

## OVERVIEW

Is Canada understood to be a mononational or multinational federation? What role has the Supreme Court of Canada (SCC) played in this understanding? Traditionally, Canadian federalism, and its evolution, is understood in terms of decentralization versus centralization. Canada, a politically and ethnically diverse nation, seen in its Multiculturalism policy, its Quebec factor and its regionalism issue, is a nation struggling with its identity; this is most evident in the many attempts at constitutional reform aiming to reflect its political society. Most recent examples include the Meech Lake Accord, the Charlottetown Accord and the Calgary Declaration. In essence, Canadians are debating whether Canada is a one nation, a two nation or a multinational state? Taking this into consideration, why not expand the understanding of Canadian federalism from centralized versus decentralized, and look at it in terms of mononational versus multinational?<sup>1</sup>

How Canada identifies itself politically very much rests on how its people, more specifically, its political actors, conceptualize federalism. Conceptualizations of federalism vary from government to government, from province to province and from individual to individual. Essentially however, one's conceptualization of Canadian federalism rests in one's belief of what

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<sup>1</sup> conceptions of federalism in the mononational fashion stress the political structure of federalism. That is to say, focus is placed on the division of powers, written in a constitution and reflected in the federal institution, and the assurance of autonomy for each level of government, within its sphere of power. Implicit is the hierarchy of governments, which usually translates into a stronger (and more important) central government. The sub-units are regarded as political units alone and not necessarily as communities. Furthermore, social diversity and subsequently, the management thereof, does not factor into the understanding of federalism. The essence of federalism is understood, under the institutional and federalism as a bargain approach (the mononational approach) as the bringing together of autonomous political units to form one larger unit. Securing stability and order are at the heart of federalism in this larger category.

On the other hand, conceptions of federalism falling under the multinational model, go beyond the discussion of the political structure of federalism to consider the social diversities that contribute to the adoption of federalism, and most importantly, the make-up of a federal system in any given country. These conceptions of federalism tend to pay attention to social diversity and stress the importance of maintaining and enabling the flourishing of this diversity so as to ensure true autonomy. The relationship between the central and regional governments is understood, not as levels, but as orders of government, in which true equality, where power is derived from the Constitution, not from another level of government, is implied.

the relationship between the provinces and the federal government ought to be and/or what the relationship between nations, if one is so inclined to accept that Canada is made up of more than one nation, ought to be. Further to this, one's conceptualization of federalism is very much dependent on what he/she perceives to be the ultimate goal of this form of governance. If the goal rests in developing a nation, then who is charged with that responsibility, the provinces or the central government? Or, is it a combination of the two? Furthermore, what facilitates or inhibits one, the relationships just mentioned, and two, either level of government performing its function or functions under a federal regime?

Three essential questions emerge: one, how is federalism conceptualized in Canada? Two, what influences have shaped and continue to shape the various conceptions of federalism? And finally, what role does the conceptualization of federalism play in everyday political life? The overarching theme of the larger project that I am working on, is the influence and effects of general theories and different conceptions of federalism on the decisions of the SCC. Essentially, I will be addressing the following questions: How has the SCC constructed the nature of federalism? Does it endorse a multinational or mononational view of federalism? Does its conceptualization play a role in its judicial making process? Lastly, why does its conceptualization change from case to case? In order to do so, it is necessary to first look at the theories which inform judicial review. That is, how does the SCC come to its decision? It is this particular aspect of the project which I focus upon for this paper.

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this, of course, is in contrast with the implicit idea of hierarchy located in the mononational understanding

## INTRODUCTION

Since the abolishment of appeals to the JCPC in 1949, and more so, since the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, mainstream Canadian scholarship has shifted away from studying the role of the judiciary vis-à-vis the shape and understanding of Canadian federalism. Instead, Canadian political scientists and legal scholars have focused upon the impact of judicial review and the power of the judiciary in the post Charter era. More specifically, they have centered their studies on the legitimacy of judicial interpretation and whether or not the Supreme Court engages in a principled approach when reaching a decision regarding the division of powers. More specifically, they have explored the debate between judicial restraint or interpretivism (objectivity) and judicial activism or non-interpretivism (subjectivity). From this, the focus opens up to the correctness of interpretations; that is whether or not, the Court rendered the *right* decision. While this is a worthwhile endeavour, it does not offer insight into how the SCC conceptualizes federalism and how it uses this conceptualization, either implicitly or explicitly, as aid when deciding cases dealing with the powers of the two levels of government.

In this paper, I intend to look at the theories of judicial review put forth by Peter Hogg, David Beatty and Katherine Swinton, so as to argue that though these three theorists present great starting points for understanding the thought process of the SCC when deciding federalism cases, they neglect to account for, in any meaningful manner, the socio-political element as an important variable in case rulings. As a result, it leads us to miss and/or terribly underestimate that the debate between subjectivity and objectivity is incomplete without considering the influence of socio-political factors, which inform the courts' conceptualization of federalism, in the decision-making process. From this analysis, we will then be able to construct a theory which recognizes that judicial review is not objective as socio-political factors play a role in how judges construct

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of federalism. The overarching goal for federalism, under this category, is justice for communities.

and conceptualize the nature of Canadian federalism. This conceptualization is not only identifiable in court decisions, but is also used in the decision making process and the thought analysis of the SCC when it renders a decision dealing with, but not limited to, federalism.

I begin this chapter with a review and analysis of the theories that inform judicial review put forth by Hogg, Swinton and Beatty. In analyzing these three theories, I will be juxtaposing them in order to first, better understand the debate over subjectivity and objectivity and second, to view which theorist provides the most acceptable thus workable theory of judicial review. All three put forth a theory that conforms to the analytical steps judges go through in reviewing federalism cases. However, the over simplicity of Hogg's theory and the complexity of Beatty's theory leaves us to conclude that Swinton puts forth the most reasonable theory of the three, in that she recognizes both the discretion of the judges and the principles involved in the process of judicial review.

However, she, similar to Hogg and Beatty, does not recognize the role socio-political factors play in the decision making process of the SCC. For this, we need to consider the work of Andrée Lajoie, who offers a current version of a more critical approach and introduces this reality to the study of judicial review. In the second part of this chapter then, I will be looking at Lajoie to see how she adds to the theories presented in the first part. Her study is beneficial in that she brings to our attention how socio-political factors play a role in judges' thought process and in their decisions. I, however, intend on taking this Lajoie consideration one step further by considering specifically how socio-political factors, that is, the political environment, play a role in the SCC's conceptualization of federalism and how this conceptualization is then used as an analytical tool in deciding cases dealing with federal-provincial relations.

#### Federalism Analysis and the Inherent Problem

When legislating the division of powers and deciding upon the constitutionality of a law or government action, the Courts structure 'their decisions in accordance with the categories set out in sections 91 and 92 [of the BNA Act, 1867]' (Monahan, 204). That is, when a federalism

case is put to the courts the question addressed by the Justices is ‘which level of government is entitled to regulate and set standards in the different areas of social policy’ (Beatty 20).

Accordingly, the courts determine if the impugned legislation or government action comes within the federal or provincial class of powers.

This task is inherently problematic as the words and the terms of the Constitution, infamous for their broadness and ambiguity, are not very helpful. As such, in determining which level of government has the power to do X, the courts can choose between different methods, including, as described by Beatty, the plain-meaning approach, external aids, and internal aids. Before engaging in the discussion of the two-step process, it is important to review these other approaches in order to understand why they are rejected by constitutional theorists as insufficient or incomplete in explaining the process of judicial review.

#### The plain-meaning approach

This first approach involves the Justices looking at the words of the Constitution for meaning, and direction. Relying entirely on the plain-meaning approach is, however, problematic as any law or activity can be understood as both (or either) a federal power, belonging in section 91, or a provincial power, belonging in section 92, due to the possibility of multiple understandings of any one phrase or power. As Beatty argues, ‘there is no one settled meaning for phrases such as *property and civil rights* or *trade and commerce* that would be decisive in any case. Read literally and according to their common meaning, each of the more sweeping allocations of powers enumerated in sections 91 and 92 could be read as justifying either federal or provincial control’ (Beatty 22).

#### External Aids: dictionaries and precedents

The second approach, external aids, similar to the former, is not of much help to Justices. Resorting to an ordinary dictionary simply provides Judges with general and incomplete

definitions.<sup>2</sup> As such, one cannot be guided by dictionary definitions in giving meaning to the Constitution.

Legal dictionaries may be of more assistance as Justices look for precedents to guide them in giving meaning to the words of the Constitution. In fact, ‘looking for precedents is one of the basic analytical methods in almost every area of law’ (Beatty 23). However, the problem arises when it is the first time an issue is directly addressed and there are no precedents.

Furthermore, this approach offers the student limited insight into how the precedents were first established. That is, what analytical tools did the Justices apply when they first ruled on a particular issue and thus established the precedent that subsequent Justices are referring to and applying?

#### Internal Aids: the intentions of the Framers and the logic of the text

In absence of external aids, Judges can turn to the intentions of the framers as an aid in determining the scope of federal and provincial powers. This method, however, is also unreliable as ‘there was no common consensus amongst those who drafted the document’ (Beatty 24). The Fathers of Confederation were more concerned with creating a federal structure ‘than with deciding where particular aspects of community life should be controlled.’<sup>3</sup>

Seeing that these three approaches are, as pointed out by Beatty, unreliable due to their highly subjective and volatile nature, how do the Justices decide if a certain law or government action falls within the federal or provincial jurisdiction? And how, in engaging in this exercise, does the Court conceptualize federalism? Let us proceed with a look at the theories put forth by Hogg and Swinton and Beatty.

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<sup>2</sup> Ibid., 22

As Beatty points out, looking at the Concise Oxford Dictionary, crime is simply defined as ‘evil acts punishable by law.’

<sup>3</sup> Ibid., 24

Despite the ambiguity of the intentions, ‘the instinct of the judges to look *inside* the Constitution for direction and guidance has paid off. In the absence of any historical evidence as to how the founding fathers intended that responsibility for such interests and activities should be assigned, the courts tried to draw the meaning of the text from the underlying values and overall structure – *the inner logic* – of the Constitution as a whole.’

## THE TWO-STEP APPROACH

Peter Hogg, Katherine Swinton and David Beatty, in looking at federalism analysis, hypothesize a two- step approach in which judges engage in when deciding the constitutionality of a challenged law or government action. For Hogg and Swinton, the Justices first focus on the impugned law or government action (step one); following this, judges focus on the Constitution (step two). For Beatty, however, the steps are reversed: in step one, judges give meaning to the Constitution; in step two, judges focus on the impugned legislation or government action. (For the purposes of maintaining consistency in this analysis, I will look at the steps in the order put forth by Hogg and Swinton.)<sup>4</sup> The three theorists, however, have different and sometimes opposing views of how the courts analyze and give meaning to one, to the Constitution and two, to the impugned law or government action; that is, are the courts, in their analysis, informed by subjective or objective principles? In focussing on this debate, the three theorists emphasize how the courts use judicial doctrines and principles of the Constitution or constitutional democracy in reaching their decisions. In turn, Hogg, Swinton and Beatty, fail to explicitly acknowledge and account for the weight in which concepts of federalism and socio-political factors have on the judicial review process. This is not to say that Hogg, Swinton and Beatty would go so far as to say that context is irrelevant. They do however fail to look at it in a systematic way and consequently such issues and questions are not a central part of their analysis.<sup>5</sup> It is both this debate amongst the three, along with the identified deficiency within their respective theories, which will be examined closely in this section.

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<sup>4</sup> For this chapter, the specific order in which the judicial two-step process is played out is not extremely significant. More important than clarifying this minor dilemma (minor in this chapter) is the analysis of the two step process. In the following chapters, the ones in which the specific cases are studied, the significance of the order of the two-step process will arise and looked at in more detail. That is, the issue of what judges do first, focus on the Constitution or on the impugned legislation/government action will be dealt with directly.

<sup>5</sup> Critical legal scholars do attempt to address the broader socio-political aspect of judicial review. Good examples include, but not limited to, Allan Hutchinson, Murray Greenwood and F.R. Scott. It is an area in which I intend to explore in more detail in the later stages of the overall project.

### Hogg's theory of judicial review

The terms of the B.N.A. Act, more specifically, sections 91 and 92, which clearly state that 'legislative authority in relation to *matters* coming within the *classes of subjects* is given to the two levels of government', informs judicial review (Hogg 328). It is this very statement that the judicial two step process in reviewing federalism cases emerges. In step one, the Judges identify the *matter* or the pith and substance of the challenged law. In step two, the matter is assigned to one of the *classes of subjects* ( Hogg 328). In other words, in step one the Justices characterize the challenged law and in step two they interpret the power distribution provisions of the Constitution and determine which level of government has the power to enact the impugned legislation (Hogg 328). The two steps are not mutually exclusive as both compliment each other; alone they are not significant.

### Swinton's theory on judicial review

In agreement with Hogg, Swinton argues that the courts consider both the impugned legislation and the meaning of the Constitution's language in deciding the validity of a law and in choosing between the competing classification of powers(Swinton 151). According to Swinton, this process can be broken down into three steps: one, 'determining the meaning or the matter of the legislation'(Swinton 151); two, delineating 'the scope of the competing classes' (Swinton 151); and three determining 'the classes into which the challenged law falls into' (Swinton 151). The first two steps collapse into one step. This, as described by Swinton, is inevitable 'for the exercise of determining the *matter* or predominant feature of the statute is affected by the ultimate objective of linking the statute to the classes of subjects in the constitution' (Swinton 151). Swinton's theory then, can also be described as a two step judicial review process. The first step involves determining the purpose and the effect of the law, the pith and substance. The second step involves defining the boundaries of the classes of subjects, thus focusing on the Constitution.

### Beatty's theory on judicial review



Similar to the previous theorists, Beatty posits that ‘there are two distinct phases or parts to the process of judicial review’ (Beatty 10). For Beatty, however, the steps are reversed. Also differentiating Beatty from Hogg and Swinton is his conviction that judicial review is principled and justified thus rendering it a thoroughly objective, and not a subjective, process. According to Beatty, in reaching decisions, courts are bound and guided by law. As such, the courts resort to rules of the constitution when reaching their decision (Beatty 9). In the first step, they focus on the Constitution, where the Justices ‘identify the limits of the law making powers of the relevant institutions or official of the state’(Beatty 10). In other words, the courts, in this step, outline the constitutional boundaries of the government whose law is being challenged. In the second step, the Justices focus on the law and/or action of the state. They look at the important features of the law or action ‘in order to see if it conforms to the limits and restrictions that the Constitution contains’(Beatty 10).

#### Beatty’s principled approach

In his quest of showing that judicial review is objective, Beatty is concerned with locating the integrity of the law within the Constitution. He argues that if one would read the decisions of the courts carefully, one is going to find an overarching and unified method of judicial review, one that is objective in principle. According to Beatty, the rules of constitutional law can be reduced to two tests/principles, proportionality and rationality<sup>6</sup>. The two principles are inherent and intrinsic to all Constitutions of liberal democracies. These are the rules of *correct judicial review*. If one reads a case without these two principles then the integrity of the law has not been upheld.

#### Step one and step two explained

In step one (for Beatty, step two for Hogg and Swinton), the court formulates a major premise where it spells out the relevant rules of constitutionalism. It then decides if the government has the constitutional power to pass a certain law or engage in a certain action

(Beatty 10). In the second step, (step one for Hogg and Swinton) the court formulates the minor premise where it decides how the impugned legislation should be classified and defined. In this step, the courts look at the pith and substance of the law to see if it can be upheld by the Constitution (Beatty 11).

The two steps are worked through differently, thus different methods of reasoning are employed in each step. In giving meaning to the Constitution, ‘the analysis is largely deducted’ (Beatty 11). The Justices rely on values and assumptions of the Constitution when interpreting it. “The courts read the Constitution *purposely* or *holistically*, to ensure that all of its component parts are of a single coherent piece”(Beatty 11). In deciding ‘which side of the line (principle) a particular law should be placed, the courts reason analogically or horizontal’ (Beatty 11). In this step, the Justices rely on past decisions, in order to ensure a measure of consistency and equality of treatment.

Hogg and Beatty point out that the examination of the impugned law, is more important than focusing on the Constitution. Over time, the focus of judicial review is less on the meaning of the Constitution, as the principles established over the years have been embedded, thus becoming part of the common judicial understanding of the Constitution. As such, the ‘only issue for the judges is how they [the principles] should be applied in a particular case’ (Beatty 12). According to Hogg, ‘the identification of the matter of a statute will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality’ (Hogg 330).

Minimizing the significance of this step enables both Hogg and Beatty to ignore how Justices formulate and then use the concept of federalism in the judicial review process. For example, in both the Senate Reference and the Secession Reference, it is in *giving meaning to the Constitution* that the Supreme Court speaks of the responsibility one level of government, in these two cases, the federal government, has on the other level of government. In the Patriation

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<sup>6</sup> These two principles were first identified by the Supreme Court in *R. v. Oakes*, 1987.

Reference and the Quebec Reference, on the other hand, this responsibility emerges from convention and not from the Constitution. Seeing this, the interpretation of constitutional principles is not merely a formality as both Hogg and Beatty espouse. Instead, it can result in a new understanding of constitutional obligations and possibly federalism. It is in this step, defining or setting the limits of the Constitution where we are able to locate the Supreme Court's conceptualization of federalism. From this, we are then able to see how the Court uses this conceptualization as a tool in arriving at its decision. Hogg and Beatty, along with Swinton, do not explicitly or extensively account for this in their explanation of the two-step analytical process of judicial review.

#### Characterizing the legislation

In characterizing the impugned legislation or government action, the Judges ask, 'what is the matter of the law' (Hogg 329)? In order to answer such a question, the Justices 'identify the dominant or most important characteristic of the challenged law,' order to determine whether or not the impugned legislation is constitutional (Hogg 328).

The impugned legislation rarely has just one aspect to it, thus rendering this step difficult. Consequently, one aspect of the law may fall within the federal jurisdiction and another aspect may fall within the provincial jurisdiction. The difficulty rests in deciding which aspect is the most important one; for Hogg this exercise is crucial as the answer in this step dictates the direction taken in the second step. In deciding what *the* matter is, Hogg argues that 'logic offers no solution' (Hogg 331). Instead, the Justices rule on which, based on their discretion, is the dominant feature of the impugned law. This dominant feature is then taken to be the matter or pith and substance of the legislation. The other aspect or aspects of the law are then considered to be incidental (Hogg 331). As such the pith and substance doctrine 'enables one level of government to enact laws with substantial impact on matters outside its jurisdiction' (Hogg 331).

In the case where one subject matter cannot be identified as the most dominant feature of the impugned legislation, the courts can in fact invoke the double aspect doctrine. This doctrine

recognizes that one aspect of the law falls within the federal jurisdiction and another aspect falls within the provincial jurisdiction. The double aspect doctrine is invoked by the courts when it finds that both aspects of the challenged law are equal in importance. The courts, however, have not stipulated when it is appropriate to use such a doctrine. Hogg, argues that the use of the double aspect doctrine is *of course, judicial restraint* (Hogg 334).<sup>7</sup>

In determining or characterizing the impugned legislation, the courts tend to look at the purpose and effect of the law. “The process of characterization of the law [identifying the matter] is not a technical, formalistic exercise, confined to the strict legal operation of the impugned law” (Hogg 335). In characterizing the law, the courts will in fact look beyond the legal aspect to consider the social and economic costs (Hogg 335).

In answering ‘what is the purpose of the law?’, the courts may look at the intentions of the statute of the government when enacting the law. This, according to Hogg, can be misleading if the language is taken too literally. One cannot say that a statute has an *intention*. Furthermore, the legislative body that enacted the law may have many, and not necessarily one, intentions when it enacted the legislation (Hogg 336).

Legislative history may in fact be of more aid in determining the purpose of the law. The legislative history of the law is helpful in that ‘it places the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it’ (Hogg 336). Legislative history is in fact a helpful tool and thus should be resorted to, by the courts, in their attempt to define the purpose of the legislation and subsequently the matter of the law.

In identifying the matter, the courts may also look at the effects of the legislation. In this, the courts ‘will consider how the statute changes the rights and liabilities of those who are subject to it’ (Hogg 337). Identifying the effects of the law ‘simply involves understanding the terms of

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<sup>7</sup> (Hogg 334)

“When the courts find that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or the Legislature.”

the statute and that can be accomplished without going beyond the four corners of the statute' (Hogg 337). However, we must keep in mind, determining the effect may not be as simple as it seems. An impugned legislation can and usually has indirect effects. This, in turn, may and can inform the characterization of the law.

The question, however, has yet to be answered; how do the courts decide what the matter is? In other words, what criteria of choice is used by the courts in determining what the most dominant feature, thus the pith and substance, of the law is? According to Hogg, there are three factors that guide the courts. One, 'full understanding of the legislative scheme, will often reveal one dominant feature. Two, precedents will often offer a guide' (Hogg 341). When neither of the two proves to be of aid, the choice is one of policy. "Thus [the criteria of choice] is guided by the concept of federalism" (Hogg 341). In other words the courts ask, 'is this the kind of law that should be enacted at the federal or the provincial level' (Hogg 341)? In answering this federalism question, the Justices should be free of any political bias. Further the approval or disapproval of the matter should neither be a factor or determinant in identifying the matter of the impugned legislation. The only politics allowed are those with a *constitutional dimension*.<sup>8</sup>

So how do the courts choose? Hogg believes that there is no principle way in deciding the matter of the impugned law. Due to the inherent disagreement in Canada's federal system, the task of identifying the matter is controversial.<sup>9</sup> The inherent controversy rests in the disagreement of views of Canada's history, political science, economics and sociology (Hogg

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<sup>8</sup>Ibid. 341.

By constitutional dimension Hogg means 'values that may be reasonably asserted to be enduring considerations in the allocation of power between the two levels of government.'  
In French Canada, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community.

<sup>9</sup> This inherent disagreement stems from the struggle between how English Canada views federalism versus how French Canada views federalism. More specifically, which level of government ought to be the strongest of the two with regard to promoting the interests of its citizens. In English Canada, the prevailing belief is to strengthen the federal government in order to maintain such universal programs as health care. In French Canada, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community.

342). Since judges have little to guide them, they may assume ‘that his or her personal preferences are widely shared, if not implicitly embodied in the Constitution’ (Hogg 342). If this is the case, then judicial review is not neutral. As such, Hogg advocates that judicial restraint be a governing precept in federalism cases. “In other words, where the choice between competing characterizations is not clear, the choice which will support the legislation is preferred” (Hogg 342).

Is determining the matter as simple as *which level of government is best suited to enact certain legislation?* Or, is there in fact a *principled* process in which dictates the courts thought process in determining and identifying the pith and substance of the legislation? Hogg does not seem to think so as he clearly advocates judicial restraint in the event of inability to clearly identifying the matter. Swinton and Beatty, on the other hand, do believe that the courts are guided by certain principles in identifying the pith and substance.

For Swinton, the courts use the statutory context as its starting point when determining the meaning of the legislation. She, unlike Hogg and, to a certain extent, similar to Beatty, believes that the purpose and the effects of the impugned legislation offer the courts the principled guidelines it needs in determining the pith and substance of the law. In looking at the purpose of the legislation, the courts rely on the legislative history or on government reports ‘identifying a problem which triggered the legislation’ (Swinton 151). Looking at the effects of the law may also be relevant in determining the pith and substance of the challenged statute. If there is a conflict between the purpose and the effects of the law, purpose tends to dominate in federalism analysis (Swinton 151).

Swinton points out that this first step is controversial in that there is no uniformity amongst the Justices on which approach will be adopted. In other words, it is not clear if the Justices will be looking at the purpose or the effects of the law in characterizing the impugned legislation. Some Judges tend to place greater weight on purpose, whereas others on the effects of the legislation. Nevertheless, ‘the dominant form of inquiry is into the purpose’ (Swinton 151). The

focus is however, dependent on ‘judicial attitudes of deference to legislatures and concerns about the balance of powers in the federal system’ (Swinton 151). We must keep in mind though that prioritizing the purpose of the legislation, without regarding the effects it may or may not have on the other level of government, enables the first level of government to expand their scope of power. In other words, if the courts focus solely on the purpose and disregard the effects one level of government may in fact increase their scope of power.

Beatty vehemently argues, unlike Hogg, that principles, emerging from the Constitution, guide the Court in deciding the constitutionality of an impugned legislation. In determining the validity of the challenged legislation, the first question the courts address, using the principle of proportionality is, *is the purpose of the law sufficiently important to justify the limits it is placing?* In this, the onus rests with the government, who enacted the impugned legislation, to show that the public interest, thus the purpose of the law, outweighs the limitation on the other level of government (Beatty 15). The Court therefore, is asked to do a cost/benefit analysis. As such, the Court asks if the gains of the community will outweigh the cost or restriction on the other level of government. In this, the Court compares the impugned legislation with other laws that are similar in principle. Beatty classifies this step/analysis as the ‘rule of consistency’ as it is believed to ensure equality (Beatty 16).

Using the second principle, rationality, the courts place the onus on the government to ‘show that the means chosen to pursue the objective was the best available to them’ (Beatty 16). The government must show that no alternative policies would have accomplished the intended purpose ‘in a way that displayed more respect for freedom of individuals or the sovereignty of the other level of government’ (Beatty 16). As such, the government must show that ‘it really was necessary for them to follow the route they did’ (Beatty 16). In using these two principles, proportionality and rationality, the courts can characterize the law and identify the matter, by looking at the purpose and effects of the law. The courts, once the matter is established, then

assess the constitutional validity of the law by determining if it is proportional and rational to the objective of the law.

By describing judicial review with these two principles, and in fact, reducing it to proportionality and rationality, Beatty has shifted the focus of what constitutional law is about. It is not about interpretation, but about justification. Thus, the main concern of the Constitution is duty and obligation and not rights. In Beatty's words, '*justification, not interpretation becomes the leitmotif of constitutional review*' (Beatty 17). It is when judges go outside the Constitution and the principles inherent in the Constitution that judicial review becomes unconstitutional and hence a dilemma.

In using these two principles, are the courts objective or is a hint of subjectivity still present? Before addressing this issue, the question that still needs to be addressed is whether or not the courts are guided by principles when interpreting the Constitution? According to Beatty, the courts are and the principles emerge from in the federal principle. Hogg and Swinton, however, recognize that in relying on the federal principle a certain level of discretion is involved in the judicial review process. Despite this however, none of the three theorists explicitly recognize the ability of the Court to formulate the concept of federalism as it sees fit. Instead, Hogg, Swinton and Beatty seem to take for granted that prevailing beliefs, whether or not beneficial to the matter at hand, ought to guide the courts.

#### STEP TWO: GIVING MEANING TO THE CONSTITUTION

This step is understood as the Justices identifying thus determining the scope of the classes of the legislative subjects. In other words, they focus on and interpret the language of the Constitution (Hogg 356). Similar to the previous one, in this step, for Hogg and Swinton, the judges have discretion. The discretion stems from the extensive overlapping regulation in the B.N.A. Act, because it stipulates jurisdiction over classes of subjects 'rather than jurisdiction over facts, persons or activities' (Swinton 151). As such, the matter, identified in the first step, can fall into either federal jurisdiction or provincial jurisdiction.



In cases, where the activity can fall into either jurisdiction, the law can be upheld under the *double aspect doctrine*. If we recall, for Hogg, this doctrine is used in the first step, when the matters of the law are found to be of equal in importance. Swinton points out that, by invoking this doctrine, the Justices are in fact negating the possibility of *watertight compartments*.<sup>10</sup> Swinton, however, points out that it became clear, especially since the second half of the twentieth century, that there is and must be overlap in regulation, as both levels of government may have good reason to regulate the same activity. (This recognition of overlap in regulation is known as the modern paradigm. The former, that of water tight compartments, is known as the classical paradigms.) The reason to regulate a certain activity can and is justified under both jurisdictions as such the doctrine of double aspect is invoked.

Hogg, in describing this second step, takes a simplistic approach, as he views this step to be *a little more than a mere formality*. Once the matter or pith and substance of the law has been established by the courts, the next step is to assign the matter to either the federal or the provincial government, according to sections 91 and 92. In interpreting the Constitution, thus assigning the power to the proper head of legislative power, is guided by the principles of exclusiveness,<sup>11</sup> ancillary power,<sup>12</sup> concurrency,<sup>13</sup> exhaustiveness,<sup>14</sup> legislative history, precedent and progressive interpretation. For Hogg, however, this step is highly subjective. In this step, the

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<sup>10</sup> Watertight compartments is understood as exclusivity of legislative powers. With no overlap between the two levels of government.

<sup>11</sup> Ibid. 357.

“Each list of classes of subjects in s.91 or s. 92 of the Constitution Act, 1867 is exclusive to the Parliament or Legislature to which it is assigned. This means that a particular *matter* will come within a class of subjects in one list.”

<sup>12</sup> Ibid. 358.

In Canada, there is no ancillary power. According to Hogg, ‘it does not seem to be necessary or helpful to introduce the concept of ancillary power to explain results that can just as easily be regarded as flowing from well-established rules of classification.’

<sup>13</sup> Concurrency is defined as a power shared by both levels of government. If two laws come into conflict, the federal law is paramount.

<sup>14</sup> Ibid. 364.

Exhaustiveness is defined as, ‘the totality of legislative power is distributed between the federal Parliament and the provincial Legislatures.’ However, Justices, when interpreting the Constitution, are aware of the fact that the Fathers could not, thus did not foresee ‘every kind of law which has subsequently been enacted.’

court has ‘to apply a large discretionary judgment to its constitutional decisions, because ‘the scope of potential government activity that the rules address is so enormous’ (Hogg 120).<sup>15</sup>

The doctrine of progressive interpretation is the doctrine most advocated by Hogg in the interpretation of the Constitution. This doctrine enables the evolution of the Constitution in order for it to be in tune with the changing nature of society and the changing nature of the government. The doctrine of progressive interpretation ‘stipulates that the general language used to describe the classes of subjects is not frozen in the sense in which it would have been understood in 1867’ (Hogg 367). Furthermore, this statute implies that the Constitution, though it is a statute, it is one unlike the others. It is organic in nature in that ‘it has to provide the basis for the entire government of a nation over a long period of time’ (Hogg 367). Inflexibility in the interpretation of the Constitution would in fact disable the governments. Hogg also points out that, because the Constitution cannot be easily amended, the responsibility rests on the courts to allow for the Constitution to adapt to the changing times.

For Swinton, defining the scope of the subjects, in the Constitution, the courts look at precedents and history. In other words, they look to the meanings of the words. These two, precedent and history may or may not ‘indicate whether a law should come within one class rather than another’ (Swinton 152). In the case where precedent and history prove to be of no aid, the courts resort to federalism concerns. As such, the courts are guided by ‘beliefs about the optimal balance of power between the federal and provincial governments’ (Swinton 152). In this, Swinton argues, like Hogg, that the courts ask which level of government is better equipped to enact the matter in question. Swinton adopts her argument from Lederman and posits that ‘the courts should reach their decisions by weighing the values of uniformity and diversity and by the following *widely prevailing beliefs*’ (Swinton 152). As pointed out by Hogg, if this be the case,

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<sup>15</sup> The discretion of the Justices is enormous, according to Hogg, because many problems have ‘been inevitably overlooked by the framers of the text. Moreover, the passage of time produces social and economic changes which throws up new problems which could not have been foreseen by the framers of the text.’

then judicial review is in fact not neutral, but bias as this step is basically based on the discretion of judges.

According to Beatty, the concept of the federal principle has provided clear direction ‘as to how the judges ought to determine whether a law is constitutional or not’ (Beatty 26). Beatty believes that from the federal principle emerges the most important principles and rules, used by the courts when giving meaning to the Constitution. The federal principle ‘ensures that both orders of government are able to enjoy a measure of autonomy and sovereignty within whatever spheres of authority they have been given control’ (Beatty 26). In other words, because of the federal principle, one level of government cannot dominate or subordinate the other level of government. This subsequently provides the starting point for the court when engaging in the first step of federalism analysis, focusing on the Constitution.

Two basic rules emerge from the federal principle. The first, is the courts cannot interpret the Constitution so as to threaten the autonomy of the other level of government. (Beatty 26) It is implicit in the division of powers that one level of government will pass laws in proportion to the other level of government. “The law must meet a basic test of balance or proportionality” (Beatty 27). As such, the courts, guided by this implicit principle of proportionality, must not interpret the classes of subjects as to subordinate one level of government. This first test is also known as the interpretive rule of *mutual modification*. “Mutual modification guarantees that a measure of balance and proportionality between the authority between Ottawa and that of the provinces. It actually builds a requirement of proportionality right into the definition of the text” (Beatty 27).

The second rule, emerging from the federal principle, stipulates that the courts need to interpret the Constitution broad enough in order to ensure that each level of government is able to pursue its goals and programs (rationality) (Beatty 27). This rule ‘acts more as a principle of entitlement or empowerment’ (Beatty 28). It works opposite of the mutual modification rule and

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is known as *concurrency rule*. The concurrency rule identifies ‘how far governments acting within the scope of their powers can go’ (Beatty 28). With the concurrency rule, the Justices take a ‘flexible and accommodating approach in defining the jurisdiction and law making authority of both orders of government’ (Beatty 28). For Hogg, however, the doctrine of concurrency is invoked when a power is understood as belonging to both levels of government; if the provincial law conflicts with the federal one, then the federal law is paramount.

In describing his two step analysis, Beatty claims that principles do in fact inform judicial review. He believes that this two step analysis is an objective and principled methodology adopted by the courts. Is it? Beatty has a very specific conceptualization of federalism; it is very legalistic and constitutional. This is not the only understanding of concept<sup>16</sup>. Furthermore, in Beatty’s understanding the federal principle and the principles that emerge from them as he does, it would seem that Beatty assumes that a particular and steadfast understanding of federalism, one that is neutral, guides the courts when giving meaning to the Constitution. In actuality, the understanding of the principle of federalism has evolved, not only in the courts’ jurisprudence, but also in the minds of the political society; this will become evident when we look at the work of Lajoie and, more particularly, when we analyze the Senate Reference, the Patriation Reference, the Quebec Veto Reference and the Secession Reference<sup>17</sup>. In light of this, we must ask, is the conceptualization of federalism embedded in the Constitution, as Beatty alludes to? If no, does that not mean that the understanding of federalism and in turn, that of the Constitution, is subjective and not objective as Beatty claims? Beatty assumes that the principles established by the courts are in fact neutral simply because the Justices claim that they emerge from the Constitution. What he does not recognize is that the understanding of the federal principles and of the Constitution are subjective<sup>18</sup>.

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<sup>16</sup> Federalism can also be understood in sociological terms where the social make-up and diversity of a country is stressed. Federalism thus is viewed as a tool or instrument for managing diversity.

<sup>17</sup> These four cases will be analysed in later chapters of this overall project.

<sup>18</sup> Allan Hutchinson has argued, in Waiting for Coraf, that there is no rule of law, but a rule of five.

We must be careful in classifying judicial review as objective as Beatty does. The fact remains that, as pointed out by both Hogg and Swinton, that each step involves the discretion of the Justices. We must be aware of the subjectivity in the two steps as there is judicial discretion in identifying the subject matter and determining which classes of subjects the matter falls into. Beatty does recognize a certain level of discretion in applying these principles. However, he maintains that ‘the principles constrain the reasoning process and direct the judges to analyse the rationality and the proportionality of the challenged law and preclude them from giving effect to the political values and visions they care about most’ (Beatty 58). But how objective are these principles when they have been created by the courts through judicial interpretation?

In looking at the theories of Hogg, Swinton and Beatty, we see that Swinton offers the more realistic analysis of judicial review. Hogg’s theory seems to be a little simplistic. He identifies the problems with characterizing the law, the ambiguity and the subjectivity of identifying the matter. One problem with his description of this step is that he feels that there is no principled guidelines that aid the courts in identifying the pith and substance. Both Swinton and Beatty, advocate that in fact there are principles in which inform the courts in establishing the matter. Furthermore, Hogg states that once the first step is completed, the second step, that of assigning the matter to either the federal or the provincial government is but a mere formality. He in fact underplays the importance of this step. The importance in that giving meaning to the Constitution may in fact be the crucial step of judicial review. It is in this step, I feel, where the Justices have the discretion to either expand or narrow the powers of the two levels of governments.

Swinton’s understanding of judicial review is similar to Hogg in that she recognizes the discretion involved in both identifying the subject matter and interpreting the Constitution. Swinton, however, departs from Hogg in the first step as she recognizes that there is a principled way, available to the courts, when characterizing the law and thus determining what the matter is. Hogg, if we recall, denounced the possibility of principles guiding the Court when it *chooses* the

matter. Swinton unlike Beatty, however, does not seem to think that there exists principles, aside from precedent and legislative history, to guide the courts when interpreting the Constitution. Both Hogg and Swinton agree with Lederman's advancement of how to interpret the constitution, that is resorting to federalism concerns and asking which level of government is best suited to enact the impugned legislation. Swinton, however, does recognize that there are aids available to the Justices when interpreting the Constitution. It is only when history and precedent fail to conclusively indicate which level of government has the jurisdiction to enact the *matter* do the courts resort to *federalism concerns*. Beatty disagrees with this precept and argues that the courts are in fact guided by principles when interpreting thus giving meaning to the classes of subjects.

However, Beatty offers a theory that is complex, the basis of which is unrealistic. The problems associated with his understanding rests in his unequivocal belief that judicial review is unmistakably objective. He takes for granted that the subjectivity of judges, because their thought process is constrained by the principles of proportionality and rationality, does in fact play a role in characterizing the law and interpreting the Constitution. Swinton, as opposed to the other two, recognizes that, yes the Justices are guided by principles, but there is a level of discretion involved in both steps.

Despite this however, she, along with Hogg and Beatty, underplay the federalism factor. That is, in constructing the theories, the authors fail to account for the fact that Justices in giving meaning to the Constitution, in fact construct the meaning of federalism which in turn is used as an analytical tool when deciding cases dealing specifically, but not exclusively, to the nature of Canadian federalism, or federal-provincial powers in general. As Lajoie so succinctly argues in Jugements des Valeurs, court rulings are infused with politics. Thus in analyzing or devising a theory of judicial review the socio-political environment must be considered

Since the JCPC began rendering rulings on cases dealing with the division of powers, the understanding of federal and provincial powers, and subsequently, Canadian federalism, has been understood differently at different times, from quasi-federal, a highly centralized state to a

decentralized state to watertight compartments to balanced federalism. It is commonly argued by legal and political scholars that the JCPC altered the meaning of the BNA Act, restructuring Canada as a decentralized state.

With the formation of Canada into a nation semi-independent from Britain, and the devising of the BNA Act, it was fully intended by the Fathers of Confederation to create, as conventional wisdom tells us, a strong central government and subordinate provincial governments. As Lower points out, in devising the Canadian federation, the Fathers considered, not the form of the state, they took that for granted; instead they considered the historic monarch (Lower 5). The result was empiric federalism or more commonly known as quasi-federalism. “Canadian federalism [from 1867-1890] was empiric, a continuation of what has always existed, and it developed empirically” (Lower 6).

This empiric nature of Canadian federalism was and is reflected in the BNA Act. The federal government was given authoritative powers, which include the residual clause, the declatory clause, the deeming clause and the power of disallowance. Further, the federal government was given nation-building powers including, the powers of taxation, defence, treaty powers and trade and commerce. These quasi-federal powers all rendered the federal government superior to the provinces. The provincial governments, in contrast, were ‘simply’ given powers centering around local and private matters. By simple reading of the BNA Act, one would be correct to assume that Canada is, or better yet, was meant to be a centralized federation. However, according to F. R. Scott, quoted by Stevenson, ‘the JCPC had distorted the centralist intention of the Fathers of Confederation’ (Stevenson 57).

Up until 1949, when appeals to the JCPC were abolished, the JCPC was the last court of appeal. The SCC was only supreme in name. In fact, it was customary for the SCC to be bypassed in the appeal process. Most appellants would sidestep the SCC and proceed to the

JCPC after the provincial courts of appeal<sup>19</sup>. It is without a doubt then, that this institution had a heavy hand in the evolution of Canada. As a result, the rulings of the JCPC are often pointed to when discussing the causes of the perceived decentralization of Canada<sup>20</sup>. More specifically, Viscount Haldane and Lord Watson are often blamed first and entirely, when attempting to explain why Canadian federalism did not develop as it was intended, that being a highly centralized state.

“For almost a century the most influential concepts of Canadian federalism were mainly defined by men who had no practical knowledge of Canada or of federalism” (Stevenson 57). Constitutionalists and fundamentalists commonly argue that the JCPC misinterpreted the BNA Act; this subsequently led to the development of Canadian federalism from a quasi federation to something closer to federalism. When the Fathers of Confederation devised the two lists, section 91 and section 92, it was their full intention to give the bulk of the powers to the National government in order to create a centralized federation. The intention failed because of the ambiguous terms, which were subject to judicial interpretation. The JCPC demonstrated how ‘the possibility if interpretation proved fatal’ (Stevenson 48). Notably, John Saywell holds that Lord Watson and Viscount Haldane destroyed the original intentions of the BNA Act by severely narrowing the powers of POGG and trade and commerce and expanding the provincial power of property and civil rights.

Between the years of 1890 and 1930, also known as the Watson-Haldane era, the JCPC, through the decisions they rendered, destroyed the ‘centralist intentions and distorted the meaning of the BNA Act to give Canada a new Constitution’ (Stevenson 57). According to Lower, ‘the

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<sup>19</sup> Before the 1950s, the credibility of the Supreme Court of Canada was constantly questioned by the provincial governments. The SCC was widely regarded as a creature of the federal government; it was created as a part of Macdonald’s centralizing agenda. As a result, it was often bypassed, by the provinces, in the appeal process.

<sup>20</sup> There exists a lively debate amongst Canadian political scientists as to whether or not Canada is a centralist or decentralized state. Simeon and Robinson for instance, argue that from the fifties and onwards, ‘provincialists trends set in and Canada evolved as one of the most decentralized federalisms now in existence.’ (Simeon and Robinson 27) Rocher, on the other hand, argues that in light of the federal



decisions in London cut decidedly into the central government's authority' (Lower 29). Simply put, from 1890 to 1930, Watson and Haldane, almost single handedly, weakened the federal powers of trade and commerce and POGG, while, at the same time, it strengthened the provincial power of property and civil rights. As Lower so adamantly argues, 'the power to make laws for the peace, order, and good government of Canada became a power not to make laws for peace, order and good government of Canada, unless every other expedient had been exhausted and dire emergency threatened. The regulation of trade and commerce was eroded to a shell' (Lower 40).

In the *A.G. Ontario vs. A.G. Canada* reference case, 1896, Lord Watson upheld an Ontario statute allowing for prohibition by local option and added that a province could prohibit the sale and production of alcohol within its borders. His ruling became important as one, it narrowed the power of POGG to be only a supplementary power to the enumerated list when it was clearly intended by the Fathers for section 92 (13), property and civil rights to be limited and most importantly, it marked the beginning of judicial rulings that were in favour of the provinces and narrowed the powers of the federal government. In the *Maritime Banking* case, the JCPC, under Lord Watson, ruled that the BNA Act did not alter the relationship between the Crown; in fact, the two levels of government were of equal status.

Viscount Haldane, embracing the trend set by Lord Watson, continued in the tradition of narrowing the powers, through court rulings, of the federal government. In the *John Deere* case, 1914, he subtly suggested that the trade and commerce power might be used only to supplement the general powers belonging to the federal government. However, if a general power is not applicable, then the trade and commerce power has little or no effect. In the *Board of Commerce* case, 1922, Viscount Haldane solidified the previous ruling by establishing that the trade and commerce power is meaningless unless it can be used with another federal power. In the *Snider* case, Viscount Haldane narrowed the POGG power, by ruling that it can only be implemented at

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government's ability to establish national standards and determine the condition in which Ottawa grants funds to the provinces, Canada is in fact and centralized state.

a time of national emergency. POGG was no longer the residual power that was clearly intended by Sir John A. Macdonald.

Critics of the JCPC commonly use the cases briefly described above to argue that this institution clearly misread and more importantly, misinterpreted the Constitution of Canada. In short, fundamentalists argue that the JCPC, in their misreading of the Constitution, caused the decentralization of Canadian federalism. Their position is three fold: first, according to fundamentalists, the Fathers of Confederation, intended to create a centralized federal state; the proof is in Sir John A. Macdonald's sentiments. Second, this intent was clearly embodied in the BNA Act; as it was discussed above, it is clear in the roles assigned to each level of government that the federal government was superior to the provincial governments. Finally, the way in which fundamentalists define the role of the judiciary supports their position; the judicial role is to provide a technically correct interpretation of the Act in order 'to bring out the meaning deliberately and clearly embodied in it by the Fathers' (Cairns 45). Therefore, the JCPC did a *bad job* in interpreting the BNA Act; more specifically, they misinterpreted the POGG and trade and commerce powers. This in turn narrowed the scope of the federal government's powers. In short, the Constitution Act, 1867, was interpreted 'to an extent that the provinces were left with the responsibilities they were neither intended nor competent to handle' (Cairns 47).

At first glance, this theory seems to offer a solid explanation for the decentralization of the Canadian federation. A closer look at this position, however, proves this theory inadequate. First, this position, that of blaming the JCPC, is misleading in that it privileges the role of the JCPC in the development of Canadian federalism. Second, it does not accredit any role to the provincial rights' movement in the development of the Canadian state. The implication of both one and two, is that the JCPC critics discount any role the changing social-economic conditions in Canada played in the decentralization of the nation. Third, these arguments accept the intentions of Sir John A. Macdonald as an historical fact, when in fact, other intentions were present at the

time of Confederation. Furthermore, as Cairns points out, the JCPC theory fails to provide a normative criteria for evaluating judicial performance (Cairns 79).

In addition to the indicated shortcomings of the JCPC theory, the advocates of this theory also fail to provide the student of Canadian Constitutional law or federalism, in any meaningful theoretical manner, with reasons for the fluctuating understanding of the division of powers and Canadian federalism. Cairns and Russell attempt to do so by introducing a social justification and the provincial rights' movement reasoning into the discussion.

Cairns, upon reviewing the positions of JCPC critics and supporters, offers a sociological justification for the actions of the JCPC. This sociological justification is in tune with the provincial rights movement theory; as, such I will look at the two theories simultaneously. Cairns sociological justification is premised on regional pluralism, as, according to Cairns, the decisions of the JCPC were in harmony with regional pluralism. At the time of Confederation, centralization seemed reasonable and necessary to establish a new polity. However, we need to recognize that a central state is 'inappropriate for the regional diversities of Canada' (Cairns 59). Furthermore, the reasons to support centralism, the most important being military defense, soon vanished. This reality coupled with the fact that the rise of importance of natural resources, a concurrent responsibility of the federal and provincial governments, increased the political importance, and subsequently power, of the provincial governments. In addition, provincial identities developed and strengthened with the rise of the provincial rights movement.

Lower points out that 'shortly after the new Dominion had been formed, some of the provincial governments began to assert their rights and powers' (Lower 28). This assertion, which came to be known as the provincial rights movement was backed by the decisions of Viscount Haldane and Lord Watson. The provincial rights movement theory adds to Cairns sociological justification of the JCPC actions in that it indicates that the JCPC, in its decisions, was harmonious with the trends of the times. As Russell points out, in Canadian political history, the provincial Premiers, not the Official Opposition, were the strongest opponents to the Prime

Minister. The objective of the provincial rights movement was to 'resist and overcome a hierarchal version of Canadian federalism' (Russell 37); The provinces, led by Oliver Mowat, began to demand constitutional equality. "The idea that the provinces are not subordinate to, but coordinate with the federal government became the politically dominant conception of Canadian federalism" (Russell 39).

The constitutional conference of 1887, in which the original four provinces and Manitoba were present, was an important turning point in the constitutional history of Canada. At this conference, twenty-two resolutions were drafted; though these resolutions were not enacted, it remained important in that they were an open resentment against the centralist notion of Canadian federalism (Russell 40). It 'demonstrated that the constitutional initiative had passed to the provinces;' centralism was losing its appeal' (Russell 40). The players of the provincial rights movement made its biggest headway in the courts, through the JCPC, and not through the traditional political process of amending the Constitution. The JCPC and its rulings, thus played a significant role in the strengthening of the provincial rights position.

Cairns, Lower and Russell, including a plethora of other Canadian political scientists, all note that the use of the centralizing features of the BNA Act, including the power of disallowance and reservation, fell into disuse, mainly because they were incoherent with the federal principle of self-government and incompatible with the development of Canada. As such, the decentralization of Canada was also due to politically conscious actions. We must recognize, therefore, that the JCPC did not initiate nor create the sentiments of the provinces; their decisions merely reflected that which was going on in the Canadian political environment.

Along with the political conscious action of the government, Russell points out that the politically unconscious developments of the two levels of governments contributed to the decentralization of Canada. The Constitution of Canada was not patriated until 1982; this was due in large part to the inability of the two levels of government to agree upon an amending formula. According to Russell, during this period, that of attempting to patriate the Constitution,

the provinces continued to gain power within its jurisdiction and solidify their provincial identities, thus strengthening its position at the constitutional bargaining table.

The discussions of Cairns and Russell remain important and innovative in that they identify other reasons for the decisions of the JCPC. They however, do not, I feel, give the other positions the importance that they deserve. Cairns in fact downplays the role the JCPC played by excusing their actions via the sociological justifications he offers, Russell does so by arguing that the decisions of the JCPC mirrored the political environment of Canada. What is also important to note is that both Cairns and Russell do not account for the political biases the JCPC may have held. Though I agree with Cairns that the political reasons alone cannot explain the actions of the JCPC, the sociological justification alone cannot either. In the end therefore, we are left with an incomplete theory of why the JCPC conceptualized federalism as it did and how it used the its understanding of the concept as an analytical tool in their decision-making process.

This void in the literature extends into the study of the SCC and the reasoning for its decisions. Andrée Lajoie attempts to, and does so persuasively, fill this void. In her study of the SCC and its role of interpreting the Constitution, she looks at ‘the political factors which are inscribed in the SCC’s decision making process in the post World War Two period. Three conceptions of federalism, (one, unilateral centralization, two, conversational federalism, and three, centralized federalism), materialize despite the lack of change in the text of the Constitution; the reasons for this must be the political environment’ (translation Lajoie 24-28).<sup>21</sup> In

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<sup>21</sup> Lajoie 30

According to Lajoie, the ‘will’ of the Court gave way for three interpretations of the division of powers and subsequently, Canadian federalism:

- (a) post WW2 – 1960 - - unilateral centralization;
- (b) 1960 – 1975 - - conversational federalism;
- (c) beginning in 1975 - - centralized federalism (from now on normalized)

(a) unilateral centralization

The centralizing nature of the SCC is not surprising as the National Assembly was the only government, during this period, concerned with provincial autonomy. In court decisions, this lean towards a centralized federation was evident in the Court’s restricted understanding of provincial competency, which implicitly benefited the federal government, and by the expansion of federal powers, relying on the judicial doctrines of federal paramountcy, residual power, the national dimension test, and the emergency doctrine, in areas of criminal law, development of the territories, and trade and commerce. (Lajoie 32)

short, Lajoie argues that Judges have their own ideas that they incorporate when interpreting the Constitution.

In her study, she is able to show that institutional and interpretation shifts reflected political changes (Lajoie 30). This claim definitely disputes Beatty's assertion that once the principles of the Constitution have been established, that focussing on the impugned legislation/government action is where all judicial action takes place. It also disputes his claim that the interpretation of the Constitution is guided by the principles of rationality and proportionality, inherent in the Constitution, thus rendering judicial review objective and not subjective.

According to Lajoie, we cannot ignore the political dimension embedded in court rulings when we attempt to theorize the role judges play in the interpretation of the Constitution and subsequently, the production of rights (Lajoie 175-176). The Court's constitutional decisions are clearly linked to the political dominant ideas (Lajoie 110). In the external camp<sup>22</sup>, this translates into support of the state's ideology and agenda. By the state, she refers to, in the Canadian case, the central government. Thus, the SCC favours a centralized federation. Essentially, this role is comprised of two dimensions: ideological and concrete/practical. This first dimension, ideological, works towards legitimizing the state (in light of the decline of credibility of the

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(b) conversational federalism

This period, notable for the Quiet Revolution in Quebec, was marked by co-operative federalism, which enabled Quebec to strengthen its powers vis-à-vis the federal government through intergovernmental arrangements, particularly the ability of a province to opt out of federal government programs with compensation. The Quebec government also gained leverage with the federal government in court rulings. It was, however, qualitative, not quantitative victories; the most notable, according Lajoie, was the ruling on the anti-inflation legislation, which restricted, to a certain measure, the power of the federal government. (Lajoie 33)

(c) Normalized federalism

The two-cultures interpretation of federalism, evident in the previous period, disappears from 1975 and on. This trend was heightened by the Quebec Veto Reference and the Patriation Reference. The Court's decisions in these cases favoured the provinces, however, the implication of the two References put the power in the hands of the federal government and tied the hands of the Quebec government. (Lajoie 35-36) [For further readings on the three different conceptions of the division of powers, please refer to part one of Andrée Lajoie's Jugements des Valeurs.

<sup>22</sup> Lajoie in looking at the courts' role looks at them in the context of internal and external camp: the internal camp is understood as the production of a text subject to interpretation (production of normative

political class vis-à-vis society) when the Court validates its laws and actions (Lajoie 176). The second dimension, concrete/practical, manifests itself in the form of state support. The Court, via its judicial review power, is able to respond to the evolution of society when the Constitution seems to forbid it and when the state's hands are tied. This is the very act engaged in by the SCC to centralize the state when interpreting the division of powers. Thus the government is no longer blocked, it needs only the positive and sometimes the negative support of the Court<sup>23</sup>. At this point then, 'the State has the ideological and the practical support, from the SCC, of its actions and the material realization of its politics' (translation Lajoie 178).

Nevertheless, the Court, by invoking judicial doctrine, is able to maintain the appearance of neutrality (Lajoie). That is, it continues to feed the myth that the Court is free from bias and political views, especially views on how the Canadian federation ought to operate, when in fact these views are influenced by the political environment. As such, any theory on judicial review must consider the role of socio-politics, which Lajoie considers, but also, and more specifically for the purposes of this project, that the SCC does have a particular understanding of federalism, which is influenced by and influences the political environment; furthermore, it uses this conceptualization as an analytical tool when dealing with cases concerning the constitutional powers and responsibilities of the two levels of government.

The four cases to be analyzed in this study all deal with relatively the same issue – that is who has the power to amend the Constitution? Is it the sole power of the central government or,

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direction); the external camp is understood as the production of state support and its (state's) reproduction methods. (Lajoie 167)

<sup>23</sup> Negative support is understood as refusing to side with the State for the benefit of the State. That is, the negative contribution or support of the Court could be seen as the SCC warning the central government of the implications that it is not aware of. (Lajoie 86) Lajoie offers the Patriation Reference as a good example: the federal government wanted the Court to declare that provincial consent is not needed when patriating the Constitution. The Court however, decided to divide the victory between the two parties by ruling that, legally, consent is not needed, however, by convention, the federal government ought to obtain a substantial measure of provincial consent. 'This not only permitted the State to proceed as it intended and provided indispensable support of its maintenance in the circumstances, but it protected it from the potential harmful effects of a too bright victory; it conceded Quebec [and the other provinces] an apparent symbolic gain of which the net ideological result was nevertheless to strengthen the apparent neutrality of the Court and to strengthen the central government.' (translation Lajoie 187)

is it a shared power – if so, is unanimity required? Despite the similarity of the basic issue of each of the four cases, the SCC, in a span of eighteen years rendered a fluctuating understanding of this power. The reasons must not only be, socio-political but also, and more specifically their understanding of federalism.

If this is true, then we must acknowledge in any theory of judicial review, not only that the Court is not guided by objective principles, as Beatty would argue, but also that federalism as a concept, is understood differently by the Court at different times. This understanding underpins its decisions and consequently, is used as an analytical tool when it renders its decisions on cases dealing with this very issue. Therefore, it is in *defining and setting the limits of the Constitution* where Judges construct the nature of federalism and then in *focussing on the impugned legislation/government action (deciding who has the power enact such a legislation)*, where the conceptualization of federalism is invoked, that is, used as an analytical tool.

In order to test the validity of this hypothesis, case analysis is needed. When examining the case, it is not only important to scrutinize the Court decisions by testing one, whether or not it did in fact follow the two-step approach, and two, if, within the decision, we can identify the Court's understanding of federalism and how it constructed this concept and subsequently, used it as an analytical tool when reasoning through its decision; it is also important to look at what influences, mainly the political environment comprised of the media and the political actors directly involved in the case, that is, those individuals or groups who were either a party to the case or playing the role of an intervener, contributed and how they contributed to the Court's conceptualization of federalism. In constructing or conceptualizing such fundamental concepts as federalism, the Court does not act alone; it is in fact affected by the environment in which it is a participant of and certainly the environment in which the case or issue unfolds.

The SCC, as an institution, is important, but it is not the cause of an outcome, in this case, the social and political understanding of Canadian federalism. By looking at the political environment and behaviour on the one hand, and the SCC decisions and their ability to construct



the nature of federalism on the other, we see that the two variables have both an independent and a dependent relationship with each other. In essence therefore, I will look at how these two seemingly distinct and independent variables are linked. That is, how do institutions, the SCC in particular, influence the social and political understanding of federalism held by political society and how does this view of political society influence the SCC? In light of this then, probing into the political environment enveloping each of the four cases, becomes an inescapable necessity.

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