A Political Theory of Federalism[1]

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June 1999

[1] The authors gratefully acknowledge support from Stanford=s Institute for International Studies and particularly to the George P. Shultz Fund for Canadian Studies. We thank Christopher Eisgruber, Larry Kramer, and Larry Sager for their generous comments without, of course, blaming any of them for any errors we failed to correct.

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I. Introduction

Multi-ethnic nations (South Africa, Russia, Nigeria, Rwanda, the former Yugoslavia, to name a few) have sometimes found decentralized political arrangements attractive. Such arrangements -- as long as they last -- permit peoples who may differ greatly in their conceptions of a good public life to develop and maintain their own separate communities, within the context of a larger and more powerful political economy.[5] Ethnically more homogeneous nations such as the United States, at the time of its founding, or Australia today, often find decentralized modes of policy formation and administration convenient as well. In such nations, geographic distances, diverse economies, regional disparities in preferences, and variations in local historical experience can make decentralized policy-making institutions more efficient and more responsive than national ones.

The advantages of decentralization are realizable, however, only if there are good reasons for the players -- ordinary citizens as well as regional and central governments -- to believe that others will generally abide by the terms of the federation. That is, all must believe that the regional governments will not try to take advantage of one another and that the center will not try to usurp power from the regions. Without such assurance, frequent disputes and suspicion of foul play would reduce the participants=

[5] This view of decentralization parallels the economist's conception in which the value of federal arrangements is that it permits subnational communities to decide autonomously what the mix of public goods and taxes shall be, so that citizens may then sort themselves into jurisdictions whose mixes they find attractive. In both views, it is important that the autonomy of local governments be preserved.

enthusiasm for the federation, possibly motivating some participating governments to withdraw from the federation altogether. Decentralized political institutions must somehow induce participants to believe that all others will abide by the federation=s terms and to act accordingly, by complying as well. That is to say, decentralization, if it is to work, must be credible, an ideal that has proven elusive at times in each of the nations mentioned, each having experienced periods of instability.

Federalism, the division of sovereign authority among levels of government, can be seen as a way of stabilizing, or making credible, decentralized governmental structures. However, the federal solution not without its own problems. It is not obvious, for example, that the division of sovereignty is actually possible. Some conceptions of government hold sovereignty to be necessarily unitary; a divided sovereign is actually several separate states.[6] Whatever the truth of this theoretical claim, the important question for our paper is whether practical federal arrangements can sufficiently insulate governmental decisions at all levels to maintain a stable and credible decentralized political structure.

From our viewpoint, then, federalism is at once an attractive and problematic governmental structure.[7] By dividing sovereign authority between a supreme national government and semi-

[6] The idea that federalism is intrinsically unstable can be traced to a Hobbesian conception of the state, according to which sovereignty must ultimately be indivisible. When superficial appearances are stripped away, on this view, federal governments are basically either centralized or are mere alliances of separate states. From this perspective, federal institutions are doomed to succumb either to centrifugal or centripetal forces. However, Hobbes's identification of sovereignty with the "ultimate" location of authority can be misleading, if the conditions under which that location can be reached are sufficiently improbable. Moreover, his focus on the state actors as opposed to the individual officials who act for the state fails to take account of the actual strategic structure of federal systems.

[7] We leave aside, for the present, the ways in which federal arrangements are often normatively problematic, in particular when such arrangements cut against the realization of equality norms.

autonomous provincial governments,[8] federal arrangements promise to secure the advantages of decentralization. But many federal arrangements (most dramatically, those in Yugoslavia or the antebellum United States) have collapsed in the face of centrifugal forces when provincial entities decided that the benefits of membership in the federal were not worth the cost, in terms of economic health, security, or regional autonomy. Conversely, in some putative federations, decision-making has become so concentrated at the center that the provincial governments come to resemble administrative extensions of the central government, rather than autonomous governments.[9] Indeed the apparent success of the American federalism has often been debunked in these terms by those who see national power, at least since the New Deal, as excessively concentrated in Washington (Van Alstyne 1985, Riker 1964).

Elsewhere, two of us have argued that American federalism is not yet dead and that the exercise of state and local power in American federalism has remained robust in the face of profound legal/constitutional transformations (Eskridge and Ferejohn 1995). Indeed, recent developments in the states as well as in the Supreme Court point to continued viability of states as political competitors for

[8] We will use the term "federalism" to denote a state broken up into provinces. Governmental powers are divided between the two levels, with some shared between the two levels, and in at least one domain each level of government is the final authority. With this definition we follow a precedent established by William H. Riker (1964). Morton Grodzins' (1964) depiction of American federalism as a marble cake rather than a stratified layer cake is an expression of the fragility of classical federal ideals within American history. Power within the American system is not neatly stratified into federal and state jurisdictions but is shared and overlapping in distinct policy subsystems. As shall be seen, our analysis suggests that, because of the peculiar period in which he wrote, perhaps the high water mark of centralized federalism in the United States, we think his conclusions were somewhat overstated.

[9] The connection, if any, between sovereignty and autonomy will not be addressed here. It is not at all clear that the sovereignty of an impoverished third world nation is any guarantee of its autonomy as a

authority.[10] While there have been continual adjustments in the legal and constitutional authority of states and of the national government within specific policy areas, the allocation of actual decision making authority in American federalism seems relatively stable. This feature of U.S. federalism is puzzling in light of the apparently opposite phenomenon in Canada, where for the last two generations aggressive regional interests have attempted to secure more regional autonomy. The failure to win such autonomy has evidently lead many Canadians to prefer to divide into separate states rather than to continue their own federal experiment. This difference is particularly notable because in many other respects, American and Canadian societies are fairly similar. Thus, the development of separatist regionalism, which so imperils Canadian federalism, and its absence in the United States, needs some explanation.[11]

The contrast between resilient American federalism and Canada's apparently less stable federal politics inspires the current project, which examines federalist experiments in different Anglo-American countries: Great Britain, the United States, and Canada. Our inquiry is aimed at identifying conditions necessary for federalism to flourish. Our central thesis is that durable federal arrangements are possible

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locus of authoritative decisions.

[10] We should also note that the responses of the Senate and President to initiatives enlarging the domain of state authority suggest that the powers of the national government within the federal system remain formidable as well.

[11] This puzzle exists despite the reality of recent efforts to devolve more authority to the American states, especially with respect to welfare policy. These efforts are not, however, based on claims of deep regional difference among states but on a belief that such policies would be better administered at a level nearer the people (taxpayers or beneficiaries). Such efforts are, moreover, statutory and involve no constitutional guarantee of decision making autonomy. Only a political naif would see in such efforts a realistic prospect of eliminating the congressional role in welfare policy.

only if two conditions hold. First, national forces must be structurally restrained from infringing on the federal bargain. Secondly, provincial temptations to renege on federal arrangements must be checked as well, possibly by the application of legal rules enforced by an independent judiciary.[12] This too is only a necessary condition and is no guarantee of the emergence or stability of federal arrangements. We do not offer a prescription of what form these structural restraints actually take and imagine that they may be institutionally embodied in many different ways. What is important, however, is that everyone has good reason to believe that the terms of federal bargain may be reasonably relied upon. In the United States, except for the period prior to the Civil War and for a short period thereafter -- perhaps from 1840 through 1877 -- both conditions have usually been present since the time of founding (although they have exhibited some local variation). Indeed the failure of these conditions to hold during this crucial Amiddle period@ of American political life helps to explain both the shape of the rebellion and re-integration of the southern states during this period. We think that achieving structural guarantees of the kind described here has contributed substantially to the success of the American federal experience and is a key to the development of effective federal arrangements more generally.[13]

II. Credible Decentralization: The Advantages of Federalism

[12] The use of judicial checks on the provinces is probably only one method of restraining them. The provinces might themselves develop fragmented systems of power that prevent them from opportunistic behavior. While such a system might be possible, it seems hard to believe that every province will be sufficiently restrained over the long run, to solve the credibility problem. Structural devices are possible to restrain the provinces, although they are not as likely to be successful, for reasons we discuss below, in endnote 19.

[13] We are tempted to argue that the presence of both necessary conditions is sufficient for a stable

Decentralized governmental structures offer many advantages over more unified forms. Rational choice theories of politics explain why a decentralized system would best satisfy popular preferences in a polity containing heterogeneous individual preferences.[14] Borrowing from Charles Tiebout and Gordon Tullock, one can suppose that if 60 citizens in a centralized polity prefer policy A and 40 prefer policy not-A, the polity will adopt policy A, but with 40 dissatisfied citizens (provided that the practice of A in one region is compatible with 'not A' nearby). A decentralized polity will usually end up with fewer dissatisfied citizens. For example, where 50 citizens in the first province favor policy A while 10 oppose it, and 30 citizens in a second province favor non-A with 10 favoring A, each province can adopt different policies, leaving only 20 (rather than 40) dissatisfied citizens. If there is mobility within the polity, citizens can move between the two provinces, and even greater satisfaction is achieved under the decentralized arrangement.

As long as migration is relatively easy, its possibility contributes to greater citizen satisfaction, but also limits the range of tax/service packages that can be offered by provincial rather than national units. Provinces would, for example, be restrained from engaging in extensive wealth redistributions.[15] Programs with such effects would locate at the national level, if indeed they exist at all. The national government would also be best suited to provide services and regulatory regimes where collective

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federalism, but cannot do so without a more systematic examination of the full range of empirical cases.

[14] Early works of great consequence include Buchanan & Tullock (1962); Hirschman (1970); Tiebout (1956); Tullock (1969). Important recent works include Ostrom (1991); Oates (1972); Peterson (1981); Trebilcock (1983).

[15] Attempt to implement programs at the provincial level would trigger "races to the bottom" in which the redistributive elements of the programs effectively disappear. See Peterson (1981).

action problems (the free rider problem and the race to the bottom) militate against optimal policies at the state level.

The political economy of decentralization may be understood either normatively or positively. As a normative theory it counsels the adoption of policy formation processes that take advantage of scale economies and that permit citizens to sort themselves among jurisdictions according to their tastes for public services. Decentralization permits the allocation of decisionmaking authority to take account of the economic characteristics of the goods and services being produced. It permits the choice of governmental units capable of internalizing externalities in service provision and recognizes that this usually will entail having different units provide each good or service and that taxation be organized at the national level (to ensure that allocational decisions are not tax induced).

As a positive or predictive theory the political economy of decentralization foresees jurisdictions arising in a manner that responds to technical production and distribution characteristics of the particular public services in question. One would expect the temporary emergence of special districts, each dedicated to producing one kind of public service, and each shifting its size and structure as technical conditions changed. Which jurisdictions actually emerged would depend on contingent technological and population characteristics. One would also expect to see a degree of flux in governmental units as technologies and tastes varied over time. However, in establishing jurisdictions, the framers of a decentralized arrangement might well reflect linguistic and ethnic differences insofar as these differences affect economic or political transactions costs. It may turn out, therefore, that for some nations, ethnically based jurisdictions will be employed in order to economize on these costs.

These arguments apply directly to multi-ethnic situations. Decentralized institutional

arrangements make it possible for German, French and Italian citizens of Switzerland to enjoy the benefits of nationally provided services and a common market and, at the same time, to live in relatively homogeneous communities. The self-sorting described above permits individuals and families to make locational decisions based on considerations of ethnic or linguistic identity as well as on economic prospects. Insofar as ethnic identity carries with it preference-related content, such sorting will support the provision of characteristic cultural goods and services associated with various ways of life. Indeed, decentralized institutions might be most valuable in multi-ethnic states. The reason is not that policy preferences are likely to be more diverse in such states, but that some policy preferences are likely to be bound up with deeply felt identities. If people place a substantial enough weight on ethnic or linguistic identity, the political-economic theory might predict a relatively stable institutional structure based on these identities. The ethnic communities may not be the optimal scale to provide certain services but they may provide a sufficient improvement over more national arrangements so that they have some sticking power. Multi-ethnic states may therefore be able to approach the generic incentive problems of decentralization in a distinctively productive way.

Although political-economic theories of decentralization show how improvement over centralized regimes is conceivable as well as beneficial, they ignore a central practical difficulty with constructing and maintaining regimes of this sort. That is, the constituted agents of a decentralized regime, the national and subnational governments will have strong incentives and many opportunities to cheat on the arrangement. The national government will constantly be tempted to increase its own power relative to the provinces and, indeed, to shift to the provinces some of the costs of national programs. The provinces, in turn, have incentives to push costs off onto neighboring states as well as to

trespass on national values. Cheating in these ways not only undermines the advantages of the decentralized arrangement, but also threatens the viability of the state itself, by inducing the constituent governments to engage in defensive activities aimed at protecting their decisional spheres. These dangers seem especially keen in multi-ethnic polities.[16] Anticipation of such failure may make the benefits of decentralization politically unavailable at the outset: regions, tribes, or states, acting rationally, will refuse to enter into a federal arrangement on the grounds that there is no credible machinery for enforcing it.[17]

In other circumstances, rational choice theories of institutions have persuasively maintained that constitutional procedure and structure can limit the collective harms caused by individually rational behavior. The enterprise of this paper is to consider what constitutional designs might be expected to ameliorate the durability problems inherent in decentralized institutional structures. Initially, we suggest theoretical solutions to the problem, then hone as well as illustrate the theory by considering its explanatory value in three different national contexts: Great Britain after 1690; Canada after 1867; and the United States after 1789.

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[16] The fact that a politics of "identity" is involved in such states makes the stakes of opportunistic behavior higher than they would otherwise be. That it is a province dominated by members of one ethnic group that is dumping costs onto a neighboring area may add heat to resentment and dispute. Conversely, the fact that identity politics makes the stakes high, may permit the establishment of credible restraints on opportunistic behavior that would not generally be available. The fact that otherwise mundane disputes might escalate into deeply felt grievances and be implicated in tragic histories may restrain participants from careless infringements on the claims of their neighbors. The examples that come to mind most easily are, of course, cases in which these restraints failed -- in Lebanon, Northern Ireland, Somalia, Yugoslavia, etc. -- but successful cases, or better, successful periods of time, must be much more frequent.

[17] One of us has called the foregoing dilemma "The Federal Problem" -- a durability problem that all

III. The Federal Solution

Genuinely federal institutions must be credibly robust against both national and provincial aggrandizements of power. That is to say, federal arrangements must represent a commitment by the parties generally to refrain from trespassing on the rights of their federal partners. How might this commitment problem be solved or managed? The obvious way to manage this problem is to list independent courts to force both the states and the national government to respect jurisdictional boundaries. But it has always been difficult to convince skeptics that courts can be made sufficiently independent to provide robust guarantees of their rights. Indeed, insofar as courts are institutionally dependent on other national institutions, they will be tend to be seen as creatures of the national government with little real authority to checks its powers on important matters. And, if no national courts are not created, state level courts would be vulnerable to an analogous suspicion. For this reason we think that judicially enforced federalism, by itself, is probably unworkable.[18]

Alternatively, we suggest that a better way to address the issue proceeds in two steps. First, head off opportunism by the national government by fragmenting power at the national level, thereby incapacitating national authorities from invading state authority by making it difficult for a national will to

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federal arrangements face. See Bednar 1998a.

[18] The antifederalist Brutus offered another criticism of such a system. In his view national courts were probably completely uncontrollable and that the U.S. Constitution essentially created a system of government by courts. If Brutus is right about this **B** if neither the national nor state governments can threaten judicial independence **B** then judicial federalism might be more workable that we argue. In order for judicially-maintained federalism to work, the courts must be adequately motivated to draw and enforce federal boundaries.

form or be sustained over time.[19] This fragmentation may be accomplished through a formal system of separation powers and a system of checks and balances that make the formation of majorities difficult. But fragmentation may also be achieved in other ways as well, such as devising an electoral system that limits the capacity of political parties to coalesce. In any case, the fragmentation of national power that inhibits national incursions on state powers also limits the capacity of the national government to interfere with the courts. This permits the second step: employ politically independent courts to prevent the states from exceeding their own authority.

Within a system of separated powers at the national level, decentralization might be implemented in three distinct ways. The first is by *rules*: the actions of national and provincial authorities are formally restricted by judicially enforceable legal rules. Alternatively, decentralized practices may be enforced by a system of informal *norms* where, in place of explicit rules, the various parties understand themselves as obligated to stay within certain zones of activity, whether or not such zones are enforceable by legal institutions.[20] Finally, federal promises might be redeemed by a self-enforcing

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[19] Note that while fragmentation is effective at the national level, it probably cannot be counted upon to provide insurance against opportunistic behavior at any sub-national level. This is essentially the point that Madison argued in Federalist 10. Smaller governments are more susceptible to majoritarian capture that can overwhelm internal checks. Furthermore, the national government is comprised of the provincial interests; each region is represented at the national level. However, no region contains representatives from the other regions or the national level; the success of fragmentation depends upon conflicting interests on the federalism question, a condition that fails at the regional level.

20. Norms can have a restraining effect on action even when they cannot be judicially enforced, whether the reason for unenforceability is traced to the political incapacity of courts or to problems of identifying judicially administrable rules to implement the norms. That the agents are motivated to interpret and give effect to norms permits decentralization to be sustained as an equilibrium. British constitutionalism is an example of norm-based enforcement. Constitutional norms in that system are not law, and are not enforceable by courts, unless they are also statutes, in which case they may be

structure of incentives in which the various actors stay within their respective zones of action as a matter of political prudence. Such a structure of incentives could in turn support an equilibrium pattern of practice among the various governments motivated by considerations of power or material interest.

For decentralization to be a credible solution to political problems, it must somehow be supported as an equilibrium in one of these three ways. The first two methods involve reliance on a rule of law to enforce decentralized practices, either through explicit rule enforcement, or compliance with normative expectations. The last involves the balancing of political opportunities and incentives to stabilize decentralized administration.

Juridical (Rule of Law) Federalism

The adoption of federalist juridical rules offers one way to enforce the boundaries between national and provincial authority. Juridically, federal governments characteristically distribute decision-making powers among some of its subunits, either through explicit constitutional provision or through the evolution of legal conventions that have the same effect.[21] The possession of some sovereignty powers permits subordinate governments to validate claims against each other as well as against the national government and permits them particularly to mitigate the damage done to their citizens by other provincial governments. Simultaneously, the national government can enforce its legal claims against

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enforced as statutes. For a perspective on American constitutionalism that recognizes the efficacity of non enforceable norms see Sager (1978) and Ross (1987).

[21] A good example of the attempt to develop a legal convention is found in Justice O'Connor=s efforts to articulate a limit to the congressional authority to regulate local governments beginning in *New York* v *United States*, 505 U.S. 144 (1992), and continuing in more recent federalism decisions,

provincial units.[22]

One aspect distinguishes a juridical from structural conceptions of federalism. While structural federalism halts the frequency of opportunism by making it difficult to decide to take or implement an action, juridical federalism seeks to remedy the consequence of an infringing action. It regulates federal arrangements by placing reliance on legal discourse based on rules or norms. Insofar as the legal discourse is backed up by an institutional structure that enforce valid claims of this sort, juridical sovereignty is said to be rule-based: a state having rule based sovereignty in a domain can exert power within its domain of authority because legal institutions enforce such claims. A state has norm-based juridical sovereignty if its claims are predictably respected by others whether or not they are enforceable in court.

While it may seem clear enough that rule based federalism is properly thought of as juridical, we think norm based federalism ought be thought of in this way as well. Judicial institutions can play a critical role in both rule-based and norm-based federalism. In the first case they are charged with identifying violations and enforcing the rules. In the second case, they act to articulate norms and

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United States v. *Lopez*, 514 U.S. 549 (1995) and *Printz* v. *United States*, 521 U.S. 98 (1997).

[22] A theory of federalism, as opposed to a theory of decentralization, must explain how subnational institutions can actually be provided with decision-making powers in certain domains. Without such an account, federalism is just another word for decentralization. If we are to take seriously the distinction between federalist and decentralized non-federalist regimes, we need to find a place in the theory for the allocation of powers. Conferring some aspects of sovereignty on subnational units can permit a regime to establish and maintain structures and policies of the sort recommended by the political economy of federalism. The division of decision-making authority can help solve a characteristic "credibility" problem faced by a political regime intent on taking advantage of decentralized policy making and administration.

expectations[23] to identify transgressions, relying on less formal methods of enforcement.[24] The most famous example of the latter is the Canadian Supreme Court=s chastising of Trudeau for attempting to patriate the Canadian Constitution without adequately consulting with the provinces.[25] AEnforcement@ of this ruling was left to public opinion or to Trudeau=s own constitutional sensibilities. But even if courts play no role at all, the public discourse of norm based federalism is juridical in that it is aimed at identifying expectations and principles governing acceptable conduct. Whether federal limits are enforceable in courts, or they evoke compliance for normative reasons, is less important than that they serve as the basis for forming accurate and stable expectations as to how others should and will behave.

A central dilemma for rule based federalism arises from the fact that national courts are asymmetrically situated relative to the national and provincial governments. Their vulnerability to the national legislature may often, or (one of us fears) typically, lead them to develop a deferential jurisprudence towards it that inhibits judicial enforcement of federal norms against national institutions. Even though no such vulnerability exists toward the provinces, the legitimacy of judicial interventions in the states will be in question if the judiciary is seen as overly deferential to national forces.

Thus, the judiciary can play an effective role in enforcing federal expectations only when it is

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23. The distinction between rules and norms that we employ is parallel in some respect to Dworkin's distinction between rules and principles, see Dworkin (1985), which in turn is derivative of Hart and Sacks' distinction between policies and principles. See Hart & Sacks (1994). For all three thinkers, principles, seen as the animating normative ideas "behind" a legal system, have direct force for normatively motivated agents, whether or not they give rise to specific legal rules.

[24] See Milgrom, North, and Weingast (1990).

[25] *Re Resolution to Amend the Constitution* (Patriation Reference) 1 S.C.R. 753 (1981).

politically independent of the national legislature.[26] That independence can be facilitated, but not assured, by the fragmentation of powers at the national level. Life tenure and protection against diminution of salary for national judges, difficult procedures for impeachment, and separation of the appointment from the confirmation power may protect federal courts from becoming captives of the national legislative authority. These protections are, however, of diminished consequence in periods when the political branches are ideologically united. They are potentially more important in periods when government is ideologically divided, but their significance depends upon the Court's being well-motivated to protect the overall federal arrangement rather than to pursue a more short-sighted substantive goal.

Structural Federalism

Federalism recognizes the existence of sovereign authority in any circumstances in which a governmental unit has a reliable prospect of asserting its assigned authority and defending it when it is challenged. Note that this definition of sovereign authority is much weaker than the claim that the unit can enforce its will against others in all counterfactual circumstances. The latter idea sees a sovereign as holder of ultimate authority and this view leads to a conception of sovereignty as necessarily unitary and is famously inconsistent with federalism as we understand it. On our account, a state can have sovereign authority if circumstances are such that it exercises jurisdiction in some domain and is not, for reliable

[26] Williamson, op cit., has expressed skepticism as to how far Chinese de facto federalism can go without attaining some juridical status. In our account such a development would take more than legal rules and norms and would require creating political conditions within which judicial independence could be sustained.

reasons, ever challenged (or is only rarely challenged) by the national government or other states. This circumstance might be based the existence of a normative structure enforcing compliance with sovereignty claims. Or, in the case of structural federalism, on the balance of resources held by the governmental units, on alliances among political or social forces, or on constitutional arrangements that permit provincial actors or institutions a direct voice in the formation of national majorities, making the formation of such majorities impossible without the concurrence of the provinces or their political agents.

This condition has two parts, one focusing on the government with a sovereignty claim and the other on the governmental units surrounding it. For a government to be sovereign in a domain it must be sufficiently decisive to assert a claim in that domain. Also, it must be the case either that the claim is rarely challenged or, if it is, that the claiming government can usually make its claim stand. In the case of federal arrangements, much of the bite in this definition will arise from the fact that, because of the structural division of powers within the national government, provincial sovereignty claims are rarely challenged. As a consequence, nonjuridically sovereign provinces can usually exercise their powers unchallenged. The danger to provincial sovereignty comes from the assertion of national preemptive power, and the challenge is to regulate the exercise of that power procedurally or structurally.

An apparent mechanism for regulating national preemptive exercises of power is to make it difficult for the national government to act without the acquiescence of the states. One can imagine numerous mechanisms for achieving this goal, though many of the mechanisms, such as a state liberum veto, are too costly to the polity's overall well-being (recall the political demise of Poland in the early modern period). Less costly mechanisms would include giving the states formal or functional control over membership in at least part of the legislature, requiring some kinds of national legislation to be

ratified by a majority of the states, vesting implementation of national programs in state officers, and so forth. Precisely which mechanisms are best suited for the particular polity may be a relatively ad hoc matter. In some cases, political traditions may evolve in the place of institutional provisions to fragment authority. For example, in Canada, voters generally "balance" their national representation by electing candidates from an opposing party to provincial office.[27]

A thesis that emerges from the foregoing theoretical discussion is that horizontal fragmentation of national power is a necessary but not sufficient condition for robust federalism. Fragmentation directly satisfies the first condition for federal stability: it checks the ability of the federal government to take advantage of the provinces. Fragmentation works indirectly on the second condition; it allows for effective juridical federalism, in which an independent court can combat defections from the provinces. To explore the different ways national power can be fragmented, and the ease with which national power can sometimes be reconsolidated to the detriment of federalism, we turn to our three historical case studies.

IV. **The Collapse of De Facto "Federalism" in Britain**[28]

Perhaps Great Britain is a surprising place to begin a story about federalism.[29] But Barry

[27] We are indebted to Brian Gaines for this suggestion.

[28] That a similar story could be told about decentralized economic development in China can be seen in Montinola, Qian, and Weingast (1995).

[29] Our account of British political development is indebted to that presented in Weingast (1995). Unlike Weingast's account, however, our emphasis on the role of a disorganized party system in providing a foundation for decentralization underlines the fragility of British arrangements in the face of a fundamental partisan realignment.

Weingast and Douglas North (1989) have argued that Britain effectively became a federal state -- in which localities were securely in control of their jurisdictions, if only de facto -- after the Glorious Revolution. Part of the Settlement of the Glorious Revolution was an agreement by the monarchy to share a substantial part of its authority with Parliament, which consisted of two chambers: the House of Lords, representing the nobility and clergy, and the House of Commons, which was representative of the propertied and commercial interests of the nation at the time. The post-1688 English (after 1707, British) division of national power between the Crown, the Lords, and the Commons -- the king-in-parliament model in which each of the three institutions had veto authority over legislation -- successfully fragmented national power. In this new system, obtaining new national legislation was arduous and parliamentary legislative output was limited compared to that in France in the same period.

Hilton Root (1984) has demonstrated some rather remarkable features of this new system. For example, "The King's Council in France was able to produce more legislation in an average four months than Parliament could in the entire reign of George I, more legislation in one year than during the reign of George II, and more legislation in any four years than the British Parliament accomplished during the entire sixty-year reign of George III." (1994, pp. 41-42) The difficulty of getting legislation made it imperative that the King and his ministers concentrate their influence, the famous system of "corruption" by which the monarchy secured Amanaged@ Parliament, to push bills of major importance to them, especially those concerning foreign and military policy. "The English Crown's authority fell primarily in the areas of state administration, foreign affairs, and in the management of the army and navy...royal administrators in England did not have means similar to those of their French counterparts to regulate the economy and divide the nation's commercial and industrial wealth." (1994, p. 44) Attempts by the

Crown to introduce enforce monopolies and to introduce excise taxes were repeatedly turned back by the parliaments of the eighteenth century.[30]

This sclerotic system permitted the local governments a great deal of leeway in setting economic policy. North and Weingast (1989) demonstrate that the fragmentation of power between the King and Parliament effectively prevented the national government from imposing taxes and regulations on commercial enterprises, and that such governmental activity occurred instead at local levels. Not only did the localities impose most taxes and regulations, these same localities were actively engaged in competition with one another for commercial advantage, and so the taxes and regulation remained relatively light. Of course, lacking a written constitution or a normative articulation of the formal powers of local governments, British federalism remained purely structural rather than juridical. Nonetheless, as our theory suggests, as long as national political power remained fragmented, de facto federal arrangements remained quite stable.

The system worked as follows: From about 1690 to 1832, British public administration and government were notably local in character.[31] Locally entrenched elites administered their communities largely without interference from Westminster. The pre-eminence of local government fit well with the

[30] For an example of a failed attempt to impose excise taxes during Walpole's administration see Price (1983).

[31] Our choice of 1690 as the beginning of a stable era of decentralized administration is somewhat arbitrary; for our purposes, we could just as well have chosen 1700, the year in which the Act of Settlement became law. The 1690s were a period marked by a relatively high level of partisanship and so, one would conjecture, would not be hospitable to sustained localism.
Indeed, if one sees the "federal aspects" of British rule as including not only localism but also relations among England, Ireland and Scotland, it is perhaps not surprising that these "British" relations were under great tension for as long as the partisan organization of British politics sustained itself: roughly until

characteristics of the public services being produced at the time. Police, sanitation services, and the maintenance of local roads probably did not offer economies of scale that would have rewarded more centralized production. More significant is the fact that most of the economic regulation that did occur was carried out at the local level. Indeed, transportation and communication were sufficiently costly to deter even consideration of more consolidated alternatives. The orientation of the localities to Parliament was through private bills for enclosures or other local projects and through patronage seeking by the local MP.[32]

Local governments and parliamentary constituencies remained remarkably constant over this period, and stable electoral practices evolved by which parliamentary seats were claimed and held by the same local elites who administered justice in their communities. As a result, the Parliaments of this period were highly fragmented, their members locally oriented and chronically difficult to organize to achieve any genuinely national project. This period, parts of which historians variously have characterized as the Whig oligarchy, the Namierite system, and the golden age of the MP, was one that saw the emergence of prime ministers capable of organizing, if only for the moment, a disparate and independent Parliament for purposes of pursuing Crown policies, principally in foreign affairs.

The Crown's influence in national politics was maintained by bargaining for control of a sufficient fraction of these seats (including the rotten boroughs) in an effort to influence parliamentary proceedings important to its interests. The resulting system was one of publically recognized "corruption" in which parliamentary seats were bid for by respectable families, ambitious merchants, and crown ministries.

1715 or so.

Some of the returns from this bidding flowed to the local electorates in the form of improved roads, waterworks, and other local projects. Some of the funds for the bidding came from the ministries, but much of it also came from the private purses of those who aspired to hold parliamentary office. (Namier YEAR?) Local constituencies often looked forward eagerly to electoral contests, seeing them as an opportunity either to "shake down" some ambitious local elites or to drain some money from the Treasury.

But after the period analyzed by North and Weingast, the political conditions for this de facto federalism -- the fragmentation of national power -- dissipated. The apparent stability of the system of locally oriented government was undermined in the nineteenth century by the growth of organized and disciplined parties.[33] Over a period of roughly fifty years, starting in about 1830 and accelerating with the passage of the Second Reform Act in 1867, the largely independent MP, usually elected without serious competition, intent on voting his conscience, and representing the particular claims of his local community, was replaced by the disciplined partisan chosen more often in contested election, focused on enacting his party's program. The system of private member legislation declined rapidly and was replaced by party programs pledging nationally oriented legislation. The norms and practices of cabinet government and party responsibility subsequently began to develop.[34]

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[32] See Cox (1987).

[33] Cox (1987) points as well to the attrition of the parliamentary rights of backbenchers and the expansion of cabinet control over the agenda in the Commons, a development that may be partly independent of the development of disciplined parties.

[34] The dating of these phenomena is somewhat imprecise. The important point for us is that the period of the three Reform Acts, 1832 to 1884, was one in which the parties became vastly more coherent and organized, and that as this occurred, the earlier system of parliamentary rights, privileges

As a result, beginning in the mid-nineteenth century, the system of decentralized administration that had characterized British public life became unglued, and Britain entered into a period of unitary governance. The fragility of decentralized political arrangements is well illustrated in modern British history.

Increasingly, disciplined parties shifted political action and administration to London on a variety of fronts, undercutting the system of local patronage-based administration within a few years and creating in its place majoritiarian parliamentary practices aimed at enacting national legislation and a centralized public administration run by a non-partisan civil service. Not surprisingly, these radical changes in the partisan organization of the House of Commons reinforced the traditional tension between it and the House of Lords, itself the last line of defense against the emergence of a unitary governmental system, and ultimately undercut the constitutional authority of the upper chamber.[35] Indeed, it is ironic, in view of this paper's concern with durable decentralization, that one of the last occasions on which the Lords was able to block legislation occurred on the Second Irish Home Rule Bill in 1893.[36]

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and organization was transformed.

[35] While we do not pursue the matter here, it is striking how weak the House of Lords and the Crown were in maintaining a semblance of a formal separation of powers. If anything, the institutional powers of the Crown in the legislative process were superior to those of the American President, and those of the House of Lords were at least comparable to those of America's Senate. Nevertheless, the political aspirations of both of these bodies declined with the partisan realignment in the House of Commons. The reason for this acquiescence must lie the in the absence of any popular base for the authority of these traditional institutions.

[36] The Lords thwarted Liberal/Labor/Irish legislation once again in the 1906-08 period, and followed up by rejecting the budget produced by Commons in 1909, thereby challenging one of the most profound constitutional assumptions of the British division of powers. The 1911 Parliament Act

With the rise of effective unitary government, what we now call the Westminster model, British courts came to adopt a jurisprudence that fit this new political reality. It was only in the mid-sixteenth century that English courts came to treat parliamentary statutes as authoritative "law," and for the next 150 years the courts approached such statutes with great flexibility, (Thorne 1942, p. 67; Cross 1987, pp. 9-11; Corry 1936) expanding the reach of some statutes under the "mischief rule,"[37] while constricting other statutes in order to avoid "unreasonable" consequences.[38] This judicial flexibility fit well with the localized nature of British politics during that period. By the mid-eighteenth century courts had begun moving toward a more literalist attitude toward statutes, however.[39] As a unitary government

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which ended the Lord's veto powers was the response.

[37] The "office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the act." *Heydon's Case*, 3 Co. Rep. 7a, 7b (Ch. Exch. 1584).

[38] *Stradling* v. *Morgan*, 1 Plowd. 199, 205, the court reported that "the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded on the intent of the legislature which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances."

[39] The development of a literalist interpretive regime occurred throughout the eighteenth century, often to be sure, in criminal cases where one would suppose that more expansive forms of interpretation would lead to unforseeable and therefore unjust results. A particularly clear statement of the new regime is found in the 1884 *Sussex Peerage* case, wherein Chief Justice Tindal wrote "The only rule for the construction of Acts of Parliament, is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense." (see Cross, 1987, p. 13). Only in the case of ambiguity may courts go beyond the statutory words and then, *only as far as the preamble to the Act.*

developed over the course of the nineteenth century, with the House of Commons at its Center, the courts were methodically working toward an astringent textualism, under which parliamentary commands would be taken seriously and applied literally and under which the courts forbade (until quite recently) the use of extramural materials for statutory construction.[40]

Textualism, then as now, was justified on the grounds that statutes provided the best and most accurate expression of the popular will and that any "errors" produced by a literalist approach to statutes could and would be remedied legislatively. The features of the Westminster model made this assumption particularly plausible in British circumstances. Parliamentary sovereignty together with unicameralism and majoritarianism permitted parliament to react quickly to deficiencies the laws, revealed in their literal application. In any case, Parliament was not content merely to trust the judiciary to defer to its statutes: in 1850 and 1889 it enacted Interpretation Acts, which attempted to spell out in detail how statutory provisions were to be construed. In addition to its more technical provisions, the 1889 Act instantiated part of the transformation that had occurred in British politics. It required courts to construe legislation enacted after 1850 as public rather than private law, and to interpret such statutes broadly and not as private bargains to be narrowly understood.

The textualism of British courts on matters of statutory interpretation stood in contrast to older methods of common law development and amounted to a marked diminishing of judicial independence

[40] The exclusionary rule was (apparently) first articulated in *Millar* v. *Taylor*, 4 Burr. 2303, 2332 (1769), though it was not rigidly applied until the late nineteenth century. Even after that point, extrinsic materials could be used to establish a statutory purpose. The House of Lords in *Pepper* v. *Hart*, 1 All E.R. 42 (1993), abolished the rule and permitted reference to parliamentary materials in many circumstances.

from Parliament. This reduction of judicial independence is not best seen as in any sense a natural doctrinal development of British law but was a recognition of a new political reality in which the Commons became the font of institutional legitimacy within British political life and was in fact able to impose its imprint on law relatively easily.[41]

Historians often explain the transformation of British governmental forms and practices by pointing to evolution in the British economy or to the changing place of Britain in world politics. But the fact is that these developments had been occurring gradually since early in the eighteenth century without undermining the localist administrative system. We do not deny, of course, that these developments had a causal role in increasing the "demand" for nationalization. But the "supply-side": the ease and rapidity of the political transformation is probably better explained by the absence of genuine institutional supports for localism. There was, simply, nothing in the British constitutional system to stand in the way of highly organized and disciplined parties once they appeared on the scene. The House of Lords by the middle of the nineteenth century not only lacked institutional legitimacy, but had no systematic connection with local administration. The monarchy had its own reasons to support the expansion of national authority in a variety of domains.

Thus, not only were there no real constitutional bases for localist resistance, the judiciary had by

[41] The transition from the purposive regime articulated in *Heydon's* case to the textualist one in *Sussex Peerage* was somewhat more gradual than might be inferred from our brief treatment. There was an intermediate maxim that evolved in eighteenth century -- sometimes called in Great Britain the "golden rule" -- which said that "words ought to be understood according to their plain and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause from whence it might be inferred that the intent of Parliament was otherwise." (Chief Barrister Parker, Mitchell v. Torrup, 1766; see Cross, 1987, p. 15).

then become too vulnerable to Parliament, especially to the newly partisan House of Commons, to validate such forces had they existed. The result was that most of the economic regulation that occurred took place on the local level. Within this system, competition among localities exerted a steady downward pressure on tax rates and restrictive regulations as well as on their enforcement.[42]

This case illustrates that the fragmentation of national authority might be a necessary condition for durable federalism. As long as the separation of powers aspects of the British system remained resilient (as they did into the eighteenth century), and as long as the parties were fragmented and disorganized, local authority remained secure. This security was not based on judicial enforcement of federal constitutional expectations, as such expectations did not exist. Insofar as judges restrained parliamentary intrusions into local and private conflict, they did so in the name of protected common law rights, not structural constitutional rights. And in any case, this line of protection weakened over the course of the eighteenth century. The principal protection of local spheres of action was structural. Parliaments of this period were too fractious and disunified to agree to substantial national regulatory legislation.

The fact that the political basis for British federalism was both fragile and eroding meant that it was not robust to the collapse of the ANamierite@ system. The absence of either an explicit federal

[42] Weingast and North (1989) have argued that this situation was behind the vast expansion of British enterprise in the eighteenth century and, subsequently, to Britain's becoming a global power. This is, of course, a reversal of the more traditional argument in that it traces the economic transformation to political causes.

bargain or an implicit understanding that laid out separate spheres of decision-making authority within which different institutions could expect to govern more or less autonomously, meant that there was no juridical impediment to expanding parliamentary claims. Even had such expectations existed, however, once parliament attained a sufficient degree of partisan cohesion British courts were no longer sufficiently independent to vindicate them. The absence of institutional restraints on the political centralization made possible increasing national demands on localities and removed any real chance of resistance to these demands in court.

Only at the level of the relations among the British states, specifically with respect to Ireland and Scotland, could one discern explicit juridical federal expectations. But the irony of the Irish situation within Britain, a situation in which the Parnellites had become pivotal to the formation of Liberal governments, made Home Rule an issue that was central to the Liberal agenda. The effect of this was to undermine the independent authority of House of Lords when it tried to block such efforts, thereby increasing the unitary nature of British government. In the absence of legal impediments to concentrated national power, the only recourse was submission to London or political resistance.[43] In our view, this as much as anything else led to the separation of The Republic of Ireland from Great Britain and to the continuing energy of separatism in Northern Ireland.[44]

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[43] As we write the Blair government has begun an effort to devolve some authority onto the Anations@ and perhaps recreate British Afederalism.@ Insofar as British national institutions remain effectively unitary **B** the devolution is merely statutory after all **B** our analysis suggests skepticism about the prospects for success.

[44] For an illustration of an attempt to overcome the deficiencies of unitary government see Spiller

V. The Erosion of Juridical Federalism in Canada

If the British case demonstrates the importance of structural support for federalist practices, Canadian history further underscores its necessity. Canada has little structural safeguard against national usurpation of provincial domain; instead, for the first half of its history as a federation, an unusual source of juridical federalism monitored the national government. An institutional shift eliminated the juridical safeguards protecting the provinces, and, we argue, motivated provincial interests to rally against the potential for increased centralization. The Canadian case demonstrates the insufficiency of provincial constraints; if stability is to be secured, the national government must also have institutional incentives to respect jurisdictional boundaries.

For the first eighty years after Confederation, an unusual institutional mechanism helped support stability. The legal rules defining the relationship between the national government and the provincial governments were policed by an unlikely juridical form: the Judicial Committee of the British Privy Council, a high court structurally independent from the influence of Canadian politics. As long as the Judicial Committee retained judicial review authority over Canadian statutes, which it held until 1949, the provinces could use the courts to protect themselves against federal encroachment, permitting the development of juridical federalism. The Judicial Committee regularly enforced limits on federal power through the application of a set of legal rules and doctrines that it developed over the eighty years that it retained appellate authority.

Once that appellate authority disappeared, however, the provinces effectively lost the capacity

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and Vogelsang (1994).

to protect their powers from central incursions through the appeal to legal rules. While, as we shall see below, there is some reason to think that the federalist norms that evolved during the Judicial Committee era retained some authority (even if they were not reliably enforced), the rule-based legal restraints on Ottawa have largely disappeared. As a result, the potential for unchecked action by the federal government, even if that potential has not been realized, has driven the provinces to agitate for change outside the legal system, resulting in chronic and volatile political instability.

While we emphasize the changing institutional structure to explain the shift in Canadian federalism, another important characteristic of the Canadian polity cannot be ignored. Canada is a state of (at least!) two societies and cultures, and the ethnic tensions between them often seems to be the source of instability of the federalism. Indeed, commentators commonly explain the chronic instability of the Canadian federation in terms of cultural and linguistic conflict. Our account is quite different. We believe that the intensity and political nature of cultural conflict is best seen as endogenous. The change in institutional rules (the patriation of appellate authority) caused minorities to lose confidence in the protection of their values within the federal system. Faced with this loss of legal protection, the only course left to them was to attempt to erect political barriers.

Both norm-based and rule-based juridical federalism have early roots in Canadian history. The tradition of federalism was established 25 years prior to the enactment of the British North America Act. In law, the Act of 1840 created a union between the two Canadian regions, Upper and Lower Canada, to be governed under one Parliament without regard to regions, which it was expected would imply a British domination over the French Canadians. In fact, the British Canadian leadership soon

realized that they could not govern without the participation of francophone leaders as well.[45] As early as 1842, Sir Charles Bagot invited a French Canadian leader into his cabinet along with an anglophone. The tradition of dual ministerial appointments continued until confederation in 1867.

The institutions created under the Act of 1840 were ill-suited to manage a de facto federalism, and deadlock and instability were common. (Russell, 1992, pp. 13-14) Delegates from the provinces of Canada (Upper and Lower) met in Quebec City to propose a structure for the new union. All were in agreement that the new union should be based upon the Westminster system of parliamentary government, but modified into a form of federalism to protect the needs of the region's two distinct populations. The anglophones of Upper Canada, led by John Macdonald, were largely in favor of a highly centralized federalism, where primary responsibility for the nation's governance would rest with the general government, while the francophones of Lower Canada, argued for a much looser alliance, with much more sovereignty retained at the provincial level. The arguments on either side remain to the present day; anglophones (at least Ontario) believe that only a centralized federalism can promote the stability and coordination necessary to generate growth, while French Canadians (occasionally joined by other regionalists) argue that only by retaining most governmental authority at the provincial level can distinct populations be preserved.

The result of several rounds of negotiation, the British North America Act of 1867 created a

[45] Stanley, 1956, pp. 99-102. Our paper argues that the characteristic gridlock of pre-1867 Canada was probably not corrigible by creating a stronger central government. The recognition that dual ministerial appointments were necessary for governability prior to 1867 was a sign of the wisdom of the governments of that period. Something like the same practice would have to evolve after the adoption of the BNA if Canada was to remain viable.

union between upper and lower Canada together with the maritime provinces and became independent Canada's de facto constitution. The provisions for juridical federalism were evident in the enumeration of powers, which is a compromise between provincialist and nationalist concerns.[46] Section 91 authorized the federal government to regulate trade and to control foreign affairs and taxation, while section 92 granted the provincial governments the last word on matters related to education, hospitals (later interpreted to mean health care), and social services, as well as all matters that did not expand beyond provincial boundaries. Criminal law was to be in the federal domain, although certain administrative duties were to be left with the provinces. Section 91 also left the residual powers to the federal government, contained in the opening clause granting legislative authority for the "peace, order and good government" of all of Canada.[47] What did not exist, however, were adequate guarantees of structural federalism. The national government was only nominally fragmented. Although it had a bicameral legislature, the upper house was as ineffective in design as the British House of Lords at representing provincial concerns.[48] True to the Westminster model, the legislature and executive were fused. While

[46] Speaking at the 1865 Confederation Debates, Hector Langevin, Solicitor General of Lower Canada, expressed the view of many French leaders: "The Central or Federal Parliament will have the control of all measures of a general character.... It will be the duty of the Central Government to see that the country prospers, but it will not be its duty to attack our religion, our institutions, or our nationality, which...will be amply protected." See Cook, et al, eds., 1967. pp. 367-8, 105n.

[47] The opening text of section 91 reads: AIt shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws, for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces.@

[48] In the text of the London Resolutions (the document that immediately preceded the final BNA Act as passed by the British Parliament), it is written that the Senate appointments would be made from the provincial legislatures, and a strict distribution of the provincial representatives was allotted. The text appearing in the BNA Act grants the Governor General the power of senatorial appointments.

the BNA Act formally specifies judicial independence, the court is often perceived as linked to the national government.[49] With little structural fragmentation, Canada was dependent upon juridical mechanisms to support its federation.[50]

The separation from Britain was incomplete; it was this lingering connection, we argue, that sustained the Canadian federation. Although the world recognized Canada as a sovereign country, ultimate legal authority still resided in London. The British Parliament alone could approve amendments

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Although this may be interpreted as a setback for the provincial powers, included in the comments for the change is a note that this was greatly discussed in the London meetings and that it even appeared in several of the drafts as such. O'Connor, 1939, Annex 4.

[49] It seems as if the court was originally intended to be subservient to the national legislature. The text of section 33 of the London Resolutions reads: "All courts, judges and officers of the several Provinces shall aid, assist and obey the general Government in the exercise of its rights and power, and for such purposes shall be held to be courts, judges and officers of the general Government." This section was removed before the BNA Act was written. No minutes were taken of the deliberations of the London Conference to write the BNA Act, so we do not know with certainty the reasons for the elimination of this section. However, the concordance prepared by the Colonial Office to explain the changes between the (Canadian) London Resolutions and the (British) BNA Act reads: "As to Court and Judges this resolution was dropped. The Judges were bound by their office. As to Officers of the provinces, the Resolution, redrafted, survives as section 130 of the Act." The texts of the Quebec and London Resolutions can be found in Kennedy (1930). However, a detailed comparison of the transitions from the Quebec Resolutions to the London Resolutions, and from the London Resolutions to the BNA Act itself, can be found in O'Connor, 1939, Annex 4. Any doubt as to the legal independence of the court justices was thereby removed, although some justices may have felt some duty to side with the federal government nonetheless, and we may thereby see some of the rationale for court members: deference to the national legislature.

[50] In a succinct analysis of provincialist claims in the Canadian founding period, Vipond argues that all parties understood that a third party would be necessary to resolve jursidictional disputes, interpreted, most likely, to mean either the courts or an imperial power. See Vipond 1991, especially pp. 34-35, and the discussion of the political thinking of David Mills, who recognized the importance of the courts to act as umpire over the inevitably blurry jurisdictional boundaries, pp. 158-9. Vipond also emphasizes the importance of the Judicial Committee in the early years of federation, which extended beyond its decisions to influencing the actions taken by the governmental agents at both the national and the provincial levels. For a formal analysis of this case, see Bednar (1998b).

to the original B.N.A. Act, which was after all a British statute. In matters of interpretation, despite the subsequent creation of a Canadian Supreme Court, the Judicial Committee of the British Privy Council served as the final court of appeals, a forum insulated from Canadian politics.

For most of the thirty years following the enactment of the BNA Act, nationalistic Conservatives, led by John A. Macdonald, controlled the government. Macdonald=s vision of provincial authority was narrow; he worked to establish the political conditions for a genuinely nationalized form of government.[51] Macdonald's government made full use of the powers to disallow provincial legislation. Russell reports that between 1867 and 1896, sixty-five provincial acts were disallowed (Russell, 1992, p. 39), provoking the development of a partisan opposition at the provincial level and of appeals to the judiciary to adjudicate jurisdictional claims. The Canadian Supreme Court, though it was created in 1875 under a short-lived Liberal Government, rapidly became the creature of nationalist Conservatives and ruled repeatedly against provincial claims.[52]

The political response to this was the development of the opposition Liberal Party in the

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[51] See Simpson (1988). Simpson emphasizes first John A. Macdonald's extensive use of patronage to build the Conservative Party into a national political party, and subsequently Wilfred Laurier's development of Liberal Party using similar tools first in Quebec and then nationally.

[52] The early decisions of the Supreme Court were nationalist. In *Severn* v. *The Queen* 2 S.C.R. 70 (1878), the court struck down an Ontario statute licensing brewers as *ultra vires*; two years later, it repeated this interpretation of the trade and commerce clause in *City of Fredericton* v. *The Queen* 3 S.C.R. 505 (1880). The Supreme Court also seemed hospitable to an expansive reading of the peace, order, and good government clause. In *Severn*, Henry J. wrote: "*Everything* in the shape of legislation for the peace, order and good government of Canada is embraced"..."sub-section 29 [of section 91] goes further and provides for exceptions and reservations in regard to matters otherwise included in the power of legislation given to the Local Legislatures".... "Every constituent, therefore, of trade and commerce, and the subject of indirect taxation, is thus, as I submit, withdrawn from the consideration of the Local Legislatures, even if it should otherwise be *apparently* included" (italics his). 2 S.C.R. 70.

provinces and the escalation of federal division of powers into a partisan issue. Led by Oliver Mowat, the Liberal Premier of Ontario, five of seven provinces convened to petition the British Parliament to amend the constitution abolishing the federal power to disallow provincial legislation. When this initiative came to nothing, the provinces turned their efforts to judicial appeals to the Privy Council. On Ontario matters Mowat himself sometimes journeyed to London to be present for the appeals.

The Judicial Committee turned out to be remarkably hospitable to provincial claims and over the next seventy years it evolved a narrow reading of the federal residual powers,[53] and construed the national exclusive power over trade and commerce to apply only to international trade and the interprovincial movement of goods.[54] As importantly, it construed the provincial authority over property and civil rights as a broad general contracts clause, imposing thereby a limit on national regulatory

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53. The Privy Council did turn to the peace, order and good government clause (p.o.g.g.) in *Russell* v. *The Queen*, 7 App. Cas. 829; I Olmsted 145 (1882), when they decided to sustain the Canada Temperance Act. The case offered the Privy Council a chance to review the decision of the Supreme Court in the *Fredericton* case. Although the Judicial Committee agreed with the Supreme Court that the Act was valid, the Committee disagreed with the manner by which the Court had reasoned the case. The Committee rejected the use of section 91(2), instead using the p.o.g.g. power. In this manner they were able to maintain the narrow construction of the trade and commerce clause established in *Parsons*. However, the Privy Council became increasingly reluctant to accept arguments based upon such a general grant of power to the federal government, and made its narrow conception clear in the Local Prohibition Case. In upholding a local prohibition statute from Ontario, Lord Watson, writing for the court, gave a narrow construction of the p.o.g.g. clause saying "To attach any other construction of the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s.91, would... not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces." *A.G. Ontario* v. *A.G. Canada* (Local Prohibition Case) A.C. 348; I Olmsted 343 (1896).

54 In *Citizens Insurance Co.* v. *Parsons*; *Queen Insurance Co.* v. *Parsons*, In the Privy Council, 7 App. Cas. 96; I Olmstead 94 (1881), the Judicial Committee held that insurance contracts fell within the provincial (Section 92(13)) authority over "Property and Civil Rights", rather than the national (Section 91) powers over trade and commerce, arguing that national powers extended only over

authority. Russell writes that of twenty division of powers issues decided by the Judicial Committee between 1880 and 1896, fifteen were resolved in favor of the provinces. (Russell, 1992, p. 42)

In so acting, the Privy Council served as the shield for the provincial governments who lacked any internal structural protection from encroachment of the federal government into their jurisdictions. It is not necessary to argue, as some might, that the Privy Council was biased in favor of the provincial governments over the federal government. The higher number of pro-provincial resolutions was partly due to the great number of pro-federal resolutions at the Supreme Court level. The Privy Council might be better viewed as a balancing element. As modern legal analyst Barry Strayer has written, Aour constitution can sustain strong government at either level.@ (Strayer, 1968, p. 216) It may be true, however, that it was easier for the Privy Council to rule against the federal government than the Supreme Court; that despite the nominal independence of the court as guaranteed by the BNA Act, the Supreme Court depended upon the rest of the federal government and therefore tended to side with it. The Privy Council was removed from the Canadian political influence, and therefore more capable of balancing provincial interests with national.

Separation from Canadian politics had its costs as well as its benefits. One might say that the Privy Council was out of synch with the rest of Canada; that it artificially maintained the same level of centralization when the dynamics of the federation called for a natural shift inward. During the Depression of the 1930s, the government of Canada proposed legislation that paralleled Roosevelt's New Deal agenda. At this point, the British Justices overturned nearly the whole of the Conservative

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international trade and commerce.

Party's New Deal Program as being *ultra vires* of the Canadian Parliament.[55] In response, the federal government decided to begin action to eliminate appeals to the Privy Council.

There had already been movements throughout the Empire as well as in Britain itself to limit the right of appeal to London, culminating in the Statute of Westminster of 1931, which established that the power to abolish appeals to the Privy Council now rested with the Dominion parliaments. Court proceedings soon followed. The *British Coal Corp*[56] case of 1935 abolished Privy Council review of federal laws, but it wasn't until 1947, in *Atty General of Ontario v. AG Canada* (ref re abolition of Privy Council Appeals)[57] that appeal to the Privy Council concerning provincial laws was abolished. The case originally appeared before the Supreme Court in 1940,[58] which decided in the federal government's favor (by 4-2): appeals to the Privy Council regarding provincial law were to be abolished. Four provinces appealed to the Privy Council (BC, NB, Ont., PQ). In evidence that the federation needed a natural adjustment, two provinces, Manitoba and Saskatchewan, supported the federal government's position. The amendment which made the Supreme Court of Canada the final court of appeal was finally enacted in 1949. However, a grandfather clause kept cases in the Privy Council for another decade. The impact of the structural change was quickly felt throughout the

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[55] Alan Cairns (1971) reports that by 1937, in a series of decisions, the Privy Council invalidated the New Deal legislation of the Bennett government. Cairns notes that most legal observers believed that the legislation struck down was of dubious constitutionality and that, in any case, the Bennett government had been turned out of government in 1935 and his successor evinced little support for the bills.

[56] *British Coal Corp.* v. *The King* A.C. 500, 520 (1935).

[57] *A-G Ont*. v. *A-G. Can*. (Privy Council Appeals) A.C. 127 (1947).

[58] The delay from 1940 to 1947 was due to the war.

country.

The parliamentary form of Canadian government, together with relatively unified parties, make it comparatively easy for majorities to form and enact legislation. Moreover, Canadian parties have been highly disciplined and programmatic parties for most of their histories. Our analysis of the British case would suggest, therefore, that Canada was not fertile soil for a durable federalism. But until 1949, when the Canadian Supreme Court became the ultimate appellate authority, the powers of the Canadian Parliament were tightly circumscribed by a politically independent tribunal. The Judicial Committee had systematically acted to provide a secure constitutional basis for broad provincial jurisdiction from 1880 until the end of the Second World War, and as long as its provincialist doctrines remained in force, the federal nature of the Canadian constitution was preserved.

Since 1949, however, with the patriation of appellate authority, the provinces have steadily lost much of the constitutional ground they had gained under the Judicial Committee. The Canadian Supreme Court, while asserting doctrinal allegiance to earlier decisions, has regularly ruled in favor of expanding national legislative authority. To a great extent, these ruling have come about by means of adopting jurisprudence deferential to parliament. However, unlike the tradition of nineteenth century British courts, Canadian statutory jurisprudence has not taken a textualist form. It did not call for a strengthening of received British judicial traditions but instead proceeded by articulating broader readings of the general peace, order and good government clause (effectively saying that the national government can deal with any problem having a "national dimension"[59]), and gradually developing a

[59] The limitations on this doctrine are given in *R. v. Crown Zellerbach Ltd.* (1988) 1 S.C.R.401, which states that "The national concern doctrine applies to both new matters which did not exist at

generous construction of national authority over trade and commerce.[60] The court has also found a "dormant" aspect to federal powers over trade and commerce that forbids provincial regulations that discriminate against nonresidents or protect local producers.[61]

The court did not restrict itself to finding an expansive constitutional basis for federal authority. It also stopped showing deference to provincial efforts to regulate in these newly created federal domains. In allowing federal action in anti-trust, securities regulation, and environmental protection, for example, the fact that the provinces had been already engaged in regulation in these areas did not stand

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Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency become matters of national concern." While some aspects of the national dimensions doctrine had appeared earlier, its development accelerated after 1949. Predictably, some Québécois judges have been apprehensive about these developments. Justice Jean Beetz criticized re-characterizing as national domains traditionally interpreted as provincial in his dissent in *Reference re Anti-Inflation Act* (1976) 2 S.C.R. 373. Swinton (1992, pp. 126-7) writes AIt is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the provincial legislatures, would disappear not gradually but rapidly.@

[60] In *General Motors* (1989) 1 S.C.R. 641, the court devised a Ageneral regulation of trade@ doctrine, A...which allows Parliament to create policies aimed at the economy as a unit, rather than at a particular trade or business, despite its impact on intraprovincial business activity.@ (Swinton, 1992, p. 127). This doctrine permitted the national government to formulate a competition policy based on its authority to regulate trade. Previous competition statutes had rested on the federal power to make criminal laws.

[61] Justice Martland wrote for the Court that A. . . the plan at issue not only affects interprovincial trade in eggs but aims at the regulation of such trade. It is an essential part of this scheme . . . specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.@ *A.G. Manitoba* v. *Manitoba Egg & Poultry Assoc*. S.C.R. 689 (1971). This decision represents a clear departure from two Judicial Committee decisions upholding provincial regulatory schemes that had impacts on producers from other provinces: *Home Oil Distributors Ltd.* v. *A.G. B.C.* S.C.R. 444 (1940), and *Shannon* v. *Lower Mainland Dairy Products Board* A.C. 708 (1938).

in the way. That provinces had traditionally acted to regulate in these areas was no impediment to federal intrusion.

The expansive readings of Section 91 powers since 1949 echoed the broad readings of the Commerce Clause given by the American Supreme Court after 1937. We can see in retrospect that U.S. Supreme Court deference to Congress in this regard was a temporary phenomenon and could have been reversed in the right political climate. In the unitary context of Canadian institutions, however, we doubt that such backsliding is likely. The Canadian system lacks the structural bounds that constrain defections in the federal relationship. No formal political institution exists to check the federal government from encroaching upon the provinces. Instead, Canada must rely upon variations of juridical federalism. In the Privy Council period, legal rules, enforceable through the courts, maintained the federal-provincial balance. These rules worked together with federalism norms, especially the convention that the provinces should be consulted on any explicit modifications to the division of powers. Under the Supreme Court (but prior to the Charter), the nature of the federal relationship was allowed to shift, but was still mildly maintained by the constraint of norms and practice.

One important norm does impose a separation of powers-like restriction on federal action. For some major constitutional issues, the Prime Minister meets with the ten Provincial Premiers for approval. The importance of this norm was demonstrated in the *Patriation Reference*, 1981. Several provinces challenged Prime Minister Trudeau's decision to patriate the constitution, without first gaining the approval of the provinces.[62] The court decided that although Trudeau's plan would alter the nature of

[62] The principal provincial objection was with the Charter of Rights and Freedoms, a new document that guaranteed rights for individuals, but also extended rights to communities. The inevitable conflict

the federal relationship, and therefore that a convention of provincial consultation existed,[63] that such a norm was not legally enforceable and therefore that the provinces had no recourse to the court.

The legal effect of the court's decision was to free up Trudeau to pursue patriation as he had originally intended. However, the court's declaration that Trudeau would be breaking an established convention placed political pressure upon Trudeau and he no longer felt that it was feasible to ignore the provincial concerns. (Russell 1987; Hogg 1992) The impact of the Charter upon provincial powers was lessened.[64] Although it worked in the *Patriation Reference*, reliance upon practice to sustain the federal relationship is risky. For this reason, demands to create structural checks on federal power are increasing, as we will describe below.

The Charter of Rights and Freedoms has again upset the balance in the division of powers. The interests of federalism and those of individual rights can contradict one another. Indeed, one reason for the establishment of federalism is to protect regional identities, while the concept of individual rights

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between these two objectives would without doubt end up on the Supreme Court=s docket, and the court would become very important in deciding what the new constitution meant. Several provinces are leery of any increased role for a court they distrust. For a discussion of the legal complexity of these competing goals, see Swinton, 1990, pp. 338-348.

[63] While the court found that a convention existed in the *Patriation Reference*, it failed to recognize such a norm in the *Senate Reference* (1980) 1 S.C.R. 54. In the *Senate Reference*, the court did not find a convention that would command the federal government to consult the provincial governments on the proposed amendment to the Senate, even though such an amendment would be "of interest" to the provinces. The court has thus drawn the line at recognizing the convention of provincial consultation only when the legislative power of the provincial governments are directly at stake. See Monahan (1987).

[64] The most important change was the addition of the notwithstanding clause, which allows Parliament or the provinces to enact legislation notwithstanding the guarantees of rights in the Charter. These exemptions expire after five years unless re-enacted.

implies a more national, or universal, interpretation. With the adoption of the Charter, the Canadian Supreme Court has had a grossly expanded docket of complex cases in the demand to define the appropriate interpretation of the Charter. At times, this task raises issues which clash with the goals of federalism.

Peter Hogg writes that federalism claims should be superior to Charter claims.[65] However, he continues to say that the Court needn't decide the federalism issue before the Charter issue, when both are raised. In fact, it might choose the Charter issue first.[66] In this scenario, federalism questions will be side-stepped as the Charter limits are defined, and the federalism question will only be addressed if the Court finds that the case passes the Charter test first. Nevertheless, provinces are worried about the potential to sap their power that the Charter raises. Despite Hogg's judgment that federalism powers should not be trumped by the Charter, the court has been inclined to read the Charter broadly.

Of perhaps the greatest concern to the provinces is that the introduction of the Charter places the justices in a highly political position, as it works in the next decade to define the limits of the Charter, without subjecting it to the same political constraints that provided the only force, however weak, to check the federal government from encroaching upon provincial territory. Still, the Charter has not

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[65] Hogg's logic is as follows: "It is impossible for a nation to be governed without bodies possessing legislative powers, but it is possible for a nation to be governed without a Charter of Rights. The Charter of Rights assumes the existence of legislative powers, although admittedly it imposes limits on these powers. I conclude that the argument that a law is invalid because it is outside the powers conferred on the enacting body by the federal part of the Constitution is a prior, or more radical, argument than the argument that a law is invalid because it offends a prohibition contained in the Charter of Rights." Hogg, 1992, p. 373.

[66] Paul Weiler (1973) has argued that prior to the enactment of the Charter, the Court often resorted to federalism grounds for overturning legislation that the Court felt violated certain rights, and

replaced legislators with judges as lawmakers. Although the vast majority of the Court's cases are considerations of the legality, under the Charter, of legislation,[67] the Court has been largely unable to come to unanimous decisions (Swinton 1990, pp. 335-337), leaving the Parliament with little guidance and upsetting the legitimacy of the Court's rulings. Nevertheless, it is the potential for encroachment that is disturbing to the provinces, and will cause increased demands for institutional reform.

From the rise of regional parties to the perennial demands of Quebec for increased sovereignty, the evidence of instability is pervasive in the Canadian polity. In the summer of 1990, the Senate, traditionally a rubber stamp for House legislation, threatened to veto an important tax bill. Progressive Conservative Prime Minister Brian Mulroney drowned the Senate activism by adding Senators until the Progressive Conservatives had a majority in the upper chamber, in a move that was constitutionally legal but unconventional--a virtual guarantee of damnation in Canada. Because of his support for the unpopular tax, Mulroney's popularity rating had plummeted to a record-setting low of 12%; his tampering with the institutional structure so outraged the electorate that it guaranteed that he would not recover.

The prospects for a solution based upon some version of a compact philosophy of the founding have been greatly reduced by the heightened awareness of the multicultural aspects of the Canadian society. Whereas it might have been possible to arrive at a constitutional compromise if Quebec was the

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therefore should not have been invoked.

[67] See, for example, Monahan 1987, and Russell, 1986, p. 576. Russell estimates that 1500 cases related to the Charter came before the various courts in the first three years of the Charter; the diversity of the various provincial courts means that until the Supreme Court can get to them, the Charter will mean different things in different parts of the country.

only special society demanding recognition (as contemplated at Meech Lake, 1987), the recognition of the indigenous societies as well as the various minority communities, whose claims to privileges have been legitimized by court interpretations of the Charter, made such a compromise impossible (Meech Lake 1990, Charlottetown 1992). Rather than create one society of all Canada, and hence increase the pressure for centralization of power, the newly recognized communities have begun to fight for increased autonomy in ways that defy traditional federal dynamics. Possibly the manner by which the institutions will be redesigned will follow a more consociational, rather than federal, path. But, if that is the case, the sense in which Canada will remain a recognizable state rather than a mere alliance of smaller sovereign entities remains to be determined.

VI. The Strength of the United States' Hybrid of Structural and Juridical Federalism

The U.S. Constitution, as it was formulated in the Philadelphia Convention and ratified by the states, is filled with expressions of federalism norms.[68] What is particularly significant about American federalism, however, is that the Framers understood the federal commitment problem and offered both structural and juridical conceptions of federalism as complementary solutions to it.[69] There is no question that Madison and the other framers of the constitution intended that the Supreme Court would

[68] Starting with enumeration of national powers, continuing through the guarantee clause and the supremacy clause, and on to the reservation of unexpressed powers to the states, the Constitution remains the classical expression of a normative understanding that the states and the national government would be supreme in their respective spheres.

[69] Alexander Hamilton's Federalist No. 78 articulated a juridical protection for federalism that was implemented by the Supreme Court in *McCulloch* v. *Maryland* 17 U.S. 316 (1819). James Madison's Federalist ##10 and 45-46 articulated structural protections for federalism that was later the basis for

review state legislation. Such legislation represented, for Madison and others at Philadelphia, the most frequent source of unjust laws; perhaps the most important effect of reconstituting American government was to place some restraints on self-dealing by the states. But the founders were certainly less clear about the need or possibilities for judicial restraints on the national government. This is not to take a position on the vexed issue about whether judicial review of federal legislation was Aincluded@ in the constitutional scheme, but only to say that the need for such review was seen as less pressing to the framers of the Constitution. And, lacking enforcement powers, the judiciary was seen as the weakest of the three branches of the federal government and was unlikely to be willing or able to oppose Congress=s will for very long.[70]

Indeed, the opponents of the proposed Constitution were much more worried about the potential powers of the judiciary in the federal scheme. As far as the framers of the Constitution went in providing guarantees for the authority of the states **B** leaving to the states all unenumerated powers and effectively giving state governments representation in the Senate[71] **B** it was not sufficient to convince

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Garcia v. *San Antonio Metropolitan Transit Auth.* 469 U.S. 528 (1985).

[70] Events soon confirmed these suspicions. Witness the Court=s meek acceptance of *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299, 2 L.Ed. 115 (1803) in which Congress effectively fired 16 presumptively life-tenured federal judges by repealing the 1801 Judiciary Act.

[71] The fact that the Senators were to be chosen by state legislatures rather than directly by the electorates and that the Senate shared with the executive the appointment powers for high ministers and the Supreme Court, illustrates the formal structural protections provided for states. In Federalist 45 and 46, Madison argued that the states had other, extra constitutional, means to protect themselves from unjust federal legislation. He estimated that the states could put about half a million men under arms, compared to thirty thousand or so commanded by Congress. Short of a call to arms, their hold on popular affections would enable the states to provide a reservoir of effective political power as well that would oppose unjust congressional designs.

many of the anti-federalists. Brutus presciently offered a powerful critique of rule based juridical federalism, arguing that it would devolve into an arbitrary government run by judges. Life tenured judges could not be controlled by the other branches and would soon find ways to escape constitutional fetters. He and Federal Farmer also criticized the structural protections in the Constitution on the grounds that they would simply be incapable of restraining a Congress determined to make use of the open ended necessary and proper clause.

These concerns and others led several of the state ratifying conventions to attempt to insist on amending the proposed Constitution to provide explicit protections for state authority. While those attempts were successfully resisted, Madison and other Federalist leaders agreed ultimately to incorporate some of the proposals as Amendments to be offered by the First Congress. While those first amendments did introduce a number of limits on Congressional powers, the only explicit protection for state jurisdictions was the notoriously vague Tenth Amendment.

The conventional wisdom among law professors has been that juridical federalism is unworkable **B** at least the rule based version of it -- and that structural features of the constitutional system must be relied upon to ensure that the federal government and the states keep to their appropriate federal roles. (Wechsler 1954; Choper 1981) The conventional wisdom among political historians has been that these constitutional structures have not in fact been able to prevent the creation of a strong national government that has substantially eroded the autonomy of the states. (Ostrom WHAT WORK IS INTENDED? NEED YEAR & ADD TO BIB IF NOT 1991; Riker 1955)

Historians are right to argue that there has been an expansion in national authority over the history of the republic and that structural forces have not been sufficient to stop it. And constitutional

lawyers are also right to note the Court has been reluctant to attempt to enforce constitutional rules to restrain this evolution. Thus, one might be tempted to conclude that there is nothing in the constitutional system sufficient to maintain federalism. But it seems to us that American federal practices have been enormously robust in the face of massive changes in the nature of the society and the economy. The states and localities are still vibrant sources of policy determination and the federal government, as large as it has become, participates more often as a partner of state and local government than as a central commander. The growth of federal power has in fact been episodic and halting. Congress has only rarely claimed the full extent of authority that seemed theoretically available to it at any particular moment in time. And even when such authority has been claimed, it has usually trickled back to states and localities within the newly created federal programs and sometimes reverted to them outright.

As some of us have argued in detail elsewhere,[72] the nationalization of American government has been neither extreme nor unidirectional and certainly not as rapid as the nationalization of American politics and culture. State authority has remained remarkably resilient in the face of immense reductions in the costs of transportation and communication and resultant increases in cross border flows of people and things. The major expansions in congressional authority have only come at those rare political moments when the characteristic centrifugal tendencies of American political institutions are defeated by the appearance of cohesive political consensus. Such moments are exceptional in American history[73]

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[72] See Eskridge & Ferejohn (1994) (surveying federalism decisions in U.S. constitutional history).

[73] National consensuses reigned during the Washington Administration (1789-97), the Era of Good Feelings (roughly the Monroe Administration, 1817-25), possibly the Jacksonian period (1829-37), Reconstruction (1865-77), the McKinley-Roosevelt Era (1897-1913), the New Deal and World War II (1933-45), and the Great Society (1964-69). But only during the Washington Administration,

and are partially offset by the scaling back that has characteristically followed them.[74] Our theory suggests a robust, albeit evolutive, federalist equilibrium induced by the structures built into the Constitution, as well as by more recent institutional developments, such as the construction of integrated state-federal administrations and political parties.

Our theory also suggests that the Supreme Court can play an effective role in enforcing federalism. The Court has both rule of law and institutional incentives to wish to enforce federalism against both national and state cheating. The rule of law incentives derive from the clear instantiation of federalism in the Constitution and from the fact that the stable exercise of political authority in the far flung American republic requires a recognition of some degree of local autonomy. The institutional incentives derive from the Court's wish to maintain its role as an arbiter of an evolving federal structure: if the Court could establish and maintain itself as a neutral broker among the states and between the state and national governments, it assures its own central importance in our governance.

On our account, the Court does have the institutional capacity to make and enforce rules restraining the states from interfering unduly with each other or with national values. It is well positioned to articulate and defend constitutional values and rights. It is also sufficiently independent of the state governments to be able to establish and maintain principled rules restricting the states from unfairly discriminating against outsiders. It is far less able, however, to restrain a determined national

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Reconstruction, the New Deal/WWII, and the Great Society was there a consensus in favor of expanding national power.

[74] The nationalizing agenda of the Washington Administration (dominated by Hamilton) was scaled back by the Democrat-Republicans (Jefferson and Madison). The ambitious agenda of Reconstruction was abandoned by the Compromise of 1877. The New Deal and Great Society have been curtailed by

government from infringing on the federal compact. Such infringements, if they are sustained, are likely to be both deliberate and popular. Judicial attempts at resistance are likely to appear willful and antidemocratic and are therefore dangerous to the maintenance of judicial autonomy.

The potential for judicial enforcement appeared early in our history. The Marshall Court firmly rebuffed state shirking[75] and attempted incursions on national power.[76] Although the Court gave a broad reading to the enumerated powers of Congress,[77] it rejected efforts to restrict state regulation of local matters simply because Congress might regulate those matters.[78]

The federal structure was less fortunate under the next Chief Justice, Roger Taney. While the Taney Court was more likely to support state authority to regulate in domains where national authority was claimed,[79] it invoked national powers to attempt to enforce the Fugitive Slave Act in face of intense

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deregulationist platforms that have prevailed in all the elections after 1964.

[75] See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) which established the Court's authority to review state supreme court decisions and reverse them if inconsistent with national rules and norms.

[76] See *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), which overturned a state attempt to tax the Bank of the United States.

[77] See *McCulloch*, which found congressional authority to establish the Bank of the United States in the "necessary and proper" clause, and *Gibbons* v. *Ogden*, 22 U.S. 1 (1824), which upheld congressional authority to regulate navigation and commerce and to preempt state laws interfering with such regulation.

[78] *Willton* v. *Black Bird Creek Marsh*, 27 U.S. 245 (1829), upholding a state authorization for a company to build a dam across a navigable river and rejecting a rigid "dual federalism" in which states were precluded from regulating issues over which Congress might theoretically regulate.

[79] Cite to the case where NY was quaranteening immigrants in its harbor and to the Philadelphia harbor masters case in 1851.....others cases would be good here.

local opposition.[80] And, in its fateful decision in *Dred Scott* v. *Sandford* (1857)[81] the Court committed a strategic as well as moral blunder that might have ended the American experiment in federalism altogether. By invalidating the Compromise of 1820, which had prohibited slavery in the former Northwest Territories, *Dred Scott* pressed the slavery issue back onto the nation's agenda under circumstances that undermined the very credibility of federalism in this context. Moreover, it called into question the Court's claim to be a neutral arbiter on questions of either federalism or slavery, and undermined Congress's capacity to maintain inter-regional compromises about the issue (such as the 1820 compromise).[82] In a real sense, the Court's decision in Dred Scott helped precipitate a chain of events that culminated in Southern secession and civil war.[83]

Federalism might have failed to survive the Civil war period in two ways. The southern secession might have succeeded, leaving behind two nations, neither sufficiently diverse to maintain federal institutions. Or the rebellion might have ended with a the construction of a national republic institutionally capable of guaranteeing directly constitutional values and liberties. While the war did end with the imposition of national authority on the southern states, this imposition was temporary and the

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80. Note the attempts of various northern states to nullify that Act.

[81] 60 U.S. (19 How.) 393.

[82] Weingast (1994) argues that the pattern of representation in the Senate **B** particularly what he has called the **A**balance rule@ which kept northern and southern representation in the Senate balanced as new states were admitted **B** was the key to keeping the Missouri Compromise in place. Other congressional practices such as the **A**gag rule@ in the House turned out to much more vulnerable to shifting demographics in the ante bellum period.

[83] See generally Fehrenbacher 1978.

system reverted partly back to the decentralized ways of the ante bellum period. Thus, federalism survived the Civil War and Reconstruction substantially intact. And, in quite analogous fashion it also survived the successive nationalizing periods represented by the New Freedom, the New Deal, World War II, and the Great Society. The story in each case is the same.

Each of these events **B** the Civil War and Reconstruction, Wilson=s New Freedom, FDR=s New Deal, and Johnson=s Great Society **B** were marked by an upsurge in the unity and purpose of the majority party which enabled it rapidly to enact a legislative program without paying much heed to the opposition. But in each case both the unity of purpose and the size of the majority contingent were only temporary and each broke apart in the face of public reactions to these legislative programs. Thus, the unified radical Republicans were unable to keep the northern public with them to transform southern society beyond about 1872.[84] Wilson=s New Freedom, produced by much smaller legislative majorities was much more short-lived, lasting only until the distracting outbreak of European hostilities. The New Deal, of course, lasted longer, perhaps because it was as much a reaction to profound and troubling national crisis as it was a rejection of a divided and exhausted Republican party. But it too fell apart as Southern Democratic representatives increasingly began to make a common cause with Republicans in opposing the extension of national powers into social, and especially racial, issues. And, like Wilson=s New Freedom, the Democratic unity that lay behind the Great Society collapsed legislatively after only a couple of years as the conservative coalition of southern Democrats and Republicans became able to stop liberal initiatives. This left the legacy of the Great Society to be carried forward administratively

[84] Indeed, as the results of the *Slaughterhouse Cases* and the *Civil Rights Cases* indicated, the Supreme Court began to erode Republican legislative and constitutional gains fairly quickly.

(whenever there was a Democratic president in office) or judicially as long as the federal judiciary retained its liberal coloration.

If in retrospect it seems inevitable that the modern revolution in transportation, communication, and warfare would render national regulation increasingly important, it is equally striking how much room was left for the states to pursue their own policies in these areas, partly because the constitutional hybrid of structural and juridical protections for federalism, but partly too because of the difficulty of maintaining unified national majorities capable of occupying the domain. Reconstruction turned out to be an unprecedented but relatively brief suppression of (Southern) state autonomy, and it was followed by a regime of political laissez-faire on race issues and judicial reluctance to interpret the Reconstruction Amendments very broadly.[85] After the end of Reconstruction, the Court became substantially less deferential towards many state economic policies, particularly those aimed at regulating wages and hours, but there were repeated instances where the Supreme Court protected state autonomy.[86]

A similar scenario can be traced for the New Deal Court constituted by Franklin Roosevelt in 1937-42. On the one hand, the Court retreated from the restrictive interpretation of national power in several pre-1937 decisions and upheld every major expansion of national power presented to it. On

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[85] See the *Civil Rights* Cases 109 U.S. 3 (1883) (invalidating portions of the Civil Rights Act of 1875); *United States* v. *Harris*, 106 U.S. 629 (1882) (invalidating the anti-lynching provisions of the Civil Rights Act of 1871, because not aimed at state action). See also *Collector* v. *Day*, 78 U.S. 113 (1871) (restricting federal taxation of the states).

[86] See *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) (allowing states to establish "separate but equal" facilities for racial apartheid); *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895) (Sherman Act does not apply to manufacturing, which is "local"); The *Income Tax* Case, 157 U.S. 429 (1895) (striking down federal income tax as a direct tax unequally apportioned among the states); *Hans* v. *Louisiana*, 134 U.S. 1 (1890) (expansive interpretation of eleventh amendment to prevent lawsuits

the other hand, the New Deal was itself highly deferential to state autonomy, and the New Deal Court reaffirmed the authority of the states to engage in economic development and employ traditional police powers without federal interference.[87] Additionally, the New Deal Court developed rules of statutory interpretation to reconcile state allocation and development policies with new federal development and redistribution statutes. Courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[88] Likewise, the Great Society legislation tended to build upon and defer to state regulation rather than to displace it completely. And, when Congress has imposed burdensome obligations directly on the states, the Court has frequently intervened, either by directly by constitutional invalidation of the federal statute[89] or by a narrow construction of the federal law.[90]

The Court has, however, been more overtly active in monitoring state regulatory policies than it

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against states).

[87] In *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), for example, the Court overruled earlier precedent and required federal courts in diversity jurisdiction cases to apply state law rather than federal common law. Justice Louis Brandeis' justification for the overruling rested mainly on constitutional federalism, suggesting that neither Congress nor the Court had the authority to displace state law in such a global manner.

[88] *Rice* v. *Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). For leading recent statements, see Cippolone (1991); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

[89] See *National League of Cities* v. *Usery*, 426 U.S. 823 (1976), overruled [5-4] by *Garcia* v. *San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985); *New York* v. *United States*, 112 S. Ct. 2408 (1992), *United States* v. *Lopez* 514 U.S. 549 (1995), and *Printz* v. *United States* 521 U.S. 98 (1997)

[90] See Eskridge & Frickey 1992 (Burger and Rehnquist Courts vigorously enforce federalism values through super-strong clear statement rules).

had earlier in its history. It has usually protected the integrity of state government and state police powers] (i.e., policies protecting public health or safety or promoting economic development), preventing their displacement by national regulation as long as the exercise of these powers has not had substantial spillover effects, either on nonresidents or on important constitutional values. If there is strong evidence that a state is pursuing a policy that pushes costs onto nonresidents, the Court has not been reluctant either to set aside the state laws or authorize congressional action. Juridical federalism has, in this respect, developed in a way that permits the states to be the primary engines of what Paul Peterson has called "developmental" (policies aimed at improving the state economy) and "allocative" policies (traditional police powers, the day-to-day operation of state services).

There have, of course, been important shifts in American federalism in the past few years. The Court has been less reluctant to defer to Congressional expansions of authority in various areas. In particular, the Court has limited the extent to which the federal government can conscript state officials to administer federal programs. It has also limited the extent to which the federal government can empower citizens to vindicate their rights against the states.[91] While these decisions are controversial and closely decided, they do not seem to cut deeply into the fabric of American federalism. The Court=s new willingness to place limits on national powers amounts, at present, to striking down or limiting authority claimed by Democratic congresses at a time when the Democrats no longer hold majorities. It is not yet clear how robust juridical federalism in checking national powers when they enjoy the support

[91] *Seminole Tribe* v. *Florida* 517 U.S. 44 (1996) and *Alden* v. *Maine* (1999).

to contemporary congressional majorities.[92] In any case, it remains the case that the most effective protections for state authority are structural -- in the unwillingness or inability of Congress to seek new authority **B** rather than reliance on the paper thin majorities by which the current court has been limiting national powers.

The contrast with Canada in particular supports the idea that structural restraints are crucially important and that critical structural variable is the fragmentation of powers at the national level. The formal requirements of bicameral approval and presentment to the President, and the less formal but characteristic incoherence of the national political parties, gives the states or their surrogates[93] multiple entrees (and vetos) to the national political process and makes it unlikely that Congress will seriously impair the operation of state governments. The system of checks and balances also facilitates the operation of judicial enforcement of federalism rules (through judicial review invalidating congressional enactments) and norms (through statutory interpretations narrowing congressional enactments): Supreme Court Justices are protected against extreme national political pressure, because their appointments reflects preferences of both the Presidents who appoint them and the Senates that confirm and because their life tenure assures a rolling ideological mixture of Justices.

Because the federal courts are substantially independent from state politics and operate through case-by-case adjudication, juridical federalism is most effective in monitoring and preventing states from

[92] We may anticipate such circumstances arising in the extension of federal criminal law or perhaps in tort reform. Federal legislation in these areas is likely to conflict with traditional state powers and should help us to understand better the contours of juridical federalism.

[93] Administrators, the President, and national political parties all have incentives to represent the interests of the states on various issues. See Kramer 1994.

infringing on other jurisdictions or from unduly favoring their own citizens. Because bicameralism and presentment operate to delay or block federal legislation, structural federalism works best to restrain the national government from overreaching its powers within the federal system.[94] But, it is important to see that the restraints on the federal government work only so long as no cohesive and long lived majority is formed. If such a majority were to appear and was determined to undermine state authority, the structural protections could probably not resist it for very long. And so, perhaps ironically, American federalism is hostage to the truth of Madison=s famous argument in Federalist 10: it is particularly difficult to form and maintain cohesive majorities in a large and heterogeneous polity. It is in this truth that the protection of individual liberties and state authority resides.

VI. Conclusion

Stable federal arrangements require that both national and provincial authorities are kept within their proper spheres of activity. Legal rules and norms can, we think, play a part in restraining these governments but cannot be relied upon to do the whole job. Instead, as Madison argued, governmental restraints are more effectively founded on structural configurations of power. In this paper we have argued that legal rules and institutions are particularly unlikely to succeed at preventing the national government from predatory jurisdictional expansion. The key to restraining such expansion is in the fragmentation of power within the national government which can prevent the formation of a legislative

[94] This argument is expanded upon in Bednar, "The Federal Problem," Stanford University manuscript, January 1995. See also Bednar and Eskridge (1995).

will. Fragmentation can be achieved in two ways: formally, by designing institutions that check the exercise of concerted power and, informally, by inhibiting the formation of unified and disciplined political parties.

The cases we have examined have permitted us a limited test of these hypotheses. The Canadian case allowed us to see how a constitutional change that reduced the institutional independence of the judiciary led, quite directly, to the decline of judicial protection for the provinces. Until 1949, both the United States and Canada enjoyed effective institutional conditions for restraining the national government from intervening extensively in provincial jurisdictions. In both nations a powerful and independent judiciary also acted to restrain the states and provinces from trampling too egregiously on their neighbors.

We argue that the institutional conditions for judicial independence were greatly weakened in Canada after 1949. This decline is especially significant where there are few effective internal checks on the exercise of national powers and effectively limits the possibilities for rule based juridical federalism applied to the national government. It is not surprising, therefore, that since 1949 the Canadian courts have been developing a jurisprudence that is more deferential to the national parliament. The Supreme Court has evolved constitutional doctrines that permit that government much more latitude to regulate economic and social activity than it previously enjoyed, and there are few fallback protections for provincial autonomy as there are in the United States. Juridical federalism still regulates what the provinces can do and Canadian courts have been active in enforcing limits to provincial authority when the provinces discriminate against outsiders or infringe on national authority.

As this process occurs, the provincial governments and their electorates can be expected to lose

confidence in the judiciary as an enforcer of traditional provincial "rights". In turn, we expect to see the development of defensive political and cutural strategies at the provincial level -- typically demands for additional special constitutional protections or special status within a looser federation and, occasionally threats to exit -- that promise to inhibit the national government from expanding its authority. Such phenomena have been occurring in recent years, and our theory would predict that Canadian federalism will continue to be troubled and may even dissolve in the future. An implication of our theory is that the obvious reason for Canada's troubled federalism -- ethnic and linguistic separatism -- are not so much the cause as the consequence of the evanescing political structure. It remains true, however, that norm-based federalism could still play a role in limiting national power as it did, arguably, in the case of the Patriation Reference. But appeals to norms will work only where there a robust sense of common purpose and a willingness of all to abide by norms supporting the continued Canadian project.

The British case allowed us to assess the impact of "informal" constitutional change on federal practices. Here in a series of developments starting at around the enactment of the First Reform Act and continuing for sixty years, the nature of British electoral and legislative practices were profoundly transformed. While there remains significant disagreement among scholars as to the details, there is little question that the expansion of the electorate led, for whatever reasons, to the formation of disciplined and unified parties that were capable of organizing both electoral and legislative activity. This political transformation undercut whatever constitutional barriers existed (the House of Lords and the Monarchy) to the creation of a unified majoritarian government capable of implementing vast and complicated legislative schemes following an election. We have argued that this same transformation significantly undercut the system of localism that had prevailed in Britain for a century and a half.

Finally, the American experience allowed us to examine the relative robustness of federal practices within a system of fragmented powers. In America, as in Canada, as long as appellate authority remained with the Judicial Committee, the courts have had the opportunity to develop a genuinely independent federalism jurisprudence. While the enforcement of federalist norms and values has been uneven and while courts have sometimes acquiesced to expansionist initiatives from various governments, recent political and legal developments suggest that juridical federalism remains quire resilient. Our emphasis on robustness and resilience and on the importance of a structurally independent judiciary leads us to doubt the pessimistic assessments of federalism's demise that are a staple of both the political science and legal literatures.

We do not doubt that in America as in Britain, if a highly unified and disciplined national political party, bent on undercutting federalist norms, were to gain large and long-live majorities, our federalist practices could be significantly eroded. At least for a time. But American political history teaches us how rare and difficult this circumstance is compared to its relative ease and frequency in the U.K. The ascendancy of the radical Republicans after the Civil War and the New Deal Democrats offer the only genuine candidates for parties of this kind. It seems safe to say that if the end of Reconstruction did not teach us how fragile and temporary this combination of power and will is in American politics, the collapse of the New Deal coalition should do the job.

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