or parents who have paid premiums and held insurable employment for the required number of hours.”²⁶⁴ The Supreme Court, using the pith and substance doctrine, sided with Parliament and found that unemployment is unemployment regardless of how or why it originates, and therefore, the intent of employment insurance is to protect workers in the absence of employment.

The last item I will cover in this section is a brief overview of cases of “great importance.” I will assign a number value to each case according to its “importance” and level of impact on the federal jurisprudence in Canada. Using a scale from 1 to 5, with one being the least significant and five being the most significant, I ranked each federalism case in terms of its impact on federal-provincial relations in Canada. Various criteria were used: word count, precedent enunciated, judicial citation patterns, levels of disagreement, and whether or not a case is a “household” name that is frequently discussed in legal literature.

²⁶³ [2005], 2 S.C.R. 669.

²⁶⁴ *Findlay v. Canada (Minister of Finance)* [1992] 1 S.C.R. 1080, para 7.

The most important determinant of this scale is the total word count length of each decision. One might expect that as cases become more complex and important the Supreme Court would expend more time and energy in explaining them. Conversely, in matters of less importance, it follows that the Supreme Court would spend less time in their explanation.²⁶⁵ Of course, there is no particularly strong relationship between opinion length and case importance: longer or shorter opinions may simply reflect the writing styles of various judges or sharp divisions within the court.²⁶⁶ The second factor of analysis is whether a longstanding doctrine has changed or not. If an old precedent is reversed—that is, if a level of government is told that they no longer have the authority to do something that they once did—that is significant. Third, the judicial citation frequency of a particular case is also important because it reflects the level of impact a decision has had on subsequent cases. A case that is cited repeatedly is more authoritative than a case that is decided but never referenced. Cases that appear in “Horn Books” are also given consideration. Together, these variables are used to determine the federalism cases of “great importance” that have been handed down over the past quarter century.

²⁶⁵ One would expect for example that the reasons contained in *General Motors Canada v. City National Leasing* [1 S.C.R. 641, 1989] carry more weight and significance than the two sentence explanation in *Chiasson v. The Queen* [1 S.C.R. 266, 1984].

²⁶⁶ L’Heureux-Dube, for example, was notorious for providing long-winded decisions; Major, in contrast, was known for being succinct.

Word Count Criteria

1: Cases assigned a “1” had a word count of 1500 words or less (including, if applicable, dissents and concurrences). These cases are almost always unanimous; indeed, disagreement is rare. In addition, no new precedents in these cases are enunciated; the case typically centers on a factual or interpretational clarification. Very little, in other words, is at stake.

2: Cases assigned a “2” are similar in nature to those that are a “1,” although they are longer and have higher levels of disagreement. These cases have less than 8000 words (including, if applicable, dissents and concurrences).

3: The biggest distinction between a “2” and “3” is length: A “3” is a case between 8000 and 15,000 words (including, if applicable, dissents and concurrences). Disagreement at this level is common. Much is at stake, the subject matter is important, and interveners are typically present; it is usually clear who wins and who loses.

4: A case that is awarded a “4” must be over 15,000 total words (including, if applicable, dissents and concurrences). The stakes are high, there is a high number of interveners, and each side has much to gain and to lose. There is usually a major dissent or concurrence.

5: A case that is given a “5” is what one could call a “blockbuster.” These cases are household names and are always mentioned in your standard constitutional textbook. In these cases, there is usually a profound shift in doctrine, a new precedent enunciated, or a longstanding precedent overturned. Indeed, they are the subject of much debate and analysis. Like a number 4, they must be over 15,000 words. However, it is the constitutional significance of these cases—the history of the issue and the doctrine enunciated—that separate the 4’s from the 5’s. Word count alone is insufficient.

The table below tracks the citation frequency of federalism decisions handed down in the post-Charter era. A surprising omission from this table is *Crown Zellerbach*,²⁶⁷ a landmark case that is frequently referenced in academic discourse and constitutional textbooks. Atop the list is *General Motors v. City National Leasing*,²⁶⁸ which is no surprise, given that it is the single most cited federalism case since 1984.

²⁶⁷ *R v. Crown Zellerbach* [1 S.C.R. 401, 1988].

²⁶⁸ 1 S.C.R. 641, [1989].

*Kitkatla*²⁶⁹ is another noteworthy example, as it cited in subsequent federalism cases more than once per year on average.

Table 2: Proceeding Citation Frequency per Federalism Case (1984-present)²⁷⁰

Name	Year	Subsequent Citation Frequency	Average (year)
<i>GM v. City National Leasing</i>	1989	13	0.62
<i>Bell Canada v. Quebec (csst)</i>	1988	11	0.50
<i>Kitkatla v. British Columbia</i>	2002	9	1.13
<i>Whitebread v. Walley</i>	1990	8	0.40
<i>Re: Upper Churchill Water Rights</i>	1984	7	0.27
<i>R v. Morgentaler</i>	1993	7	0.41
<i>Global Securities Corp. v. British Columbia</i>	2000	7	0.70
<i>Reference Re: Firearms Act</i>	2000	7	0.70
<i>Ontario (A.G.) v. OPSEU</i>	1987	7	0.30
<i>Scowby v. Glendinning</i>	1986	6	0.25
<i>Canadian National Railway v. Courtois</i>	1988	6	0.27
<i>Alberta Gov't Telephones v. CRTC</i>	1989	5	0.24
<i>Bank of Montreal v. Hall</i>	1990	5	0.25
<i>Friends of the Oldman River v. Canada</i>	1992	5	0.28

²⁶⁹ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.

²⁷⁰ Five citations was the minimum number of citations required for a case to make the table.

Together, using word count and judicial citation frequency as our measure, we have listed in order of importance the ten most significant federalism decisions handed down by the Court over the past twenty-five years.

Table 3: The Ten most Prominent Federalism Cases in the Post-Charter era:

Cases of Great Importance
<i>General Motors v. City National Leasing</i> (1989)
<i>Bell Canada v. Quebec</i> (1988)
<i>R. v. Crown Zellerbach</i> (1988)
<i>Canadian Western Bank v. Alberta</i> (2007)
<i>Friends of the Oldman v. Canada</i> (1992)
<i>Ontario Hydro v. Ontario</i> (1993)
<i>Husky Oil Operations Ltd. v. Minister of National Revenue</i> (1995)
<i>R. v. Hydro Quebec</i> (1997)
<i>West coast Energy Inc. v. Canada</i> (1998)
<i>AGT v. Canadian Radio-Television and Communication Commission</i> (1989)

C. Appeal Frequency

The Supreme Court hands down important decisions on a variety of issues, which originate from both federal and provincial appellate courts across the country. Indeed, the Court not only handles a broad range of important and relevant cases, but such cases come from a diversity of places. The table below tracks the origins of each case. As the numbers below indicate, population is the single largest determinant in the federalism case list appeal frequency.

Table 5: Appeal Frequency According to Province or Appellate Court

	BC	AB	SK	MB	ON	QB	Mari- times	Fed- eral	Refer- ence²⁷¹	Total (n)
Dickson	6	1	2	-	7	6	6	3	-	31
Lamer	3	1	1	1	3	2	1	4	1	17
McLachlin	7	5	1	1	2	10	1	4	2	33
Total (n)	16	7	4	2	12	18	8	11	3	81
Total (%)	19.8%	8.6%	4.9%	2.5%	14.8%	22.2%	9.9%	13.6%	3.7%	-

As the data indicate, the Supreme Court hears more federalism appeals from Quebec (18 cases, 22.2%) than from any other province in Canada. Perhaps this comes as little surprise, given the history of aggressive constitutional battles to which the province of Quebec became so often engaged. These numbers are followed closely by British Columbia (16 cases, 19.8%) and Ontario (12 cases, 14.8%), with appeals from the Prairie Provinces—Alberta (8.6%), Saskatchewan (4.9%) and Manitoba (2.5%)—being the least common region for appeals to originate. The Maritime Provinces were coded into a single category; eight appeals (9.9%) came from that region over the past three chief justiceships.

Lastly, 11 cases (13.8%) have come from the Federal Court of Canada, including cases from both the Federal Court of Appeal and Tax Court. For the purposes of this table, “references” only include reference questions that were referred directly to the Supreme Court (usually by the Governor in Council). On the other hand, reference questions that were submitted to an appellate court, which were later appealed to the Supreme Court, were included in the column of the province or region from which they originated. The reason for this distinction is that reference decisions that are handled by an appellate court are subject to further appeal whereas references that are handled by the Supreme Court are not.

D. Conclusion

So far, we have looked at the historical caseload frequency of the Court, and established that federalism cases in the post-*charter* era are almost as common as they were in the pre-*charter* years. If caseload size is an indication of importance, we can comfortably state that the significance of federalism cases has not diminished, with any

measure of significance, over time. We also know that landmark decisions are found in a variety of topics over the past three chief justiceships. The Court's activity and involvement in federalism matters is well noted: past precedents have been reversed, legislation has been declared invalid, and hotly contested constitutional battles played out before them. Were the Supreme Court simply an institution that maintained a "hands off" approach—allowing intergovernmental arrangements to function and repair themselves through the various internal mechanisms they have established to resolve disputes—there would be little need for government to present issues before them. However, the fact that multiple government interveners become actively involved in federalism cases underscores the point that something important is at stake—something that justifies the use of time and resources to attempt to influence the outcome of a decision.

But *how* does a federalism dispute make its way to the Court? Or to employ a phrase commonly used in childhood squabbles: "who started it"? Indeed, which level of government is most litigious, and to what extent are non government actor's responsible for initiating a dispute? When a dispute is initiated, to what extent does government intervene and become involved? We know that on at least 81 occasions some direction on federalism matters was sought. But which litigants are most frequently seeking direction? What type of litigants can one expect to find? Is it the Attorney General of Canada taking on a multitude of provinces, or do non-government actors initiate most disputes? Is there a "winner take all" mentality between the "feds" and the "provs," or does a more cooperative spirit prevail? The next chapter examines these issues by looking at the actors and interests at stake in federalism cases.

Chapter V **Dispute Initiation, Intergovernmental Conflict and Intervention**

Scholars often refer to the Supreme Court as a “judicial umpire.” However, the connotations of this expression make it easy for readers to assume that if a division of powers case ends up in the Supreme Court, the federal and provincial government are at odds on a particular policy issue. This is not necessarily so. The Supreme Court’s federalism docket is diverse and reflects the complicated and collaborative nature of modern intergovernmental relations in Canada.

In this chapter, I show the limitations of viewing federalism cases through the lens of a zero sum game. Four points of consideration make this so. First, I examine the ‘dispute initiation’ process and find that non-government actors are responsible for instigating most disputes. This dispels the notion that federalism cases are the product of head to head disagreements between the “feds” and the “provs.” Second, after establishing the origins of disputes, I track the rate at which government intervenes or becomes involved in federalism cases. Third, having established the rate in which government becomes involved, I analyze which side of the dispute they take. Lastly, from these discoveries I am able to show that the outcomes of federalism decisions are not well served by a traditional “who won, who lost” analysis.

A. Dispute Initiation

It is important to provide a working definition of ‘dispute initiation’ before analyzing the data. For the purposes of this chapter, the “initiator” can be defined as the party that first challenges an alleged wrongdoing, circumstance, statute, or legal opinion before a certified judicial board, tribunal or trial court. This information can be found in the “judgments below” section of the written reasons. In the case of a reference question

directed to a provincial superior court, the party who challenged the superior court's response is said to have first initiated the dispute. Indeed, "asking" the Court for a legal opinion is not the same as initiating a dispute, because a response is needed before disagreement—or disappointment in the answer—can take place. It is how the federal or provincial government responds to a superior court's handling of a question that determines whether or how a dispute is initiated in this circumstance. If both the federal and provincial governments are satisfied with how an appellate court answered a reference question, there is no need for the Supreme Court to handle a dispute.

However, in viewing the case list there are instances when either the federal or provincial government appealed an inferior court's response to a reference question. In *Reference Re Canada Assistance Plan (B.C.)*²⁷², for example, the Federal government appealed the British Columbia Court of Appeal's belief that the federal government did not have any unilateral, statutory, prerogative or contractual authority to limit its obligation under the *Canada Assistance Plan* (CAP). The Attorney General of Canada, who appealed this decision to the Supreme Court of Canada, is said to be the "initiator" of this dispute. Had they accepted the inferior Court's opinion, and maintained CAP payments to the Government of British Columbia, the "initiator" label would not apply, because there would be no dispute. In *Reference re: Firearms Act (Can.)*²⁷³, the Attorney General of Alberta queried whether it was within the legislative authority of Parliament to regulate the registration and licensing of firearms. The Alberta Court of Appeal ruled that it was within the power of Parliament to regulate the sale, licensing and possession of firearms. The Attorney General of Alberta

²⁷² [1991] 2 S.C.R. 525

²⁷³ [2000] 1 S.C.R. 783

appealed this decision to the Supreme Court, which grants them the status of dispute “initiator.”

Like the giving of a reference opinion, the act of creating a law or statute is not enough information in itself to assign the “initiator” label. That is, one cannot simply say that the provincial government of such and such is the “initiator” because it passed the law in the first place. Rather, it is the party—the organization, level of government, business, corporation or citizen—who responds to the law by challenging its validity in court. The first party who challenges a provision is the one who is said to have “initiated.” From there, applications for intervention typically follow; in all cases, initiation is primary, intervention is secondary. In *Ward v. Canada*,²⁷⁴ for example, a fisherman was charged with selling seals contrary to section 27 of the federally enacted *Marine Mammal Regulations Act*. Ward applied to the Trial Division of the Supreme Court of Newfoundland to challenge the validity of the legislation. In this instance, Ward’s response to federal legislation constitutes “initiation,” the mere existence of the *Marine Mammal Regulations Act*, does not. Additionally, the initiator is not always among the listed disputants. For instance, in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, Lafarge Canada Inc. wished to erect a facility on waterfront lands owned by the Vancouver Port Authority (“VPA”), a federal undertaking pursuant to the *Canada Marine Act*.

Together, the City of Vancouver and the VPA approved the project in principle, but a group of ratepayers opposed the development and filed an application of appeal to the British Columbia Supreme Court, “arguing that the City had declined to exercise

²⁷⁴ *Ward v. Canada (Attorney General)*, [2002], 1 S.C.R. 569

jurisdiction over the lands and ought to have insisted that Lafarge obtain a City development permit. The VPA replied that no City permit was necessary because VPA lands enjoy interjurisdictional immunity as “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867*, or because the management of those lands is vital to the VPA’s “federal undertaking” pursuant to the federal s. 91(10) jurisdiction over “navigation and shipping.”

In the alternative, the VPA contended that there was an operational conflict and that, according to the doctrine of federal paramountcy, the conflict must be resolved in favor of federal jurisdiction. The chambers judge granted the ratepayers’ application and declared that the VPA lacked jurisdiction to approve the project. The Court of Appeal set aside the decision, finding that VPA lands are “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867* and declared the City’s zoning and development bylaw to be inapplicable to the proposed development. In this rather complicated development, a NGA—the ratepayers in this case—initiated the dispute, even though the group of ratepayers is not found in the case name. The VPA, who relied on federal jurisdiction, had to respond in court to the Attorney General of British Columbia.

As the table below indicates, non-government actors are the catalysts for the majority of disputes. In most instances, they challenge the *vires* of a piece of government legislation, which in turn, ignited the federal or provincial government to respond.

Table 1: Dispute Initiation According to Chief Justiceship

	NGA	Prov gov't	Fed gov't	Other²⁷⁵
Dickson	23	8	0	-
Lamer	14	2	1	1
McLachlin	24	7	2	-
Total	61	17	3	-

Indeed, three quarters of all federalism disputes were initiated by a NGA (75.3%), with only three cases being initiated by the federal government. On the other hand, provincial governments initiate one in five cases (17 decisions), which is far more often than the “feds.” Although federalism disputes necessarily involve government because it is their legislation that is called into question by somebody, in most cases government is not responsible for initiating a dispute. It turns out that NGA’s are the chief instigators in federalism disputes. The fact that government responds to litigation three times more often than it initiates is significant. I will elaborate on this point below.

To begin, litigation jeopardizes their jurisdiction and places them in a position of uncertainty—a position they are only able to influence to some extent through intervention. It also speaks to the effectiveness of intergovernmental arrangements that take place outside the Court through informal means. If the vast majority of cases are initiated by the NGA’s, it means that head to head disputes between different levels of government—“Canada v. The Provs”—is rare. But most importantly, it raises questions about the nature of federal/provincial disputes. If government responds more than it initiates, in what ways and to what extent does it become involved in federalism matters?

In matching up the disputants, “government versus non government” is the most common pairing for litigants in federalism cases. The fact that government is involved in

²⁷⁵ Reference submitted by the Governor in Council.

the majority of cases is expected and is not alarming at first glance. In 39/81 cases, the provincial government became embroiled in a conflict with an NGA; however, in only 10 instances did the Federal government become directly involved in a dispute that played out before the Courts. The federal and provincial government squared off in only 13 cases, of which the majority were reference questions. In almost every one of these decisions, a heated battle between the respective legislatures emerged, with notable examples including: *Reference re: Canada Assistance Plan*, *Reference Re: Firearms Act*, *Reference re: Same-Sex Marriage*, *Reference Re: Employment Insurance Act*, *Reference Re: Assisted Human Reproduction Act*, *Reference Re: Securities Reference Act*.

Table 2: Dispute Type According to Chief Justiceship

	Prov v. NGA	Fed v. NGA	Fed v. Prov	NGA v. NGA
Dickson	18	2	3	8
Lamer ²⁷⁶	4	4	4	3
McLachlin	17	4	6	5
Total	39	10	13	16

Despite these examples, however, the federal and provincial governments rarely square off. In much more common occurrences, the federal and/or provincial governments will respond to a dispute that was initiated by a NGA who either disagreed with a particular piece of legislation or invoked a federalism argument as a way to build a defense against a potential fine or prohibition. In either case, the Court is presented with an opportunity to apply a situation to existing case law. In light of the uncertainty litigation represents, government representatives at both levels feel compelled to respond.

²⁷⁶ There was one reference case in the Lamer era that was removed from analysis.

B. Intervention

While the vast majority of constitutional cases originate through private litigation, almost every case, with the exception of three, involves government to some extent. As Table 8 indicates, “government litigiousness,” a phrase I borrowed from Patrick Monahan, is widespread and rampant, with an average of more than three different legislatures intervening per case involving the division of powers.²⁷⁷

Table 3: Intervention frequency per chief justiceship according to province:

Government	Dickson	Lamer	McLachlin	Total
Canada	15	4	18	37
Ontario	9	6	22	37
Quebec	15	9	19	43
Maritimes	11	5	16	32
Manitoba	7	4	12	23
Saskatchewan	14	6	10	30
Alberta	12	8	12	32
British Columbia	10	6	14	30
Total interventions	93	48	123	264
Number cases	31	17	33	81
Inventions per case	3.0	2.8	3.73	3.3

Across the board, government is actively involved in federalism matters. Quebec is the single biggest “litigator” at 43, while the Federal government and Ontario (at 37 cases a piece) lag not far behind. With the exception of Manitoba, every province appears in at least one third of all federalism disputes. Although government does not typically “start fights,” they are not afraid to jump in and attempt to “finish them.”

Not surprisingly, intervention is a sign that a case is important enough to warrant attention. Another reason for increased government litigiousness in private litigation is

²⁷⁷ Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*, 155.

that the Court “appears most receptive to federalism arguments when government, rather than private interest, has instituted the litigation.”²⁷⁸ This statement was true in 1987 and continues to be true today. Indeed, in every federalism case where government was altogether absent—where government was neither a plaintiff nor a defendant, nor involved by way of intervention—the Supreme upheld the *vires* of government legislation. In other words, government only gets involved and expends resources if something important is at stake. We will explore doctrines and dispositions in the next chapter, but the point, for now, is clear: had the validity of an impugned provision been in question—or if there was a serious chance that government was going to “lose”—it would have undoubtedly intervened and attempted to convince the Court of its position(s).²⁷⁹

C. Intergovernmental Conflict and Relations

Tracking the frequency of intervention is limited, because one is unable to ascertain the legal position of the government interveners. Nowhere in a case does it indicate in the case notes or docket summary list the legal position assumed by the parties who were granted intervention. Is the Attorney General of Canada putting forth a “centralist” doctrinal position, invoking the paramountcy and interjurisdictional immunity doctrines in an attempt to expand “Team Canada’s” jurisdiction? Or is the

²⁷⁸ Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto, ON: Carswell, 1987): 155.

²⁷⁹ The closest exception occurred in *Unifund Assurance Co. v. Insurance Corp. of British Columbia* [2003], a case involving the issue of extraterritoriality as it pertains to an insurance claim. In this case, the Supreme Court ruled that “Section 275 of the Ontario *Insurance Act* is constitutionally inapplicable to the appellant because its application in the circumstances of this case would not respect territorial limits on provincial jurisdiction.” The Court’s decision did not infringe upon the jurisdictional boundaries of the provinces; it simply applied the facts of the case to the most appropriate province.

federal government intervening as a precaution—intervening “just in case” something goes wrong in oral argument? In the spirit of harmony, perhaps he is intervening on behalf of a province engaged in a dispute with a NGA. I have translated these scenarios into categories and applied them to my case list in an attempt to measure the frequency and type of intergovernmental conflict that makes its way to the Court. I have created four categories to measure this phenomenon: unified, indifferent, precaution, and turf. They are defined in the sections below. I also touch on how the Supreme Court responds in relation to the different types of conflict that come before it.

Unified

Although direct disputes between government occur, some cases involve a unified government front, where a NGA is up against not only the federal government, but provincial governments as well. The “unified” label is therefore ascribed to cases where both levels of government are unified in their response to an opposing litigant. At its most basic level, unity can be said to exist when the federal government intervenes and speaks on behalf of a province or when a province speaks on behalf of Canada. This is evident in the written reasons of a decision, most commonly under a factual header—“The Facts”—but also, and sometimes to a much greater extent, the analysis. There are numerous variations as to how the Court communicates an intergovernmental alliance within the reasons it provides. Some cases reveal only a one-sentence comment in passing, with no evidence as to the doctrines or arguments upon which the respective levels of government were unified: “[T]he Attorney General of Canada intervened on behalf of the Attorney General of Quebec,”²⁸⁰ or “[T]he Federal government intervened

²⁸⁰ *Attorney General of Quebec v. Udeco Inc. et al* [1984].

in support and on behalf of the Attorney General of Nova Scotia.”²⁸¹ In other cases, however, the analysis of a decision provides a much more in-depth account of an intervention, where the Court comments on the implications an intervention has on a potential disposition: “[L]astly, where, as here, one level of government supports the constitutionality of another level’s legislation, a court should be cautious before finding the impugned provision *ultra vires*.”²⁸²

To be sure, the legal position taken by the respective government interveners is the most clear-cut way of determining an intergovernmental alliance within a case. Unfortunately, the reasons behind an allegiance—or intervention—are not always found in cases where unity is observed. In *Reference re Quebec Sales Tax* [1994], for example, the Governor in Council queried the Supreme Court of Canada on whether it was within the legislative authority of the Legislature of Quebec to amend and transform its provincial sales tax into a tax similar “in all essential respects” to the Federal government’s goods and services tax. The Attorney General of Canada intervened on behalf of the Attorney General of Quebec and argued that the proposed amendments were within the legislative power of Quebec because they exemplified a direct tax. Further, in Gonthier’s unanimous decision can be found a dialogue between the Court and the “Attorneys General” and the arguments they put forth in support of their unified position.

There are three snippets from this decision that can be used to further define the criteria and parameters of this category. First, “[T]he Attorneys General of Quebec and Canada have agreed that the tax will be collected within the province...” is an example of pre-judicial arranging by the respective legislative authorities. That the federal and provincial

²⁸¹ *Skoke-Graham v. the Queen* [1990].

²⁸² *R. v. Demers* [2004] S. C. R. 489

governments “agreed” on a workable solution before its constitutional validity was tested by the Court highlight the prevalence of intergovernmental collaboration. Another dimension occurs when the Attorney General of Canada presents an argument on behalf of a provincial legislature: “The Attorney General of Canada argued that the category of exempt supplies does not create an indirect tax in practice.” The third and final dimension is when the Court acknowledges an argument that was presented in unison: “I therefore agree with the Attorneys General that the general tendency of this exemption is to create a direct tax consistent with the constitutional imperatives recognized in earlier decisions.”

Indifferent

One can assume that there is a close correlation between a government’s willingness to intervene and the significance of what they perceive the political and legal implications of an impending outcome represents. Likewise, the absence of intervention signifies the inverse: that a dispute is not important enough to warrant any type of involvement, that a case is low risk, and usually a dispute between a NGA and a provincial government. Indeed, the “indifferent” label was assigned to cases involving only one level of government. The presence or absence of Federal or Provincial government involvement can be found in the case name or interveners heading, located at the top of each decision. A couple different factual scenarios fit this category. The first instance is when a NGA (“the appellant”) is going head to head against the Attorney General of a Provincial Legislature (“the respondent”), with no intervention by the Federal government (in almost all cases, the Attorney General of Canada). The best example of this description involves education cases—a sphere of jurisdiction falling within the exclusive legislative authority of the provinces.

In *Greater Montreal Protestant School Board v. Quebec* [1989], the Government of Quebec, under s. 16(7) of the *Education Act*, sought to universalize the non-denominational components of its grade school curriculum. The provincial government was met with resistance by a Protestant school board and various interveners and agencies who challenged the reforms on the grounds that they were “*ultra vires* the province.”²⁸³ Whether the Government of Quebec’s attempt to reform its curriculum is successful or not had little implication on the operation or jurisdictional power of the federal government. It is no surprise, therefore, that the Attorney General of Canada was altogether absent from this dispute. In cases that do not involve them, they do not typically become involved.

Precaution

There are a series of cases where the federal or provincial government will intervene but will say little or nothing in oral argument. A case taking place under these circumstances can be referred to as a “precaution” dispute—a “just in case” scenario that is important enough to warrant intervention, but not important enough to be referenced or discussed at length in the written reasons of judgment. A precautionary case can take one of three forms. A government intervener may intervene but have nothing recorded in the written reasons, which is the most typical scenario under this heading. It can be assumed that if the federal government intervened and was adamantly opposed to the jurisdictional claims of the provincial government that the Court would make reference to such opposition in its written reasons.

²⁸³ *Greater Montreal protestant school board v. Quebec (Attorney General)* [1989], 1 S.C.R. 377.

Secondly, a government intervener may also become involved for the purpose of stating a concern or requesting a clarification: “The Attorney General of Canada intervened in this appeal to argue that: [I]f the provision in question is held to be within provincial jurisdiction, this decision would not preclude overlapping federal jurisdiction over securities matters in respect of international and interprovincial transactions and co-operation, or any other relevant head of federal jurisdiction.”²⁸⁴ The Federal government, in this case, was taking a “wait and see” approach, so that should the Court rule against them, they can regroup and make additional arguments to limit their losses.

Third, one can identify a “precautionary” case by seeing the dispute initiation account of the Court, as was the case in *Canadian Western Bank v. Alberta*: “In the present appeal, we are not confronted with a dispute between the federal government and Alberta. Rather, the appellant banks are independently making the claim to carry on their insurance activities in Alberta free of the insurance regulations imposed on all other promoters and vendors of insurance products in the province.”²⁸⁵ In blockbuster decisions with far-reaching precedential implications, it is not uncommon for many governments to become involved to some extent.

In most cases, however, the factual section of a decision will identify the major interveners and indicate the litigant to whom they gave their support. As discussed, if after reading the factual section one came up empty, I would look to a judge’s analysis, which would often contain direct references to the arguments that the major interveners have submitted on behalf of the litigant they were supporting. The last step that was

²⁸⁴ *Global Securities Corp. v. British Columbia (Securities Commission)* 1 S.C.R. 494 [2000].

²⁸⁵ 2 S.C.R. 3 [2007]

taken to assign cases to this category was to look through the written reasons provided in the lower court decisions, including an examination of the names of the litigants that were listed. Some examples of “precautionary” cases include: *Lamb v. Lamb*²⁸⁶, *Whitebread v. Walley*²⁸⁷, *Allard Contractors Ltd. v. Coquitlam (District)*²⁸⁸, and *Paul v. Forest Appeals Commission*.²⁸⁹ The Attorney General of Canada intervened in each of these cases, but the reason for intervention was altogether absent from the written reasons. None of the decisions were landmark, but *ultra vires* arguments against the Federal government were attempted by NGA’s. Naturally, the Federal government intervened to respond.

Turf

The fourth and final category of cases that I have identified is the quintessential “turf” dispute. Turf wars—or head to head disputes between federal and provincial levels of government—produce the type of cases that make news headlines. They are nostalgically federal, because they represent what most people envision when they think of federalism—the constitutional battles between John A. MacDonald and Oliver Mowat before the JCPC, or the energy wars of the 1970s. In these cases, the doctrinal and political positions of the respective levels of government are clear: the federal government wants to “win” and so do the provinces. Both present competing conceptions of the public good, and make arguments for how a decision will either frustrate or enhance the service delivery of government. In “turf” disputes, the written reasons make it clear that the federal and provincial governments are on opposing

²⁸⁶ 1 S.C.R. 851 [1985]

²⁸⁷ 3 S.C.R. 1273 [1990]

²⁸⁸ 3 S.C.R. 371 [1993]

²⁸⁹ 2 S.C.R. 585 [2003]

sidelines. No arguments “on behalf of,” no pre-court “agreements,” and certainly no loss for words.

At the heart of these matters is a battle over the control and delivery of public policy and the level of authority each believes is necessary to fulfill those objectives. In *Reference re Firearms Act*, for example, the Attorney General of Canada went head to head with the Attorney General of Alberta.²⁹⁰ At hand was a disagreement over which level of government retained jurisdiction over the licensing and registration of firearms, setting up a battle between the provinces jurisdiction over “property and civil rights” on the one hand and the Federal government’s “criminal law” power with regard to public safety on the other. However, a “turf” battle need not involve direct conflict between different levels of government in order for them to be directly opposed, for one level may intervene in opposition to the other. Such has been the case for landmark cases like *Crown Zellerbach*²⁹¹, *Ontario Hydro*²⁹², and *Lafarge Canada*.²⁹³

Because federalism involves government, it is easy to assume that federalism cases involve direct conflict between governments, that turf cases are standard, and all others are the exception. However, different categories exist, and the breakdown below presents some surprising twists.

Table 4: Conflict Type According to Chief Justiceship: 1984-2012

	Unified	Indifferent	Precaution	Turf
Dickson	4	9	7	9
Lamer	3	3	4	7
McLachlin	6	9	8	9
Total	13	21	19	25

²⁹⁰ *Reference re Firearms Act (Can.)* 1 S.C.R. 784 [2000]

²⁹¹ [1988], 1 S.C.R. 401

²⁹² [1993], 3 S.C.R. 327

²⁹³ [2007], 2 S.C.R. 86

In almost half the number of federalism disputes that appear before the Court—unified and indifferent cases combined—there is no intergovernmental conflict whatsoever. In fact, out of 81 cases, only 25 involve direct conflict between the federal and provincial governments. This number drops in half when “conflict through intervention” scenarios are omitted.²⁹⁴ An additional 19 cases involve cross legislative or “precaution” intervention, but of course, no recorded argument, or doctrinal position, is recorded in the reasons for judgment. The remaining 34 decisions do not involve intergovernmental conflict at all; of these cases, 13 represent a federal-provincial *alliance* and 21 involve the interests of only one level of government. There are a few different ways to interpret this.

From one angle, one could say that the Supreme Court deals on average with only one head to head dispute each year and that intergovernmental conflict and litigation is rare. Second, and more importantly, the fact that there are intergovernmental alliances in a federalism *dispute* demonstrates the limitations of viewing such cases through the lens of a zero-sum game. Because government sticks together in some cases—or in the case of “indifferent” scenarios, remains neutral and lets the other fend for itself—one cannot presuppose at the onset that government is at odds on a particular policy issue when it ends up in Court.

D. Winners and Losers

Up until this point, we have avoided discussion on judicial outcomes, or more pointedly, the notion of “winners” and “losers.” We know from the previous section that

²⁹⁴ As we saw in Table 2, government went “head to head”—that is, “Canada v. the Province of...”—in only 13 cases.

whenever the Court has an opportunity to clarify or expand legislative jurisdiction, federal and provincial governments almost always become involved to some extent. However, we also learned that not every case presents an opportunity for the Court to declare a clear “winner” and “loser.” In some cases, there is no intergovernmental conflict, and in other scenarios, both levels of government are unified against a common opponent.

Yet, at the conclusion of almost every judicial decision, a judge will dismiss or allow an appeal. In either instance, both the appellant and respondent have a vested interest to convince the Court to side in its favor. Unfortunately, while both sides want to “win,” the Supreme Court is unable to dismiss *and* allow an appeal in the same decision; so one side will inevitably “lose.” The fact that many disputes have questions framed in terms of whether an impugned piece of legislation is *ultra vires*, inoperative, inapplicable or outside the legislative competence of a respective legislature implies that the Court must choose between one of two outcomes: that a piece of legislation is either valid or invalid, and that one side will “win” and the other will inevitably “lose.”

However, the reality of winning and losing in federalism cases is more complicated than what might first appear. When I first looked at the Supreme Court’s handling of the division of powers, I thought I would be able to devise a system that would tally the win/loss record of the “feds” and the “provs,” which in turn would reveal the ideological preferences of the Court. But the federalism docket does not allow for such an analysis. It is not safe to assume that if the interests of an appellant are represented by the “provs,” the interests of the respondent are automatically backed by the “feds.” As we will recall from our discussion above, federal and provincial

governments are not always at odds, and in some cases, are unified against a common opponent. In cases involving intergovernmental “indifference,” the legislative authority of only one level is in question. Not surprisingly, when I first attempted to measure the win/loss record of the “feds” and the “provs” I ran into significant problems. Originally, I defined “wins” and “losses” strictly upon division of powers criteria (as opposed to declaring a winner or loser based on the final outcome).²⁹⁵

In crafting these labels, I asked the question: “Was federal and/or provincial legislative authority challenged, and, if so, was it upheld or pushed back?” If the Supreme Court upheld the *vires* of federal or provincial legislative jurisdiction, it was considered a “win.” If one side “won” the other did not inevitably “lose,” and vice versa. In fact, in a third of cases (27 out of 81), both the federal and provincial governments “won” at the same time. That is to say, the impugned provisions of each level were upheld in the same decision. To use another illustration, in more than half of cases (44 out of 81), the legislative outcome of one level (valid or invalid) had no barring or affect on the legislative territory of the other. In other words, there are 44 cases where one side would win (or lose) but the other would neither win nor lose. In light of these results, it is inaccurate to view federalism cases as a competition between different levels of government. But that does not mean that there is no utility in analyzing wins and losses, either.

How the Supreme Court responds to ‘government’ is a more fruitful consideration. In the tables below I look how government fares in cases where it is up against a NGA. To employ the categories we developed above, I will look at the win/loss

²⁹⁵ Indeed, one level of government can “win” on division of power grounds but still lose on *Charter* grounds, as was the case, for example, in *Irwin Toy* [1989], *supra*.

record of government in “unified” and “indifferent” cases. This simplifies matters because we do not have to contend with governments who are opposed. There are 13 cases where the “feds” and the “provs” are united against a NGA; and in these cases, team government “wins” every time. It is striking that when government is unified, the Court has yet to rule against them. Another astonishing discovery occurs when the win/loss record of “indifferent” cases are examined. Out of 20 cases, where only one level of government (usually a province) appeared against a non-government actor, government won 19 times. The only exception occurs in *A.G. (Que) v. Greater Hull School Board* [1984].²⁹⁶

These findings give some credibility to the suggestion that the Supreme Court facilitates government action by upholding its ability to legislate or collaborate for mutual benefits. There is not enough information to prove this conclusively on division of power grounds, so we will need to look to the legal doctrines they employ for additional insight. However, “we should not begin,” as Ryder notes, “with an *a priori* commitment to either centralization or decentralization,” as if to say “decentralization or centralization were abstractly valuable for their own sake.”²⁹⁷ We should avoid the interpretive pitfalls of “ideological determinism.”²⁹⁸

F. Conclusion

As we learned from this chapter, not every federalism case can be viewed through the lens of a zero-sum game. In the modern era, federalism cases do not often originate

²⁹⁶ 2 S.C.R. 575

²⁹⁷ Ryder, “Equal Autonomy in Canadian Federalism,” 572.

²⁹⁸ Jean-Francois Gaundreaux-DesBiens, “The ‘Principle of Federalism’ and the Legacy of the *Patriation* and *Quebec Veto* References,” in J. Cameron and Bruce Ryder, eds (2011): 139.

from the legislatures whose authority is challenged. There are different categories of conflict that accompany division of power disputes. Some cases express the cooperative nature of modern intergovernmental relations, while others resemble the landmark constitutional battles of the Laskin Court. Indeed, it is no longer accurate to state that the Supreme Court simply chooses between competing claims of jurisdiction, for not every case that comes before Court involves a disagreement between the federal and provincial government. Although Supreme Court judges behave like umpires in certain situations, the nature of federal-provincial relations have evolved to the point where such a label cannot be applied universally. The federalism docket is diverse and reflects the collaborative nature of modern intergovernmental relations.

The Supreme Court's docket is ripe for analysis. Federalism continues to be an important constitutional matter, and important precedents have been handed down on a diversity of matters. But which judges are the federalism leaders of the Court? Which judges are authoring the decisions, and subsequently, creating the jurisprudence that either frustrates or upholds the political ends that federalism was intended to serve? To what extent is the Supreme Court unified or fragmented in federalism cases? Is the Court divided on certain issues? In short, what are the "hot button" issues of the Court? In the chapter that follows, I will answer these questions and identify the major federalism players on the Court. Upon identifying the federalism contributors of the Court, I will be in a position to assess the extent to which they agree or differ on major issues of law. Does the Supreme Court have a universal decision-making philosophy in federalism cases, or is it a collection of individual philosophies?

Chapter VI Judicial Participation and Disagreement

In an ideal world, a unanimous decision is preferable to one that is fragmented.

According to one Supreme Court justice, the provision of separate reasons is not the preferred means through which to influence the majority, because it “cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”²⁹⁹ In many ways, it weakens the clarity of the law, “detracts from the authority of the court,”³⁰⁰ “creates uncertainty,”³⁰¹ “casts doubt in the minds of litigants, signals dissention to the lower courts...and ultimately sends a muddled judgment to government.”³⁰² Justice L’Heureux-Dube, in an article published in 2000, underscores the relationship between disagreement and restraint by stating: “[Supreme Court Justices] must exercise a degree of self-discipline in order to avoid having multiple, redundant opinions detract from the quality of the Court’s decisions and thereby diminish its legitimacy.”³⁰³ Disagreement is not a liberty whose use is intended to be flippant.

On the other hand, disagreement or the threat of disagreement has an important role and function within the Court. It places a check on unfounded reasoning by articulating the perceived deficiencies of a majority judgment, signals to future litigants an alternative line of reasoning, reassures the losing party that their side was recognized

²⁹⁹ As cited in Antonin Scalia, “The Dissenting Opinion,” *Journal of Supreme Court History* 4 (1994): 35.

³⁰⁰ Matthew Bergman, “Dissent in the Judicial Process: discord in Service of Harmony,” *Denver University Law Review* 68, No. 1 (1991): 86.

³⁰¹ John Alder, “Dissents in Courts of Last Resort: Tragic Choices?” *Oxford Journal of Legal Studies* 20, No. 2 (2000): 242.

³⁰² Bonnie Androkovich-Farries, *Judicial Disagreement on the Supreme Court of Canada*, M.A. Thesis (Lethbridge, AB: University of Lethbridge, 2003): 60.

³⁰³ Claire L’Heureux-Dube, “The Dissenting Opinion: Voice of the Future” *Osgoode Hall Law Journal* 38, No. 2 (2000): 501.

and understood,³⁰⁴ and creates an avenue for future exploration and law development.³⁰⁵

In some cases, albeit rarely, dissents create the basis for future judgments.

Although much of the disagreements among judges in the modern era are delicately packaged and polite—expressions of “great respect” for “my brother” and “learned colleagues”—minority reasons speak volumes about the deliberations and debates that would otherwise take place only amongst judges in closed chambers. Written disagreements are significant for research purposes because it reveals alternative perspectives, identifies the jurisdictional territory and intellectual axis from which an alternative potential disposition could be reached; and thus elucidates the arguments and legal positions that receive at least traction and the ones that do not.

However, not every federalism decision along the way has been unanimous. Some cases offer “scathing” dissents, and some do not even have a majority set of reasons. While the data shows that the Court prefers unanimity whenever possible, judges are not afraid to branch off and deliver alternative paths of legal logic. That being said, what is the range of disagreement? Is there a clustering of opinions around the center of the federal-provincial jurisprudential axis—with minor nuances of disagreement—or is the territory of the debate vast and rugged, with written reasons scattered across the precedential map? Are disagreements rooted in fundamental ideological differences—with desire for provincial autonomy colliding with centralizing doctrines and ideals—or do they stem from disagreement over the doctrines that are used to dispose of an appeal?

³⁰⁴ Richard B. Stephens, “The Function of Concurring and Dissenting Opinions in Courts of Last Resort,” *University of Florida Law Review* 5 (1952): 395.

³⁰⁵ Matthew Bergman, “Dissent in the Judicial Process: Discord in Service of Harmony,” *Denver University Law Review* 68, No. 1 (1991): 82.

A. Fragmentation and Unity

Disagreement is a key part of our judiciary. It signals to researchers the alternative routes that were taken on the pathway leading to the creation of an outcome. Whether disagreement in federalism matters is common or rare is the purpose of the tables that follow.

Table 1: Decision type per Chief Justiceship:

	Unanimous	Majority	Plurality	Total (n)
Dickson	13 (41.9%)	15 (48.4%)	3 (9.7%)	31
Lamer	8 (47.1%)	8 (47.1%)	1 (5.9%)	17
McLachlin	21 (65.6%)	10 (31.3%)	1 (3.1%)	33
Total	42 (52.5%)	33 (41.3%)	5 (6.3%)	81

As the data in the table above indicate, the Supreme Court is “united” on more than half (52.5%) the federalism decisions it has delivered since 1984. However, while the level of unanimity within the Dickson and Lamer courts is between forty and fifty percent (41.9% and 47.1%, respectively), the McLachlin Court represents a sharp spike in unity. Indeed, of the 32 federalism cases that passed through the McLachlin Court since January of 2000, two thirds have been unanimous (65.6%). Overall, unanimous outcomes (52.5%) are more common than majority judgments (41.3%), while plurality decisions, in any period, are rare (representing only 5 cases, or 6.3%, of all federalism cases). In each era, the proportion of unanimous decisions has increased, which gives the *prima facie* impression the Court is trending toward higher levels of agreement. However, in almost half the decisions Supreme Court judges have failed to unanimously agree on the outcome, or corresponding reasons, of case. This is worthy of deeper inquiry. Are 8-1 decisions the “norm,” with repeat offenders dissenting in almost every decision? Or is the Court deeply divided, narrowly escaping with 5-4 majorities?

Using the sum of squares equation, we developed a “fragmentation index” to measure the disagreement levels of the past three chief justiceships.³⁰⁶ Whereas Table 1 (above) tracks the frequency of the type of judgments, the table below averages the voting breakdown of a panel’s signatories. Indeed, if there is a string of 5-4 or 4-3 decisions, the fragmentation level will be high; alternatively, if most outcomes are 8-1 or 6-1 majorities, the fragmentation level will be low.

Table 2: Average level of fragmentation on Supreme Court per Chief Justice Tenure:

Chief Justice	Fragmentation Index
Dickson	0.672
Lamer	0.785
McLachlin	0.877

As the data in the table above indicates, the Supreme Court has become less fragmented and more unity over time. The Dickson Court is the most fragmented at an index score of 0.672, followed by the Lamer (0.785) and McLachlin (0.877) Courts. While these figures to point to growing levels of agreement, they say nothing about which issues the Court is unified and the issues to which they are prone to disagree. Is the Court “settled” on some topics, while consistently divided on others? Do the patterns of agreement and fragmentation change according to chief justiceship? As the table below suggests, the answer to the aforementioned questions is “yes.” Although there are important factual variations within any given topic—“trade and commerce,” for example, is a broad subject

³⁰⁶ The sum of squares equation is calculated as follows: square the number of signatures on each set of reasons that are provided and add them up. Next, square the number of judges on the panel. Third, divide the sum of the reasons by the squared sum of the judges. For example, if the voting breakdown was 6-2-1, it would be $(36) + (4) + (1) = 41$. 9 judges on the panel = 81 . Therefore, $41/81 =$ a fragmentation index of 0.5 . The smaller the number, the greater the level of fragmentation. $1 =$ unanimity.

that also encompasses “property and civil rights”—the table below reveals that the Court is divided over some subject more than others.

Table 3: Average level of fragmentation on Supreme Court per Issue:

	Fragmentation Index (Dickson)	Fragmentation Index (Lamer)	Fragmentation Index (McLachlin)	Fragmentation Index (total ave)
Trade / Commer	0.91	0.68	0.72	0.77
Transport / Com	0.76	0.89	0.68	0.78
Natural Res	0.77	0.57	1.00	0.78
Taxation	0.33	0.79	1.00	0.71
Education	0.54	0.76	-	0.65
Social Services	-	0.81	1.00	0.91
Crim / Reg	0.72	1.00	0.81	0.84
Section 95	-	-	1.00	1.00
Total (average)	0.672	0.785	0.877	-

Indeed, the issues to which the Court is most likely to display disagreement are education (0.65), transportation and communication (.78), trade and commerce (.78) and natural resources (0.78). On the flip side, they are most unified over matters related to social services (0.91), criminal and regulation, and intergovernmental disputes pertaining to agricultural and aboriginal questions raised by section 95 of the *Constitution Act, 1867*. But disagreement patterns change according to chief justiceship. The Dickson Court, for example, could not agree on taxation (0.33) or educational matters (0.54), but they were almost completely unified over trade and commerce issues (0.91). The Lamer and McLachlin Courts, in contrast, saw little unity in trade and commerce matters (0.68 and 0.72, respectively), but were much more unified than the Dickson Court over issues related to taxation (0.79 and 1.00, respectively). The McLachlin Court is united on issues related to “social services,” an issue category that was altogether absent in the Dickson era. Although the average level of agreement on the Supreme Court has increased over time, each era had its “hot button” issue: for Dickson, it was taxation; for Lamer, it was

natural resources; and for McLachlin, it is transportation and communication, a divide that was renewed in two recent decisions stemming from Quebec.³⁰⁷

B. Judicial Participation

As we have seen, there are patterns of disagreement on the Court, but which justices are producing judgments and which ones are communicating their disagreement through separate reasons? By locating the “major players” in federalism decisions, one is better equipped to identify whether philosophical debates take place within the Court. If such debates exist, it is important to determine what, exactly, the debate is about.

Table 4: Authorship per Supreme Court Justice: The Dickson, Lamer, and McLachlin Years.³⁰⁸

	Unanimous ³⁰⁹	Majority ³¹⁰	Plurality	Total	Percentage of Total Federalism Cases
Dickson	2	8	0	10	12.5%
La Forest	2	2	3	7	8.8%
Iacobucci	4	3	0	7	8.8%
Le Bel	4	2	1	7	8.8%
Binnie	2	6	0	6	7.5%
Beetz	3	2	0	5	6.3%
Gonthier	3	1	0	4	5.0%
McLachlin	2	2	0	4	5.0%
Sopinka	2	1	0	3	3.8%
Chouinard	1	1	1	3	3.8%
Major	3	0	0	3	3.8%

³⁰⁷ *Quebec (Attorney General) v. Lacombe*, [2010] and *Quebec (Attorney General) v. Canadian Owners and Pilots Association* [2010].

³⁰⁸ In this table, justices are ranked according to frequency; however, those justices who wrote two reasons for judgment or less were omitted from this table. Chief Justice Lamer, surprisingly, only authored two decisions. Also, Table 7 calculates the number of written reasons that lead to “judgments” in particular—that is, majority, unanimous or plurality decisions—which is distinguishable from the number of written reasons in general, which includes dissents and separate concurrences.

³⁰⁹ Percuram cases (which are seven in total) were excluded from this table, as it is impossible to identify an individual judge.

³¹⁰ The total number of majority judgments exceeds the total number of majority decisions; the reason for this is co-authorship, where each judge who participates in a combined judgment is given full credit for authoring a majority decision.

Abella	1	2	0	3	3.8%
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As Table 4 indicates, some judges produce significantly more written judgments than others. Chief Justice Dickson, for example, provided a written judgment in more federalism cases (10 cases, 12.5%) than any other Supreme Court justice in the post-*Charter* era. La Forest, Iacobucci and Le Bel authored the second highest number of federalism cases at seven, although it is important to note that La Forest delivered more plurality judgments than everyone else combined.³¹¹ At first glance, it may seem reasonable to believe that La Forest’s “majority struggles” were symptomatic of the “fragmented” decade in which he was writing. However, that is a difficult assertion to maintain: of all the plurality decisions involving federalism disputes since 1984, three out of five belong to La Forest, with Justices Chouinard (in 1999) and Le Bel (in 2010) being the only exceptions.

There are also longstanding justices, such L’Heureux *Dubé*, who failed to deliver a single judgment. The implication of this point is that a judge was either never appointed to author the reasons for judgment or that the reasons they drafted were never persuasive enough to convince a majority of judges. On the other hand, there are other judges who have delivered a disproportionate number of judgments in relation to their years of service. For example, Justice Le Bel, who was appointed to the bench in 2000, delivered six federalism judgments in the first eight years of his tenure.

The frequency of written judgments only tells part of the story, however. If the point of this exercise is to uncover the major “players” or “debaters” in federalism cases,

³¹¹ Justice La Forest’s “plurality” judgments include: *Canadian Pacific Airlines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Air Canada v. British Columbia* [1989] 1 S.C.R. 1161; and, most notably, *Ontario-Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327.

it is important to look to the number of dissents and separate concurrences that are authored as well. Indeed, if it turns out that a few justices stand out for their lengthy and frequent dissents, it would be logical to ask what, exactly, they are dissenting about. Is it a Supreme Court justice from Quebec taking a philosophical stance against the erosion of provincial autonomy, which threatens the way of life for Quebecers? Or perhaps a judge crafted a separate concurrence because it softened the doctrine with which a matter was disposed. Whichever the case, by studying judicial participation in particular, and the unity and fragmentation levels of the Court in general, we can determine the extent to which debates take place among judges. If it turns out that the Court is completely unanimous in its decision-making, there would be little point attempting to discover, in a later chapter, the nature of their disagreements.

Table 5, below, ranks judges according to the *total* number of written contributions made to federalism cases since 1984.³¹² It includes every justice that sat on the Supreme Court since Dickson took over as Chief Justice. The below listed judges are ranked according to frequency.

³¹² Because Table 5 below examines the contribution frequency of *individual* judges, percoram decisions were excluded from analysis. This represents seven omissions from the Supreme Court's federalism caseload.

Table 5: Total Number of Federalism Contributions per Supreme Court Justice (n):

	Unanimous	Majority ³¹³	Plurality	Dissent	Concur	Total	% of Total Federalism Cases
La Forest	3	2	3	3	3	14	17.5%
Dickson	2	8	-	-	1	11	13.8%
Wilson	-	2	-	4	5	11	13.8%
Iacobucci	4	3	-	3	-	10	12.5%
Le Bel	4	2	1	2	1	10	12.5%
McLachlin	2	2	-	3	2	9	11.3%
Beetz	3	2	-	-	3	8	10.0%
Binnie	2	3	-	1	-	6	7.5%
Estey	-	1	-	2	2	5	6.3%
Gonthier	3	1	-	-	-	4	5.0%
Lamer	-	2	-	1	1	4	5.0%
McIntyre	1	-	-	1	2	4	5.0%
Deschamps	2	-	-	2	-	4	5.0%
Major	3	-	-	-	-	3	3.8%
Sopinka	2	1	-	-	-	3	3.8%
Chouinard	1	1	1	-	-	3	3.8%
Bastarache	1	-	-	-	2	3	3.8%
Abella	1	2	-	-	-	3	3.8%
Fish	-	-	-	-	2	2	2.5%
LeDain	-	1	-	-	1	2	2.5%
Stevenson	-	-	-	1	-	1	1.3%
Charron	-	1	-	-	-	1	1.3%
L'Heureux	-	-	-	1	-	1	1.3%
Rothstein	-	1	-	-	-	1	1.3%
Cromwell	-	1	-	-	-	1	1.3%
Dubé	-	-	-	1	-	-	1.3%
Total (n)	34	36	5	24	25	124	-
Total (%)	27.4%	29.0%	4.0%	19.4%	20.2%	-	-

The top seven federalism contributors come as little surprise: La Forest, Wilson, and Iacobucci are long standing justices who produced a proliferation of reasons throughout their careers, while Dickson and McLachlin are chief justices. It is also

³¹³ The total number of majority judgments exceeds the total number of majority decisions; the reason for this is co-authorship, where each judge who participates in a combined judgment is given full credit for authoring a majority decision. See, for example, the co-authored reasons of Binnie and Le Bel in *Canadian Western Bank* and *Lafarge Canada*.

unsurprising to see Justice Beetz, who was known for his contested constitutional battles with Laskin, atop the table as well. Nothing from the top of the list is out of the ordinary. However, the most striking feature of this table is the number of prominent judges that have been virtually silent on federalism matters. Chief Justice Lamer, for instance, who was known for pushing social and political boundaries—as evident by the *Remuneration of Judges*³¹⁴ and *Secession*³¹⁵ references, to name but two examples—provided reasons in only four federalism decisions in a career that spanned two decades. L'Heureux-Dubé, “the great dissenter,” did not channel her lack of judgment opportunities into a flurry of dissents or concurrences; indeed, her only contribution to the jurisprudence is the dissent she provided in *Starr v. Houlden*.³¹⁶

It appears that interest in federalism plays a significant role in whether a judge decides to contribute or not. There appears to be some evidence to suggest that blocks of federalism “experts” or “debaters” exist, at certain times, on the Court. For five years—between 1985 and 1990—Dickson, La Forest, Wilson and Beetz sat on the bench together, and combined to produce 34 sets of reasons over a 27 case period: 22 judgments, 8 separate concurrences and 4 dissents. In almost every federalism decision during this period, one of these four judges either provided the reasons for judgment or minority reasons. In the Lamer years, it is difficult to locate a similar block of participators, because the small sample size (17 federalism cases) makes it difficult to unearth any notable patterns. However, there were two very active and antagonistic members during this era: Justices Iacobucci and La Forest. Together, they combined to

³¹⁴ *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1998] 1 S.C.R. 3

³¹⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217

³¹⁶ *Starr v. Houlden*, [1990] 1 S.C.R. 1366

produce 13 sets of reasons (8 judgments, 3 dissents, and 2 separate concurrences). Most notably, on three instances neither judge would sign onto the reasons for judgment provided by the other, and in 6 cases, they signed onto conflicting sets of reasons.

In *Ontario Home Builders' Association v. York Region Board of Education*, a rather heated exchange between Iacobucci and La Forest unfolded. Writing for the majority, Iacobucci makes reference to La Forest's dissent throughout his reasons and, in particular, his addendum: "First, I note that underlying my colleague's approach is an insistence upon categorizing the EDCs as "land taxes", while ignoring their true nature....In characterizing EDCs as land taxes, my colleague has oversimplified the nature of the scheme, and overlooks the ways in which EDCs are novel and unlike any known form of taxation....With respect, however, I find his characterization of the EDC scheme is so narrow that he ultimately seems to deny the complexity that necessarily and appropriately exists within the realm of land use planning."³¹⁸ Three other judges signed off on Justice La Forest's reasoning, creating a 5-4 split within the Court.

The last example I wish to highlight with regard to this rivalry is *R v. Hydro-Quebec*,³¹⁹ a "rematch" of *Ontario Hydro v. Ontario*. In this decision, La Forest reversed his losing fortunes in *Ontario-Hydro* by persuading a majority of judges to sign onto his reasons for judgment. Iacobucci, who had disagreed with him in *Ontario Hydro*, co-authored a dissent with Lamer.

Finding active judges or blocs of judges in the McLachlin Court is a bit more tenuous, given the extended length of the period and the high rate at which written reasons are dispersed. Prior to 2009, Binnie, Bastarache and Le Bel were the most

³¹⁸ Justice Iacobucci, para 80-86.

³¹⁹ *R v. Hydro-Quebec*, [1997] 3 S.C.R. 213

prolific writers in the McLachlin Court, accounting for 18 sets of reasons. Although the sample size is too small to draw any significant conclusions, of the 18 panels Le Bel and Bastarache sat on together, they signed onto, or authored competing reasons, in 6 cases. This number is more profound when percoram and unanimous decisions are subtracted from the equation: in federalism cases where minority reasons were present, not once did Le Bel or Bastarache sign onto the same reasons. Since then, McLachlin has authored 6 of the past 8 judgments, and one of those 8 judgments was a percoram decision. Interestingly, Chief Justice McLachlin went from being virtually silent on federalism before 2009 to authoring almost every decision since.

C. Swing Judgments

This section deals with the concept of “swing” judgments.³²⁰ A swing occurs when a judge who is designated to provide the written judgment not only fails to secure the necessary signatures of a panel to form a majority, but also loses them to another author. Swings are an important but overlooked dimension of judicial disagreement that helps uncover possible voting patterns and divisions within the court. Indeed, if judgments are “stolen,” it is important to identify the judges who are involved and the issues they represent. The swing cases, as well as the judges and issues involved, are listed in the table below.

³²⁰ For a more detailed account of the concept, see Peter McCormick, “Structures of Judgments: How the Modern Supreme Court of Canada Organizes its Reasons,” *Dalhousie Law Journal* 32, Vol 1 (2009): 35-67.

Table 6: Federalism Swing Judgments from 1984-2012

Case	New Judgment	Original “Judgment”	Decision Type	Issue
Re Ownership of the Bed of the Strait of Georgia (1984)	Dickson	Wilson	Majority	Natural Resources
Deloitte Haskins and Sells v. Worker’s Comp. Board (1985)	Chouinard	Wilson	Plurality	Trade / Commerce
Rio Hotel Ltd. v. New Bruns. (Liquor Board) (1987)	Dickson	Estey	Majority	Criminal / Regulation
Finlay v. Canada (Minister of Finance) (1993)	Sopinka	McLachlin	Plurality	Social Services
Ontario Hydro v. Ontario (1993)	La Forest	Iacobucci	Plurality	Trade / Commerce
Husky Oil Operation v. Minister of National Revenue (1995)	Gonthier	Iacobucci	Majority	Trade / Commerce

One of the first things that stick out from this table is that both Wilson and Iacobucci were twice the “victims” of swing judgments. While Iacobucci lost both judgments on “trade and commerce” issues—one to La Forest and one to Gonthier—Wilson lost one judgment to Dickson (a natural resource case) and one to Chouinard (a trade and commerce case). These observations help explain why Wilson and Iacobucci authored so many dissents. Indeed, half of Wilson’s “dissents” came at the hands of a “swing judgment,” although five concurrences and two non-swing dissents are still far above the mean.³²¹ In Iacobucci’s case, two out of three dissents resulted from a “swing.” In other words, he was not a great “federalism dissenter,” as a cursory viewing

³²¹ Wilson concurred on a variety of constitutional issues and cases. They are listed as follows: *Skoke-Graham v. The Queen* [1985] (criminal and regulation); *Deloitte Haskins & Sells v. Worker's Comp. Board* [1985] (trade and commerce); *Great Montreal Protestant School Board v. Quebec (Attorney General)* [1989] (Education); *Canadian Pacific Airlines Ltd v. British Columbia* [1989] (transportation and communication); *Ibew v. Alberta Government Telephones* [1989] (trade and commerce, transportation and communication).

of the data may suggest; rather, he tried on multiple occasions to form a majority judgment, but because he could not procure enough signatures, it became a dissent.

Assessing the rate at which judges participate in federalism matters is important for locating patterns of disagreement and interest levels in a topic. As the tables above suggest, more than half of our case list (62%) contains a minority reason of some type. At the individual level, we can see that debates—indeed, rivalries—exist on the Court. But what, exactly, are the rivalries about? Is it a matter of pitting “centralists” against “provincialists,” or is the nature of the disagreements more technical in nature? Iacobucci and La Forest certainly traded barbs in the two leading decisions of the Court; and Le Bel and Bastarache, in later years, were also prone to disagreement.

D. Of “Provincialists” and “Centralists”

When I first considered the disagreement patterns on the Court, I thought a central component of this chapter would be about uncovering the centralist/provincialist leanings of judges. I hypothesized that there would be strong federalism “dispositions” on the Court (similar to the Laskin, Dickson, and Beetz years in the late 1970s and early 1980s) and that blocs of “centralizers” and “balkanizers” would be found. Unfortunately, no such demarcation exists. There are two reasons for this; I will touch on them briefly.

First, judicial disagreements in federalism cases often take place over issues that have little to do with jurisdictional “preferences.” The Court is united in the general philosophical approach it takes in division of power cases. It is not the case that some judges embrace the overarching decision-making philosophy and some consistently reject it (as if there are “centralist” or “provincialist” outliers on the Court). Rather, the Supreme Court’s federalism philosophy serves as an organizing principle that transcends

the technicalities over which they disagree. As we learned from above, disagreements are not absent, but they do not take place along overarching philosophical lines.

Provincial autonomy versus centralization is not a language or continuum that the Court recognizes. Nor does it accurately describe the outlook of its judges. Notwithstanding a few divided judgments in 2011, the Supreme Court has been increasingly unified in its disposition of federalism cases.

Second, as we will recall from our discussion in Chapter 5, the Supreme Court's federalism docket does not lend itself to an either/or, zero sum analysis.

Intergovernmental relations in the modern era are complex, and so are the disputes that appear before them. In some cases, there is no dispute between government at all. In other cases, the "feds" and "provs" are united against a common opponent or altogether absent from a dispute. For these reasons, it is difficult to use individual voting patterns as a way to unearth the federal/provincial leanings of judges. The Supreme Court is not a collection of individual judges whose centralist/provincialist tendencies offset each other in a series of back and forth deliberations. Rather, they collectively pursue an overarching approach to federalism, and it is within the confines of this approach that disagreements from time to emerge.

But what is the nature of the philosophy upon which they are unified? To what extent does the Court give deference to intergovernmental unity? How does the Supreme Court respond to government when they are unified against a common opponent? Are the Supreme Court's doctrinal preferences in division of powers cases consistent with the intergovernmental collaboration that is so characteristic of our era, or do they deliver

judgments that carve out specific lines of jurisdiction? We know they are unified in their approach, but that begs the question: what is their approach?

Chapter VII Doctrine

The decision-making approach the Court employs in federalism disputes is the purpose of the chapter that follows. As we shall see, a distinct decision-making philosophy of facilitation—informed by overlapping and liberal interpretations of federal and provincial heads of power—emanates from the federalism case law of the Court. This philosophy informs the legal doctrines judges select and, in many ways, serves to reinforce and facilitate the collaborative nature of modern intergovernmental relations. Upon completion of this chapter, we will be in a position to “judge” the implications of the Supreme Court’s post-*Charter* federalism jurisprudence and determine the extent to which it frustrates, or reflects, the political ideals the founding fathers intended federalism to serve.

Organizationally, this chapter is divided into three main sections. The first section provides a brief literature review of the different schools of thought that attempt to classify the motives that underlie the Supreme Court’s federalism jurisprudence. The second section discusses the doctrinal frequencies of the Court as well as the principles they espouse in their reasons for judgment. The third and final section examines the decision-making philosophy that informs the doctrines that are chosen.

A. Literature review

The neutrality of the Supreme Court of Canada in federalism cases has been the subject of widespread disagreement and debate. In viewing the literature, doctrinal analyses of the Supreme Court’s handling of division of power disputes typically leads to one of two conclusions: crudely, that the Supreme is biased, however radically, in favor of the federal government; or that the Supreme Court is an impartial, neutral arbiter

without clear preference for one level over another. Although various nuances, overlaps and insights are contained within each respective thought “camp,” the fundamental turning point of the debate is clear: the Supreme Court is either “neutral” and “balanced” in its approach to federal judicial review, or it is decidedly biased. In the paragraphs that follow, I summarize the most common theories that attempt to understand the nature and impact of federal judicial review in Canada. Surprisingly, there has yet to be a researcher that has conducted an exhaustive review of the Supreme Court’s handling of the division of powers.

Pendulum Theory

In Canada, “balance” and “federal judicial review” typically go hand in hand in scholarly publications.³²² Not surprisingly, for much of the past few decades scholars have attempted to point out the Supreme Court’s track record of neutrality.³²³ Those who subscribe to this notion suggest that, “for every swing to the benefit of the central government that a court takes, it appears to take an equivalent swing to the favour of the provinces.”³²⁴ Over time, this “balances” out. As the name suggests, the “pendulum theory” of federal judicial review suggests that legislative power undergoes a series of jurisdictional ebbs and flows which results in alternating periods of centralization and

³²² Bruce Ryder, “Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers,” *Supreme Court Law Review* 54 (2011); Baier, *The Courts and Federalism*, 2006.

³²³ This approach is found in numerous studies that look at federal judicial review in Canada. See, for example: Swinton, *The Supreme Court and Canadian Federalism*, 1990; Garth Stevenson, *Federalism in Canada* (Toronto, ON: McClelland and Stewart, 1989); Peter H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987); Peter Hogg, *Constitutional Law of Canada*, 2007; Stephen Brooks, *Public Policy in Canada* (Toronto, ON: McClelland and Stewart, 1989).

³²⁴ Baier, *Courts and Federalism*, 23.

decentralization. Such a theory posits that, over the long run, federal and provincial swings in power cancel each other out, thus creating “balance” within a federation.

In his classic, albeit dated, article “Is the Supreme Court of Canada Biased in Constitutional Cases?” Peter Hogg concluded that the:

Supreme Court of Canada has generally adhered to the doctrine laid down by the Privy Council precedents; and that where the court has departed from those precedents, or has been without close precedents, the choices between competing lines of reasoning have favoured the provincial interest at least as often as they have favoured the federal interest. There is no basis for the claim that the court has been biased in favour of the federal interest in constitutional litigation.³²⁵

Hogg takes the approach that both levels of government “win” and “lose” at an equivalent rate. In his eyes, balance is not derived from the principled desire and intent to create balance for the sake of creating balance—as if balance is inherently good—but is rather the end result of offsetting swings in jurisdiction. For evidence, he lists favorable outcomes for each level of government, positioning his article on the assumption that the Court’s give and take approach is consciously driven by an offsetting centralist/decentralist logic. Hogg says nothing, however, about the decision-making philosophy that governs the choices of Supreme Court judges. More recently, the Supreme Court’s handling of the interjurisdictional immunity doctrine in *Canadian Western Bank*³²⁶ and *Lafarge*³²⁷ led John G. Furey to remark that the “pendulum truly has swung” back in favor of the provinces, signaling a retreat from the more “centralist” reasoning in *Bell Canada*.³²⁸

³²⁵Peter Hogg, “Is the Supreme Court of Canada Biased in Constitutional Cases?” in *The Canadian Bar Review* 57 (1979), p. 739.

³²⁶ 2 S.C.R. 3 [2007]

³²⁷ 2 S.C.R. 86 [2007]

³²⁸ John G. Furey, “Interjurisdictional Immunity: The Pendulum Has Swung,” *Supreme Court Law Review* 42 (2008): 620.

Gerald Baier, on the other hand, while similar to Furey and Hogg in some aspects, summarizes the Supreme Court's stance on federalism through a pure doctrinal lens. He states that the Canadian Supreme Court has not "approached the division of powers with nearly as much gusto as its American counterpart...and has shied away from grand theorizing...in favor of more discretely based judgments that make detailed distinctions about constitutional jurisdiction."³²⁹ The Canadian Court, one could say, sees itself not so much as a "neutral arbiter," but as a balancing agent that intervenes on an as-needed basis. Both Hogg and Baier agree that the Supreme Court is not a conscious, ideologically driven centralizing agent, but an institution that attempts to judge division of power disputes according to the level of government that is best suited to handle a particular sphere of authority.³³⁰

However, Baier warns of the centralizing implications of the Supreme Court's federalism jurisprudence in recent years. In particular, he cites their liberal application of the federal criminal law power, and to a lesser extent, the national dimensions branch of POGG, which, he argues, systematically erodes provincial jurisdiction. From these lines of reasoning the doctrine of "provincial incapacity" is created. Baier implies that the Supreme Court is systematically, albeit subtly and unintentionally, eroding provincial autonomy and shifting a disproportionate level of decision-making responsibility to the feds.

³²⁹ Gerald Baier, "New Judicial Thinking on Sovereignty and Federalism: American and Canadian Comparisons," in *The Justice System Journal* 23 (2002), p. 12. See also Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: UBC Press, 2006), pp.129-155.

³³⁰ Hogg, *Constitutional Law of Canada*, 721-23; Baier, *Courts and Federalism*, 157-165.

Centralization Thesis

Unlike adherents to the more optimistic “pendulum” theory of judicial review, there are some thinkers who believe national high courts are centralizing institutions that place provincial levels of government at a decided disadvantage. Andre Bzdera, for example, is highly critical of federal judicial review because, he contends, national high courts are inherently centralizing agents. Bzdera disagrees with both Hogg and Baier by rejecting the “pendulum” theory of judicial review and the end consequence of “balance.” In the alternative, he states rather pointedly that the Supreme Court “has demonstrated a consistent centralist stance over the past 25 years,” and that through “generous interpretation of federal constitutional competences (with such concepts as national dimensions, commerce power, external relations and national sovereignty) and particularly by refusing to review federal spending in areas of member-state jurisdiction, federal high courts are able to validate virtually all federal legislative ends.”³³¹

Additionally, Bzdera notes that during the period from 1949 to 1990, “few substantive federal legislative acts were deemed to be unconstitutional by the Supreme Court on federalism grounds.”³³² It is important to keep in mind that Bzdera was writing in 1993, and that since then, several subsequent jurisprudential developments have taken place. Nonetheless, his stance is important because it rejects the balance-through-offsetting-outcomes-approach that is held by the majority of constitutional observers. In contrast, he believes the Supreme Court erodes provincial power because of the centralist motives that inevitably flow from national institutions and the nation-building objectives

³³¹ Andre Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review,” *Canadian Journal of Political Science* 26, No. 1 (March, 1993): 17-20.

³³² Bzdera, “Comparative Analysis of Federal High Courts,” 13.

inherent in their design. Jurisdictional centralization, therefore, is not an accidental byproduct of the sum of judicial decisions, but a political goal that is achieved by the conscious political attitudes of the judges presiding.

Jean Leclair concurs with Bzdera's centralist conclusion, but instead of using comparative research to ground his perspective, he looks to the end result of the Supreme Court's jurisprudence instead. He believes that since constitutional repatriation in 1982, the "lure of centralist efficiency is overpowering a fundamentally important part of Canada's federal character: regionalism."³³³ With "functionalism" leading the charge, there is little being done to "counterbalance" the needs of "regional polities."³³⁴ However, his outlook is not as bleak or cynical as Bzdera's. While he believes the Supreme Court has been decidedly central over the past few decades, he leaves open the possibility that Supreme Court judges can create balance by "developing a structured and normative understanding of the role of provinces."³³⁵ He does not contend that national high courts are inherently central or that the political inclinations of judges lead them to side in favor of the "hand that feeds them." But he agrees that the Supreme Court is more comfortable assigning jurisdiction to the legislative bodies that possess the most appropriate means of administering it.

Of the perspectives we considered, not one derives a conclusion from an exhaustive account of the Supreme Court's handling of federalism cases. Bzdera uses international comparative research to assert that are inherently centralizing agencies; Baier draws a more measured conclusion, but only uses a sampling of cases to support it;

³³³ Jean Leclair, "The Supreme Court's Understanding of Federalism: Efficiency at the Expense of Diversity," *Queen's Law Journal* 28 (2003): 411-453.

³³⁴ Leclair, "The Supreme Court's Understanding of Federalism," 415.

³³⁵ Leclair, 453.

and neither Leclair nor Hogg provide more than eight case studies to substantiate their positions. My contribution to the discussion is an analysis that draws insight from a comprehensive look at the federalism cases of the Court.

B. Doctrines and Justifications

Notwithstanding the perspectives summarized above, the best approach to draw out the decision-making philosophy of the Court is to study the doctrines, and corresponding rationales they provide, to settle disputes. As we will recall from our discussion in Chapter 2, the doctrines judges apply are informed by political preferences. Therefore, by examining the Supreme Court's doctrines, and the subsequent impact of those doctrines, one is better positioned to ascertain the decision-making outlook from which they precipitated.

To achieve this goal, I went through every federalism case handed down over the past three justiceships and tracked the doctrinal frequency of the Court. In particular, I looked at the Court's determination of an impugned statute's validity, applicability and operability, determinations that are made through the pith and substance, interjurisdictional immunity and paramountcy doctrines, respectively. These analyses take place in almost all division of power cases. They are, to be sure, the hallmark features of a traditional federalism analysis.

“A law that purports to apply to a matter outside the jurisdiction of the enacting legislative body may be attacked in three different ways.”³³⁶ Peter Oliver reminds us of the sequence of federal judicial review. First, in the opening lines of the reasons for judgment, one will almost always find reference to the well-established “pith and

³³⁶ Hogg, *Constitutional Law of Canada*, 382.

substance” analysis, which involves the ‘characterization’ of legislation for the purpose of determining its ‘validity.’ After determining the dominant feature of the law in question—its purpose and effect—the Court then assigns that law to an appropriate head of power. From here, the Court is able to determine whether such a law is valid by virtue of the enacting legislature.

If, after the pith and substance test, the Court finds that an impugned provision is *intra vires*, or within the authority of the enacting legislature, they then determine whether or not a validly-enacted law is “applicable” to matters that fall outside the jurisdiction of the enacting legislature. This second stage of analysis invokes what the courts refer to as the interjurisdictional immunity doctrine, the notion “that legislation enacted by one order of government cannot interfere with the core of any subject matter that is under the jurisdiction of the other order of government.”³³⁷ The third step involves the application of the ‘paramountcy doctrine,’ which assesses whether a valid and applicable provincial law is operational in light of potential conflicting federal legislation. Operationally, when there are inconsistent or conflicting federal and provincial laws, the federal law prevails and the provincial law is declared “inoperative to the extent of the inconsistency.”³³⁸

The three steps, or progressions, that I identified above are fundamental to an analysis of the division of powers. Over the past three chief justiceships, however, the Court has been reluctant to apply them. The validity of most statutes is upheld, and only rarely are laws declared inoperative and inapplicable. Does this mean that the Court

³³⁷ Peter Hogg and Rahat Godil, “Narrowing Interjurisdictional Immunity,” *Supreme Court Law Review* 42 (2008): 623.

³³⁸ Hogg, *Constitutional Law of Canada*, 382.

refrains from making decisions? The short answer is no. But the point of emphasis in this section is that the Court is reluctant to embrace its traditional role as umpire. While litigants often attempt to persuade the Court to invoke the doctrines of paramountcy and interjurisdictional immunity, seldom do they do it.

Determinations of Validity

As the data in the table below indicate, it is rare for the Court to declare an impugned provision invalid on division of power grounds. Over the past three chief justiceships, only three federally enacted pieces of legislation were declared *ultra vires* and only seven provincial laws were declared to be “beyond the powers” their legislative capabilities. For a Court whose mandate, for so long, was to act as a “judicial umpire,” this finding is astonishing. While recent scholarship has identified a string of cases that points to the relatively “hands-off” approach of the McLachlin era, an exhaustive comparative analysis of this nature is the first of its kind.³³⁹

Table 4: Success rate of litigants invoking *ultra vires* arguments in Federalism cases

	Number t <i>Ultra vires</i> attempted	Number t <i>Ultra vires</i> successful	
		<i>Fed</i>	<i>Prov</i>
	-		
Dickson	24/31 cases	1/31	5/31
Lamer	10/17 cases	0/17	1/17
McLachlin	23/33/cases	2/33	1/33
Total	57/81 (70.4%)	3/81 (2.5%)	7/81 (7.4%)

Before I address the cases where the Courts declared an impugned provision invalid, I will elucidate a few additional findings from this table. First, in more than two thirds of all federalism cases (70.4%), litigants from one side or another attempt to convince the Court of the merits of an *ultra vires* ruling. In contrast to these crafty

³³⁹ See, for example, Bruce Ryder’s article, “Equal Autonomy in Canadian Federalism,” *Supreme Court Law Review* 54 (2011).

attempts, the Court makes such rulings in less than 10 percent (9.9%) of its decisions. While they hear numerous arguments in favor of *ultra vires* rulings, the Court chooses to dispose of matters through other avenues. Second, despite the unsuccessful track record of the “beyond the powers” argument, litigants continue to attempt it.

At face value, a disposition that states “the impugned provision is *ultra vires* the enacting legislature” is the most crushing defeat one can experience in a federalism dispute. It is not simply a matter of exempting a particular someone from otherwise valid and applicable legislation; it is the Court saying that a legislature is prohibited from doing something. This is why it is important to look at the context of each of the *ultra vires* rulings over the past three chief justiceships, as will be done in the section that follows.

On the flip side, in how many instances and at what proportion are laws upheld? What is the spirit of the reasoning underpinning the *vires* status of an impugned provision? Is the Court simply rubberstamping the validity of every federal statute that comes its way? That is, is the Court allowing the federal government to intrude upon provincial legislative jurisdiction? To what extent are provinces resisting the feds and to what extent does a cooperative spirit prevail?

Table 5: Federal-provincial statutes held to be valid or *intra vires* on federalism grounds³⁴¹

Chief Justiceship	Federal Statutes	Provincial Statutes	Total (n) ³⁴²
Dickson	16/17	24/28	40/45
Lamer	13/13	7/8	20/21
McLachlin	20/22	24/25	44/47
-	49/52 (94.2%)	55/61 (90.2%)	104/113 (92.0%)

Given the numbers above, it comes as little surprise that Bruce Ryder, writing in 2010, found it “hard to remember” the last time the Court declared a law invalid. As the data suggests, the constitutionality of more than 9 out of 10 statutes has been upheld over the past few decades. While federal statutes do slightly better than that of provincial statutes, provincial statutes are more often challenged, which might help explain that provincial laws are declared invalid more often than federal laws. Even so, the Court is not disproportionately striking down the validity of laws enacted by either level of government. Rather, the Court upholds the vast majority of statutes at both the federal and provincial level. Until three very recent decisions,³⁴³ save for a minor jurisdictional issue in *Unifund Insurance*,³⁴⁴ the last time a law was declared invalid on division of power grounds was in 1993, in the *Mortgentaler* case.³⁴⁵ The Court almost went two decades before declaring a law invalid on federalism grounds.

³⁴¹ The total number of cases are defined as the total number of cases where the validity of a statute was called into question; indeed, if the validity of statute was not discussed in a decision or dispute, there is no basis to include that case, for the purposes of this table, into the “total.”

³⁴² The total number is over 81 because in some cases, both federal and provincial pieces of legislation were declared valid and both sides therefore “won.”

³⁴³ *Reference re: Securities*, supra, *Reference re: Human Reproduction Act*, supra, and *Quebec (Attorney General) v. Lacombe* [2010], 32608.

³⁴⁴ *Unifund Insurance Co v. Insurance Corp. of British Columbia* [2003] 2 S.C.R. 63

³⁴⁵ *R v. Mortgentaler* [1993] 3 S.C.R. 463

There are two additional factors that reveal multitudes about the Court and its disposition of division of power disputes in particular. In Chapter V, we learned that there are four different categories of federalism cases—turf, precaution, indifferent and unified—and that non-government actors initiate most disputes. From these two findings we were able to demonstrate the limitations of viewing division of power cases through the lens of a zero sum game.

The rate at which the Court upholds legislative provisions adds credence to this suggestion. In the modern era there are 27 occasions where the validity of *both* federal and provincial legislation is upheld in the same decision, and in 11 of these 27 cases, the feds and provs were locked in a head to head “turf” war. In this subsection of cases, the litigants representing the interests, and/or making arguments on behalf of, one level of government attempt to convince the Court of the invalidity of an opposing legislature. As the numbers show, the Court is not often swayed by such arguments. In one third of all cases, they uphold the validity of the statutes enacted by both levels of government; in 49 decisions, the *vires* of only one level of government is under review; and in only six cases is the validity of one level of government upheld while the other level is denied.³⁴⁶

To think that whenever the jurisdictional line for one level of government expands, the other automatically retracts, is erroneous. The Supreme Court has made its preference quite clear in this regard. In fact, justices Binnie and Lebel, writing for a united Court in *Canadian Western Bank*, had this to say: “A court should favour, where possible, the ordinary operation of statutes enacted by both levels of government.”³⁴⁷

³⁴⁶ *Clark v. Canadian National Railway* [1988], *Starr v. Houlden* [1990], *Mortgentaler* [1993], *Ontario Hydro* [1993], *Lacombe* [2010], and *Reference Re: Securities* [2011].

³⁴⁷ At para 31, 2 S.C.R. 3 [2007].

And in his reasons for judgment in *Chatterjee*, Binnie recognized that an age of “[C]o-operative federalism recognizes that overlaps between provincial and federal laws are inevitable.”³⁴⁸ In both instances, the Court had the opportunity to declare that such overlap was unconstitutional. But they did not.

In other cases, the Court has not shied away from concurrent authority, and in some instances, has gone to great lengths to embrace it: a “flexible approach to federal-provincial cooperation [is] appropriate to modern federalism, where matters will frequently attract concurrent legislative authority.”³⁴⁹ Writing for the majority in *OPSEU*, Dickson, in a pioneer-like statement, summarized the Court’s position as follows: “The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers.”³⁵⁰

The third element that helps explain Tables 4 and 5, above, is a familiar one. As the Court explicitly reminds us in *Rothmans, Benson & Hedges*, they are sympathetic to intergovernmental unity in federalism cases:

The conclusion that s. 6 of *The* [provincially-enacted] *Tobacco Control Act* does not frustrate the purpose of s. 30 of the [federally-enacted] *Tobacco Act* is consistent with the position of the Attorney General of Canada, who intervened in this appeal to submit that the *Tobacco Act* and *The Tobacco Control Act* were enacted for the same health-related purposes and that there is no inconsistency between the two provisions at issue. While the submissions of the federal government are obviously not determinative of the legal question of inconsistency, there is precedent from this Court for bearing in mind the other level of government’s position in resolving federalism issues: see *Kitkatkla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.³⁵¹

³⁴⁸ At para 32, *Chatterjee v. Attorney General of Ontario* [2009] 1 S.C.R. 624

³⁴⁹ Para 152, *Assisted Human Reproduction* [2010] 32750

³⁵⁰ Para 27, *Ontario (Attorney General) v. OPSEU* [1987] 2 S.C.R. 2

³⁵¹ Para 26, [2005], 1 S.C.R. 188

Prior to this, the Court made a similar statement in *OPSEU* when it noted the “federal government’s intervention in support of the Ontario law” and intimated that, because of this, the Court “should be particularly cautious about invalidating a provincial law.”³⁵²

Interjurisdictional Immunity

Determining the dominant characteristic of a challenged law, and in turn, assigning it to the appropriate head of legislative power, may be the first step in federal judicial review, but it is not the last. If the *vires* of an impugned provision is upheld, and the pith and substance of a matter is established, the Court proceeds to the next question: “Is the impugned legislation applicable?” In theory, the doctrine of immunity is reciprocal, that is to say, “it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment.”³⁵³ However, such a theory has produced “asymmetrical” results. It has, in the words of Bruce Ryder, “served *only* to place limits on the application of valid provincial laws, and it has done so in a wide range of significant contexts.”³⁵⁴ To be sure, the Court has yet to employ the interjurisdictional immunity doctrine as a basis to waive the applicability of an otherwise valid federal law to an exclusive provincial undertaking. Unlike the first stage of a traditional division of powers analysis, there is not an equal chance that it will be used for either level of government.

³⁵² Para 1, *Ontario (Attorney General) v. OPSEU* [1987] 2 S.C.R. 2

³⁵³ *Canadian Western Bank, id.*, at para. 35.

³⁵⁴ Ryder, “Equal Autonomy in Canadian Federalism,” 586.

Were it not for a trio of cases that involved interprovincial undertakings in 1988,³⁵⁵ one could say that the interjurisdictional immunity doctrine has all but vanished. As the numbers below indicate, the Supreme Court has been reluctant to declare legislative provisions inapplicable to extra jurisdictional matters. As Peter Hogg notes, the “idea of interjurisdictional immunity finds its genesis in cases concerning federally-incorporated companies,” but also applies to federally regulated undertakings and some fields of transportation and communication.³⁵⁶ It does not extend much further, however.³⁵⁷ While the opportunity for the Court to consider application of this doctrine is relatively uncommon—about one case in four—the Court has spent considerable time articulating its concerns about how it disrupts the federalism balance in Canada.

Table 6: Success rate of litigants invoking immunity arguments in Federalism cases

	N Interjurisdictional Immunity arguments attempted	N Interjurisdictional Immunity arguments successful
Dickson	7/31	3/31
Lamer	2/17	0/17
McLachlin	10/33	1/33
Total	19/81 (23.5%)	4/81 (4.9%)

Consider, for example, former Chief Justice Brian Dickson’s critical comments in *OPSEU*: “[The] interjurisdictional immunity is not a particularly compelling doctrine.”³⁵⁸

³⁵⁵ *Bell Canada*, supra, note 68; *Canadian National Railway Co. v. Courtois* [1988] 1 S.C.R. 868; *Alltrans Express Ltd. v. British Columbia (Worker’s Compensation Board)*

³⁵⁶ Hogg, *Constitutional Law of Canada*, 383-388.

³⁵⁷ In *Canadian Western Bank*, the Court in its introductory paragraph made as much clear: “This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction.”

³⁵⁸ Para 3, *OPSEU* [1987]

Consider also the perceptive and comprehensive discussion of justices Binnie and Lebel in *Canadian Western Bank* [2007]. Writing for the majority, and citing a plethora of case law, they referred to the interjurisdictional immunity doctrine as one of “limited application which should be restricted to its proper limit. A broad use of the doctrine would be inconsistent with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.”³⁵⁹ A few paragraphs later they drove in the final dagger: “While in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.”³⁶⁰

Essentially, the Court signaled that it has little appetite to consider expanding the scope and application of this doctrine and that “paramountcy” is the likely “fallback” option for litigants. That interjurisdictional immunity is least preferred was also clarified in *Lafarge*: “the doctrine of interjurisdictional immunity should generally not be applied where the legislative subject matter presents a double aspect and both federal and provincial authorities have a compelling interest....[F]ederalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity.”³⁶¹ In yet another example, in *Alberta Government Telephones v. CRTC* Dickson reminded us of where immunity fits within the doctrinal “totem pole:” “Canadian federalism has evolved in a way which tolerates

³⁵⁹ Para 42, *Canadian Western Bank* [2007]

³⁶⁰ *Canadian Western Bank* [2007], para 77.

³⁶¹ Para 4, *British Columbia (Attorney General) v. Lafarge Canada* [2007], 2 S.C.R. 86

overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.”³⁶²

Despite its disfavor, the Supreme Court surprised analysts of the Court by invoking the interjurisdictional immunity doctrine in *Quebec (Attorney General) v. Canadian Owners and Pilots Association* [2010].³⁶³ Although the Court took a measured approach with a few dissenters along the way, McLachlin’s majority judgment did not recapture the doctrinal flair of *Canadian Western Bank*. In the end, the Court believes that an “asymmetrical application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism.”³⁶⁴

Paramountcy

The third and final stage of a traditional division of powers analysis involves the task of determining whether a validly enacted law is inoperative to the extent that a legislative inconsistency arises or “where it is impossible to comply with both legislative enactments.”³⁶⁵ Or to borrow Dickson’s classic formulation in *Multiple Access Ltd. v. McCutcheon*: “In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other.”³⁶⁶

³⁶² Para 72, *Alberta Government Telephones v. Canada (CRTC)* [1989] 2 S.C.R. 225

³⁶³ 2 S.C.R. 536.

³⁶⁴ *Canadian Western Bank*, supra, para. 45.

³⁶⁵ *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121

³⁶⁶ *Multiple Access Ltd. v. McCutcheon* [1982] 2 S.C.R. 161

We know from previous discussion that immunity doctrines are avoided by the Court whenever possible. While the paramountcy doctrine is viewed more favorably than that of interjurisdictional immunity, the Court has developed a high threshold for its exercise as well. In the words of Wilson J. in *Deloitte Haskins*, for example, if “faced with the choice of construing the provincial legislation in a way which would cause it to invade the federal sphere, thereby attracting the doctrine of paramountcy, or construing it in accordance with the presumption of constitutionality, I prefer the latter course. I believe also that it accords better with the more recent authorities on the scope of the paramountcy doctrine.”³⁶⁷

A few years later, in *Husky Oil*, Iacobucci, along with three others in dissent, set the tone for subsequent cases and warned that “some” is not a strong enough basis to justify inoperability in the future:

In closing, although I find there to be no conflict between s. 133 (1) and the Bankruptcy Act, I posit that, even if there were to be some element of conflict, this must be evaluated in light of the fact that the provincial legislation is *intra vires*. Legislation that is *intra vires* is permitted to have an incidental and ancillary effect on a federal sphere. I would emphasize again that this Court has traditionally declined to invoke the paramountcy doctrine in the absence of actual operational conflict. I am uncomfortable with the watertight approach to federal bankruptcy legislation propounded by the respondents. To interpret the quartet as requiring the invalidation of provincial laws which have any effect on the bankruptcy process is to undermine the theory of co-operative federalism upon which (particular post-war) Canada has been built.³⁶⁸

In Iacobucci’s eyes, the Court ought not be quick to declare operational conflicts. Legislation is permitted to have incidental and ancillary effects on each other. To illustrate, the paramountcy doctrine was bypassed in *Siemens v. Manitoba*, where it was determined that “The *Criminal Code* specifically creates an exception to the gaming offences where

³⁶⁷ *Deloitte Haskins Sells v. Worker’s Comp. Board* [1985] 1 S.C.R. 785, para 37

³⁶⁸ *Husky Oil Operations Ltd v. Minister of National Revenue* [1995] 3 S.C.R. 453, para 162. It is interesting to note that cooperative federalism is a manifestation of government—and one that is deferred to by the Court.

provincial lottery schemes are established, affirming the double aspect of gaming, promoting federal-provincial cooperation and removing operational conflict and any question of paramountcy.”³⁶⁹ Indeed, before the paramountcy doctrine applies, the Court looks to both the ancillary and double aspect doctrines, which I touch on below.

Table 7: Success rate of litigants invoking paramountcy arguments in federalism cases

	N Paramountcy arguments attempted	N Paramountcy arguments successful
Dickson	13/31	2/31
Lamer	2/17	2/17
McLachlin	11/33	2/33
Total	26/81 (32.1%)	6/81 (7.4%)

It should come as little surprise that rulings of inoperability are rare.

Although litigants attempt to make the case for paramountcy in about a third of all cases, only six successful arguments have been made since 1984. In *Law Society of B.C. v. Mangat*, for example, the Court found that the federal *immigration act* must prevail over the province of British Columbia’s *Legal Professional Act* because “dual compliance to both statutes is impossible without frustrating Parliament’s purpose.”³⁷⁰ In other words, the threshold for this application is high. The Court is hesitant to resort to paramountcy if other doctrinal avenues are available. When all other avenues are exhausted, a “restrained approach to doctrines like federal paramountcy is warranted.”³⁷¹ By “restrained,” the Court means that its use should be applied conservatively and only when preferred doctrinal alternatives have first been considered.

I will conclude our discussion of this doctrine with a few highlights of the criteria the Court uses to determine its doctrinal choices. When the doctrines of paramountcy

³⁶⁹ *Siemens v. Manitoba (Attorney-General)* [2003] 1 S.C.R. 6, para

³⁷⁰ [2001] 3 S.C.R. 113, para 23.

³⁷¹ *Reference re: Securities Act* [2011], 3 S.C.R. 837, para 60

and interjurisdictional immunity are invoked, they are done after much hesitation and careful consideration. That being said, if a traditional division of powers analysis rarely produces determinations of invalidity, inoperability, and inapplicability, which doctrines is the Court relying on instead? They prefer the application of legal doctrines that allow for greater jurisdictional overlap. They give the “double aspect, ancillary powers and living tree doctrines liberal rein, thus promoting a great deal of overlap and interplay between federal and provincial laws in growing areas of *de facto* concurrent jurisdiction.”³⁷² Although it is not my intent to provide a series of tables that captures the frequency of each of the various doctrines used by the Court in federalism cases, I will say a few words about the double aspect and ancillary powers doctrines, and then turn our discussion to the philosophy that informs the selection of these doctrines.

Alternative Doctrinal Avenues

In the modern era, a traditional analysis of the division of powers usually ends with the Court applying doctrines that uphold legislative concurrency. I will mention two brief examples and will begin with the ancillary powers doctrine. After the dominant or most important characteristic of a law is determined to fall within a class of subjects allocated to the jurisdiction of the enacting legislature, the law will be held to be *intra vires*, even if it has spillover, or incidental effects, in areas outside of its jurisdiction. This concept has become known as the ancillary powers doctrine, even though no such reference can be found in the Constitution. This doctrine is used to facilitate incidental overlap, and as such, a great portion of modern jurisprudence rests on its application. As

³⁷² Ryder, “Equal Autonomy in Canadian Federalism,” 567.

Peter Hogg reminds us, “With respect to those incidental or ancillary effects, legislative power is, of course, concurrent rather than exclusive.”³⁷³

Second, the idea that “subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91,” is known as the double aspect doctrine.³⁷⁴ It is a doctrine that, when invoked, preserves legislative concurrency by ensuring that the laws of both levels of government are upheld and respected. In the spirit of upholding federal/provincial balance, the Court explores the viability of this doctrine before the doctrine of federal paramountcy is applied. Although the Court has not created a step-by-step criterion that determines whether federal and provincial features of a proposed law can coexist, W.R. Lederman suggested that the double aspect doctrine comes into play when “the contrast between the relative importance of the two features is not so sharp.”³⁷⁵ And when, as Peter Hogg reminds us, tolerance of legislative concurrency does not result in the “frustration of federal purpose.”³⁷⁶ In *Rio Hotel v. N.B.*, for example, Chief Justice Dickson (as he then was) found that the prohibitions of nude dancing in adult taverns contained a liquor-licensing (and, hence, a provincial) aspect as well as a criminal law (and, hence, a federal) aspect.

The Court’s doctrinal choices reveal multitudes about their approach to the division of powers. As we saw from the tables above, the Supreme Court is committed to a modern, flexible vision of federalism that generously interprets both federal and provincial heads of legislative power. This tendency is precipitated by an overarching political philosophy that aims not simply to maintain but to foster jurisdictional balance

³⁷³ Hogg, *Constitutional Law of Canada*, 393.

³⁷⁴ *Hodge v. The Queen* [1883] 9 App. Cas. 117

³⁷⁵ W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981): 244.

³⁷⁶ Peter Hogg, *Constitutional Law of Canada*, 411.

and intergovernmental collaboration in Canada. The doctrinal choices we looked at are but examples—or manifestations—of this overarching philosophy. I will now turn our discussion to the explicit remarks judges make about their decision-making approach.

C. Supreme Court as ‘Facilitator’

The Supreme Court’s trifold role as that of “enabler,” “accommodator” and “advisor” is symptomatic or indicative of a broader decision-making philosophy of facilitation. There are three main ways in which this philosophy works in practice. Facilitation takes place when the Court 1) advises government on how they should proceed in the future, should an aspect of legislation be declared invalid; 2) enables legislative concurrency to sustain through toleration; and accommodates cooperative arrangements established by government. In the paragraphs that follow, I identify what these roles mean and how they are exemplified in post-*Charter* federalism case law.

The political philosophy of the Court in federalism cases is evidenced by various factors. First, the positive manner in which the Court responds to intergovernmental collaboration within the courtroom suggests there is merit to preserving such relations even if such relations go outside the formal strictures of the Constitution. In almost all cases where intergovernmental unity is present, the Court is tolerant provided both levels of government agree to its terms.³⁷⁷ Another component of this broader approach is that the Supreme Court consciously avoids legislative interference because it believes that governments, working in collaboration, are the ideal sculptors of federalism. The tendency toward determinations of *intra vires* flows from this principle.

³⁷⁷ An excellent example of a breakdown of an intergovernmental arrangement is *Finlay v. Canada (Minister of Finance)* [1993] 1 S.C.R. 1080, *supra*, Chapter 5.

A third component is that the Supreme Court seeks to provide guidance to government. This can take the form of trimming back ever so slightly the boundaries of legislation as needed, and then signaling to litigants how the Court would decide should a case, with similar factual circumstances, appear before them in the future. These are value statements which indirectly impact how federalism is operationalized in Canada.

Supreme Court as Accommodator

I will begin with a relatively recent case that underscores the reality of judicial accommodation. In the *Securities Reference*, a unanimous Court reflected upon its role, and jurisprudential tendency, by stating: “The Supreme Court of Canada, as final arbiter of constitutional disputes since 1949, moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation — an approach that can be described as the ‘dominant tide’ of modern federalism. If there was any doubt that this Court had rejected rigid formalism in favour of accommodating cooperative intergovernmental efforts, it has been dispelled by several decisions of this Court over the past decade.”³⁷⁸ The key word in this excerpt is “accommodates.” The predominant decision-making pattern of the Court is to take steps to help make intergovernmental relations run more smoothly. To make this guiding principle work in practice, a flexible doctrinal approach must necessarily follow. In contrast, a willingness to declare laws invalid is the antithesis of accommodation and resembles the judicial approach supreme court judges have come to reject: formalism.

Interestingly, the words “balance” or “flexibility” are nowhere to be found in the *Constitution Act, 1867*. They are value statements invoked by Supreme Court judges and

³⁷⁸ *Reference re Securities Reference* [2011] 3 S.C.R. 837, paras 57 and 58.

serve as the rudder upon which legal doctrines are selected and applied. In the end, it is the Supreme Court's federalism philosophy that determines the manner in which disputes are disposed. The doctrines that Supreme Court judges select facilitate this underlying philosophy and form part of a larger policy objective of the Court.

Supreme Court as Enabler

As the perceived “highest good,” the Supreme Court seeks to facilitate intergovernmental relations by maintaining a “hands off” approach that allows governments to make collaborative arrangements in the absence of judicial interference. Wade Wright states that the Court justifies this stance as a “posture of restraint.”³⁷⁹ Take, for example, the words of Binnie and Lebel in *Canadian Western Bank*: “the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism.’”³⁸⁰ They continue: “The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.”³⁸¹ Justice Deschamps, echoing their statements in her judgment in *Reference re Employment Insurance* states: “The task of maintaining the balance between federal and provincial powers falls primarily to governments.”³⁸²

Here, the Supreme Court acknowledges the reality of federal/provincial collaboration by expressing the restrained approach with which they are inclined to

³⁷⁹ Wade Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada,” in Jamie Cameron and Bruce Ryder, eds (2010) *Supreme Court Law Review* 51.

³⁸⁰ 2 S.C.R. 3 [2007], Para. 24.

³⁸¹ *Canadian Western Bank*, *supra*, para 42.

³⁸² 2 S.C.R. 669 [2005], para 10.

respond it. In the modern era, the general rule has been to permit different levels of government to negotiate behind the scenes in a cooperative matter so long as the result of such negotiations does not disrupt the federalism balance in Canada. The Supreme Court's federalism case law suggests that the threshold with which they are willing to tolerate intergovernmental arrangements is high. This point is reinforced in *Lafarge*: "A successful harbour in the 21st century requires federal-provincial cooperation. The courts should not be astute to find ways to frustrate rather than facilitate such cooperation where it exists if this can be done within the rules laid down by the Constitution."³⁸³

Of course, the "rules laid down" are more difficult to "break" when there is generous tolerance of, and a flexible approach to, overlapping powers. Writing for the Court, Justice Abella upheld the provincial legislative component of a federal-provincial scheme: "In my view, the 1978 Federal-Provincial Agreement, like the scheme in the *Egg Reference*...both reflects and reifies Canadian federalism's constitutional creativity and cooperative flexibility....The Grant of Authority falls squarely within a well-established body of precedent upholding the validity of administrative delegation in aid of cooperative federalism."³⁸⁴ In *Pelland*, the Supreme Court enabled cooperative federalism to exist. They did not look to the spirit or underlying principles of the Constitution to determine whether "constitutional creativity" or "cooperative flexibility"

³⁸³ *British Columbia (Attorney General) v. Lafarge Canada Inc* [2007] 2 S.C.R. 86, para 86. In addition, as we will recall from our discussion in Chapter 5, the Supreme Court responds favorably to governmental litigants who are unified against a common opponent. In every case where this has occurred, the Court has sided in favor of "Team Government." And one of the reasons for this can be found in what the Court had to say in *R. v. Demers*: "[L]astly, where, as here, one level of government supports the constitutionality of another level's legislation, a court should be cautious before finding the impugned provision *ultra vires*" (para 18).

³⁸⁴ *Fédération des producteurs de volailles du Québec v. Pelland* 1 S.C.R. 92 [2005]

were consistent with framers' intent. Nor did they discuss the implications of such enablement on political society.

One of the reasons for this is that the Supreme Court believes that part of its mandate is to enable the federation to adapt to the political and social realities of the times. As constitutional amendments are both time consuming and difficult, the Court tailors its jurisprudence to better align with the needs of the present. Consider what they had to say in *Ontario Home Builders' Association v. York Region Board of Education*: “[A]n inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures. It must be remembered too that the *Constitution Act, 1867*, like other federal constitutions, differs from an ordinary statute in that it cannot easily be amended when it becomes out of date, so that its adaptation to changing conditions must fall to a large extent upon the courts.”³⁸⁵ It is clear that the Court does not wish to obstruct. Indeed, if they maintained an “inflexible interpretation, rooted in the past” they would prevent Parliament and the Legislatures from being able to collaborate—and by implication, *blur* formal legislative boundaries—for the purpose of fulfilling “shared” goals. Instead of insisting that Government pave the way for this possibility by way of formal amendment, the Supreme Court does it for them.

The third and final suggestion that the Court serves as an enabler is the longevity with which they recognize this role. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, the Supreme Court embraces “co-operative federalism” as the “theory upon which (particularly post-war) Canada has been built.”³⁸⁶ Here, the Court recognizes that government, not the courts, brought about a historical shift in the nation’s constitutional

³⁸⁵ [1996], 2 S.C.R. 929, para 145.

³⁸⁶ [1995] 3 S.C.R. 453, para 162.

balance. This government-led convention is not something the Court resists, but rather, embraces it as an early cornerstone upon which their post-*Charter* federalism jurisprudence is based.

Supreme Court as Advisor

Another way the Court facilitates or maintains federalism balance is through its “advisory” role. That is to say, when Court believes that a law stretches beyond the acceptable legislative boundaries of the constitution, they not only declare it invalid but in some cases foreshadow to the losing party what a law should look like if they desire for it to be upheld the “next time.”

In what is perhaps the best example of this “advisory” role in modern jurisprudence, in *Reference re Securities Act*³⁸⁷ the Supreme Court declared the federal government’s proposed securities regulator *ultra vires*. In their response, the Court advised that a more cooperative approach would be more consistent with established case law: “The experience of other federations in the field of securities regulation, while a function of their own constitutional requirements, suggests that a cooperative approach might usefully be explored, should our legislators so choose, to ensure that each level of government properly discharges its responsibility to the public in a coordinated fashion.” And further: “A cooperative approach that permits a scheme recognizing the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available and is supported by Canadian

³⁸⁷ [2011] 33715

constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities.”³⁸⁸

In this reference, the Court viewed the federal government’s proposed securities regulation scheme unfavorably, not because the “incidental effects” were “constitutionally suspect” but because it was “the main thrust of the legislation.” In order for the ancillary powers doctrine to take effect, a proposed statute must be valid as a whole: “[W]hile the proposed Act must be found *ultra vires* Parliament’s general trade and commerce power, a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available.... The common ground that emerges is that each level of government has jurisdiction over some aspects of the regulation of securities and each can work in collaboration with the other to carry out its responsibilities.”³⁸⁹ And further:

It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts. Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other’s own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada’s constitutional framework rests demands nothing less.³⁹⁰

The Supreme Court stopped short of providing an in-depth prescription for next time, but they established the parameters and approach for what a future framework

³⁸⁸ *Reference Re: Securities Act* [2011] 3 S.C.R. 837, paras 9 and 12.

³⁸⁹ *Reference Re: Securities Act* [2011] 3 S.C.R. 837, paras. 129-131.

³⁹⁰ *Reference Re: Securities Act* [2011] 3 S.C.R. 837, paras. 132-133.

should look like. In this illustration, the Supreme Court facilitated intergovernmental relations by, first, protecting the provinces from federal encroachment, and second, by giving advice on what a future securities regulator might look like. Although determinations of *ultra vires* are often symptomatic of legal “formalism,” the Supreme in this reference did not waiver on its decision-making philosophy of balance, for it was on the basis of balance and the philosophy of cooperative federalism that the proposed regulator was opposed. Instead of telling the federal government that it lacks the authority to create a national securities regulator, the Court simply advised that a more cooperative approach was necessary.

D. Conclusion

The Supreme Court’s reluctance to declare laws invalid, inoperative or inapplicable stems from a federalism decision-making philosophy that seeks to facilitate modern intergovernmental relations in Canada. Where possible, the Court allows elected representatives, in the spirit of cooperation, to steer the course of federalism with limited judicial supervision. In order to allow government to fulfill their political mandates—which necessarily involves the fulfillment of social welfare programs—the Supreme Court has adopted a flexible interpretive approach that allows for generous interpretation of both heads of legislative power. The Court believes that facilitation of jurisdictional overlap is necessary for adapting to the political and social realities of modern Canada. And it is within these generous interpretive boundaries that the Court seeks to maintain federal/provincial “balance.”

Interestingly, while the Supreme Court speaks of the pragmatic benefits of “cooperation” and “flexibility,” they underemphasize and underexplore the moral

implications of the jurisprudence that is ushered in by their philosophy of facilitation. To put it another way, that the federal and provincial governments agree to the terms of a collaborative framework does not make it “constitutional.” I contend that the adaptation of jurisprudence to meet changing social and political conditions undermines the eternal principles that underlie our constitution. The Supreme Court’s “hands off” approach, while “restrained” in one sense, is not value-free and has profound implications on the federal-provincial balance in Canada. I will explain why this is so in the concluding chapter.

Chapter VIII Judging Federalism

Throughout this project, we conducted a multifaceted inquisition of Supreme Court decision-making. In previous chapters, we learned that the modern Court holds more power over more matters; enjoys unprecedented and internationally unrivalled levels of independence; and wields significant discretionary control over their docket. We also learned that Supreme Court judgments are the byproduct of the political attitudes and policy objectives of the judges that create them. Philosophically, it is clear that they avoid drawing clear jurisdictional lines in the sand and leave up to government, wherever possible, the determination and scope of intergovernmental relations. That the Court not only tolerates but welcomes intergovernmental collaboration, cooperative arrangements and legislative concurrency is no longer a surprise; it is a reality.

Up until this point, much has been said about who the Court is and what they produce. The project has been explanatory and observational in nature. However, I have said very little about the implications of the Supreme Court's jurisprudence on government and society. And it is at this point that the overarching theme of the project comes "full circle." Indeed, what are the political and moral consequences of blurred jurisdictional lines? Does it matter? What happens when behind-the-scenes negotiations and interactions between different levels of government erodes the constitutional boundaries that define their separation? Does our post-*Charter* federalism jurisprudence lead to greater levels of administrative centralization? To what extent, and in what ways, does the Supreme Court's handling of the division of powers influence our way of life?

In this chapter, I evaluate and "judge" the consequences of the Supreme Court's jurisprudence in relation to the political ideals the Fathers of Confederation intended the

federal principle to serve. Despite the “restraint” with which the Supreme Court’s approach is lauded, its value system that threatens provincial autonomy, leads to greater bureaucratic centralization, clouds the relationship between political choice and consequence, and convolutes the mandate and priorities of Parliament. I contend that their “hands-off” approach to the division of powers is a form of abdication that allows government to facilitate its policy objectives by going outside the formal strictures of the constitution. This is quite unlike their approach to *Charter* matters.

I have divided this chapter into three component parts. First, I explain how the Supreme Court’s approach to federalism matters is carried out with little regard for, and in the absence of, history and our founding principles. Second, I underscore the consequences of judicial inaction and elucidate the formal and informal interplay of Supreme Court decision-making. Third, I contrast the ends of federalism that I identified in Chapter I—“the criteria”—with the contemporary case law of the Court.

A. Background, Context and Approach

In this section, I bring to light important and distinctive aspects of Supreme Court decision-making that are neither discussed by litigants, scholars nor judges. There are two points in particular I wish to emphasize. First, the Supreme Court’s approach to federalism issues is at odds with Canada’s constitutional heritage. To begin, the jurisprudence fails to account for or discuss Canada’s founding debates. This we learned from our Chapter II analysis of Supreme Court’s academic citation patterns. More importantly, however, the outcomes of impending decisions hinge not on whether a law is harmonious with the framers’ intent or the spirit of the constitution, but on whether a law frustrates or upholds their conception of “balance.” In other words, the task of

applying the original meaning of the constitution has been displaced by a newly created litmus test that factors in the political/institutional impact of an impending precedent. The end result of a decision, therefore, is intractably linked to public policy processes and outcomes that are desired by the Court.

Second, how the Court operationalizes federal ‘principles’ differs markedly from the philosophical debates that unfolded during the ratification debates. There are few examples in which the Court relies on the “principles” of Confederation as a means to resolve a dispute. The closest instance can be found in the *Quebec Secession* reference.³⁹¹ Here, federalism was recognized as one of four “foundational constitutional principles.”³⁹² Writing for the Court, Chief Justice Lamer stated that sections 91 and 92 of the *Constitution Act, 1867* represent the “textual expression of the principle of federalism in our Constitution, agreed upon at Confederation.” He went onto say: “principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.”³⁹³

According to this decision, principles serve as the interpretive aid for the explicit written text of the Constitution. They are “unwritten norms” that form the basis of “constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text. In the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of

³⁹¹ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217

³⁹² *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para 47

³⁹³ *Reference re Secession of Quebec*, para 52.

Canada.”³⁹⁴ A few years later, the Court reaffirmed these statements in *Ward v. Canada*: “The principle of federalism must be respected.”³⁹⁵

However, what the Court says about the principle of federalism on the surface is at odds with how they strive to make it work in practice. The political principles that they choose to apply hardly resemble the political ideals underpinning the *Constitution Act, 1867*. Instead, as was demonstrated in Chapter VII, Supreme Court judges have adumbrated a decision-making philosophy that places bureaucratic efficiency—informed by legislative concurrency, intergovernmental collaboration and balance—above the first principles of Confederation. This fact is demonstrated by the textual crumb trail of the Court as well as the policy implications brought about by their decisions. And this brings us to our next point.

B. Formal and Informal Interplay

The Supreme Court’s *prima facie* posture of restraint in federalism cases is not value-free and is informed by political rather than legal notions. Traditionally, to study the Supreme Court is to study the formal elements of politics: judicial decisions and their reasons. However, the end goal or object of the Supreme Court’s jurisprudence is the informalities of politics. That is to say, judicial decisions—in the formal realm—are simply a vehicle to allow intergovernmental relations to function desirously in the informal realm, which is where the most significant political reforms have taken place over the past quarter century. The Supreme Court’s decision to not interfere with intergovernmental relations is a political choice informed by an awareness of consequence. The Court’s jurisprudence is, self-consciously, then, an attempt to set the

³⁹⁴ *Reference re Secession of Quebec*, para. 53-55.

³⁹⁵ *Ward v. Canada (Attorney General)* [2002] 1 S.C.R. 569.

ground rules for a highly informal and personalist form of politics that unfolds between governments. The Court thus uses the formal realm to influence and steer what happens—or what is allowed to happen—in the informal realm (for example, First Ministers’ conferences, liberal use of the federal spending power for intergovernmental cost-sharing arrangements, and the like). Supreme Court judges are fully aware of the consequences of their doctrinal choices; indeed, it is because of these consequences that they select the doctrines that they do.

Second, it is the compilation of the direct and indirect, formal and informal that leads to “under the table” centralization in Canada. Because the Supreme Court has established a framework that allows numerous intergovernmental arrangements to take place, they are therefore, at arm’s-length, responsible for them. By “turning a blind eye,” and allowing such arrangements to unfold, they are in turn enabling them: “Constitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism.’”³⁹⁶ Centralization thus takes place in various proxy issues whereby the centralization that goes on, goes on under the radar of the Court’s jurisprudence. Federal spending, for example, flies below the radar when the arrangement is such that the provinces consent to receive money from the “feds” so long as the provinces carry out health care under the auspices of the *Canada Health Act*—a federal piece of legislation.

The federal government is the more powerful body; they have the means to raise revenue, and to fund initiatives, at rates provinces could only dream. However, with this power follows influence. If provinces desire federal money, they must play by federal rules and meet the conditions of their grant dollars. Provincial budgets now depend on it;

³⁹⁶ 2 S.C.R. 3 [2007], Para. 24.

bureaucracy has adapted to facilitate it. While intergovernmental arrangements are not wrong in and of themselves, it raises questions as to how these arrangements were able to take place and evolve in the first place. They could not have done it without some direct (i.e. doctrinal selections) and indirect (i.e. turning a blind eye) judicial facilitation. By allowing the practice of collaborative federalism to operate and evolve, the Supreme Court is allowing the more powerful body—the federal government—to incrementally influence the constitutionally exclusive mandate of the provinces.

C. The Ends of Federalism

As we learned in the previous chapter, the Court expresses a strong commitment to facilitating federal/provincial relations by endorsing the contemporary intergovernmental practices of “cooperation,” “collaboration,” “concurrency” and “flexibility.” However, this approach is inconsistent with the political and moral virtues the founders were attempting to engender. There are four ends that the founders believed federalism would serve: the i) protection and control of local interests, ii) heightened government responsiveness, iii) increased clarity and focus in the national legislature, and a iv) greater connection between individual choice and consequence. As we shall see, the Supreme Court’s federalism jurisprudence undermines the principle of each desired end.

Provincial Autonomy

First, the tolerance and embrace of blurred jurisdictional lines undermines provincial autonomy. Although some may argue that such developments are forward looking and positive, such a scenario allows the “feds” to incrementally influence and control the mandate and priorities of the provinces. To be sure, cooperative federalism allows the federal government to become involved, however arm’s-length and well

intended, in exclusive areas of provincial jurisdiction. Through liberal use of the federal spending power, by way of conditional grants and project subsidies, the federal government is able to influence the manner in which provincial priorities are shaped. By placing conditions on how funds are utilized, they indirectly undermine the autonomy of the provinces. Ultimately, provinces have the liberty to turn away federal money, but to do so would place them at a national disadvantage.

Consider, for example, the spending “conditions” attached to the “cooperative” agreement the Court embraced in *Findlay v. Canada*: “The scheme, like most shared-cost arrangements between the federal government and the provinces, is essentially cooperative. The provinces may participate; they are not obliged to do so. The provinces have responsibility and exclusive jurisdiction over social assistance within their boundaries. The federal government agrees to share the cost of their programs, provided certain conditions are met. One of the conditions is that the province enter into an agreement with the federal government. The language of the agreements tracks the language of the CAP Act and incorporates conditions imposed by that Act.”³⁹⁷ In this illustration, the Court recognizes the nature and scope of provincial authority, but in the same paragraph, raises no issue with the fact that the central government is placing conditions or standards on provinces that have an opportunity to benefit from federal dollars. The Supreme Court’s silence therefore acquiesces the appropriateness of the arrangement.

Additionally, such arrangements erode provincial autonomy, because there is little choice about whether they can accept the funds or not. Technically, the provinces can reject the conditions and turn the money away. However, if a province does not join in on attractive

³⁹⁷ 1 S.C.R. 1080 [1993]

funding initiatives, other provinces will benefit from the influx of revenue, and the competitiveness of the opting out province will suffer. As Barry Cooper reminds us, “The chief consequence of exercising the federal spending power, and especially the use of conditional grants, is to enable Ottawa to flex its fiscal muscle and influence (or distort) provincial decision-making.³⁹⁸ By accepting fiscal gifts from the federal government, provinces become dependent, conform to national standards, and are left with no long-term guarantees that Parliament will sustain its level of funding. The constituents of provinces will then come to expect the programs that federal funding provides, and, in the chance that they vanish, will lobby the federal government for programs that were under provincial jurisdiction to begin with.

This is problematic because a universal social welfare standard is imposed upon the provinces, and the federal government, upon creating this standard, devises new ways to fund it, thus reinforcing and cementing their involvement in jurisdiction that does not belong to them. While the upfront pragmatic benefits of federal grants-in-aid are enticing for provincial legislatures, they erode the principle and spirit of federalism that underpins our constitution.

Government Responsiveness

A jurisprudence that fosters legislative concurrency is additionally problematic because it indirectly contributes to legislative backlog, political unresponsiveness and regional discord and strife. While none of these consequences are discussed or considered in the written reasons of recent jurisprudence, it is difficult to deny the reality. If the federal government enters into various interprovincial cost-sharing arrangements

³⁹⁸ Cooper, *It's the Regime, Stupid*, 189.

that have budgetary and policy implications—like Canada Health Transfers, for example—parliamentarians must expend time and energy to discuss, review, draft and vote on the parameters of each agreement. Federal bureaucracy must also adapt to meet the workload needs created by additional responsibilities. There are three reasons why this has the potential to make parliamentary proceedings more inefficient.

First, the size of the federal government expands, because new ministerial portfolios are created to manage the funding allocations and spending priorities of new departments, which initiate bills, and propose policy frameworks, that require subsequent review and ratification. With a much wider issues net with which to legislate, members of parliament are faced with the difficult task of reviewing both local and national matters under a single legislature. It follows that more bills will be initiated, which slows the review process and consumes time of members. Second, an increased purview will undoubtedly lead to debates about funding and allocations. Unfortunately, such a scenario invites regional discord and strife. Members will be preoccupied with lobbying for regional interests that they will have difficulties focusing on the primary task at hand. This has the unintended consequence of distracting Parliament from matters of “great importance,” which brings us to our next point.

National Unity, Focus and Reflection

The Supreme Court’s philosophy of facilitation has the unintended consequence of cluttering the decision-making table of Parliament. Indeed, can one remember the last federal election where health care did not factor prominently into a political party’s campaign platform? When the federal government creeps into provincial territory, it increases the workload and mandate of its representatives. Instead of being confined to

national issues, which have a potential unifying effect, members of Parliament, acting on behalf of their constituents or province, lobby for funding to carry out local initiatives. The disparity of resources, coupled by the inequitable distribution of provincial transfers, opens the door for regional alienation, and, in turn, disunity. This prevents federal representatives from focusing on the tasks upon which they were constitutionally entrusted to legislate.

Federal involvement in provincial affairs, despite their well intentions, corrodes the virtues the founders' believed that exclusive spheres of jurisdiction would inculcate. The national legislature is supposed to be conducive to focus and reflection. By clouding the table with local matters, which are most dear, members of parliament have less time to reflect and more time to quibble. And with more quibbling, comes less camaraderie and fewer instances of political friendship, which makes deliberation on national issues less fruitful and effective.

Political Choice and Consequence

When the jurisdictional lines between federal and provincial levels of government are muddled, it is difficult for voters to evaluate the failure or success of provincial ruling parties because track records are masked by federal contributions. The founders understood that if the people of a province, through the principle of representative democracy, were in charge of managing local affairs, they must live out the consequences of their political decisions. For example, if the ruling party of a province mismanages its finances, the people of that province will hold the ruling party accountable and vote them out of office. In the alternative, if the electorate wishes to vote in a government that makes social programs a priority, they must devise a strategy as to how to fund, and

subsequently, sustain it. The founders understood that with local control, a greater level of responsibility followed. But if voters are no longer clear as to which level of government is responsible for what, it is difficult for them to hold elected officials accountable. And it is for this reason that the Supreme Court's embrace of blurred jurisdictional lines contributes to this problem.

Ideally, under a federalized system, the mismanagement of affairs of one province does not affect, or take away from, the fiscal standing of another. Indeed, the founders understood that federalism protects fiscally prudent and industrious provinces from having to bailout or subsidize the political mismanagement of other provinces. But when the roles of different levels of government become entwined, citizens are unable to see the consequences of their political decisions. That is to say, if provinces desire programs or infrastructure initiatives, they must use the local or provincial treasury to fund them. If a province wishes to administer costly social programs, they alone must pay for it. On the other hand, if one lives in a province that fails to provide adequate health care services, he or she can move to a province that does. At the end of the day, it is up to the constituents of a province to measure the success of the decisions of their elected representatives. If taxes must increase in order to pay for initiatives that are desired by its constituents, the legislature must justify a tax increase to its voters. Upon seeing the consequence of greater service levels (i.e. tax hikes), voters will have the opportunity to evaluate whether that is a political course they wish to sustain.

As we demonstrated, the Supreme Court has allowed Canada's constitutional waters to murky. They have done so directly, by selecting flexible doctrines that allow for a great deal of jurisdictional overlap. They have also done so indirectly, by allowing

behind-the-scenes intergovernmental arrangements to grow and evolve. What the Supreme champions and tolerates in the formal and informal realm is inconsistent with the political ideals the founders intended federalism to serve. The consequences of their post-*Charter* jurisprudence have eroded provincial autonomy, clouded the relationship between political choice and consequence, and detracted parliamentary focus. The Supreme Court's posture of "restraint" suppresses the civic virtues that naturally emanate from a classical, originalist reading of the division of powers. The question then becomes, whose job is it to rediscover the forgotten principles of the past: government or the Courts?

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