

Beyond Umpire and Arbitrator:
Courts as Facilitators of Intergovernmental Dialogue in
Division of Powers Cases in Canada

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ABSTRACT

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The courts in Canada have often been cast, by both courts and legal scholars, as ‘umpires’ or ‘arbiters’ of the federal-provincial division of powers – umpires or arbiters that have the exclusive, or at least decisive, authority to clarify and enforce, and resolve disputes about, ‘who does what’ in the federal system. However, the image conveyed by these metaphors underestimates the role that the federal and provincial political branches play in the federal system, by working out their own solutions, in the intergovernmental arena, both directly and indirectly, where questions and disputes arise about how jurisdiction is and should be allocated. The image conveyed by the umpire or arbitrator metaphors also sits uncomfortably with the facilitative role that the Supreme Court of Canada has carved out for itself in its recent division of powers decisions, a role that casts the courts as facilitators of these instances of intergovernmental dialogue.

This doctoral dissertation challenges, and moves beyond, the umpire and arbitrator metaphors. It examines the political safeguards available to the provinces in Canada to prevent, or limit, perceived federal encroachments

on provincial jurisdiction, in the process highlighting the role that the political branches play in Canada in working out their own allocations of jurisdiction, outside of the courts. It describes, and critically evaluates, the facilitative role carved out by the Court in its recent division of powers decisions, identifying various reasons to be skeptical of a facilitative role that casts the courts as facilitators of intergovernmental dialogue. Finally, and with an eye to future research, it briefly outlines an alternative facilitative role that focuses on facilitating deliberation about the division of powers implications of particular initiatives, arguing that it would be premature to dismiss facilitative approaches to judicial review altogether.

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INTRODUCTION

The courts in Canada have often been cast, by both courts and legal scholars, as ‘umpires’ or ‘arbiters’ of the federal-provincial division of powers – umpires or arbiters that have the exclusive, or at least decisive, authority to clarify and enforce, and resolve disputes about, ‘who does what’ in the federal system.¹ The political branches, the view seems to be, play at most a secondary role, which involves ensuring that their initiatives respect any applicable jurisdictional constraints, and looking to the courts for guidance if these constraints are unclear, or a dispute about them arises.²

A superficial review of the *Supreme Court Reports* might appear to confirm the accuracy of the image conveyed by these metaphors. Gun registration, environmental regulation, safe injection sites, assisted human reproduction, national securities regulation, same-sex marriage – there have been active, often intense debates about each of these issues in recent years in Canada. These debates have raised (or at least been translated into) disagreements about the scope or limits of federal and provincial

¹ See, e.g., *The Queen v. Beauregard* [1986] 2 S.C.R. 56, para. 27 (referring to the courts in Canada as “the ultimate umpire of the federal system”); and P. Russell, “Constitutional Reform of the Canadian Judiciary” (1969) 7 Alta. L.R. 103, 123 (“both in the popular imagination and the view of most Canadian statesmen, the primary role of the ... [Court] is to act as the final arbiter of the Constitution or the ‘umpire of the federal system’”).

² There are exceptions: see, e.g., P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), ch. 10 (challenging the impact of the courts).

jurisdiction – disagreements that ended up in the Supreme Court of Canada, which was asked to play the role of umpire or arbiter, by deciding whether an initiative that implicated these issues respected the division of powers.³

However, the image conveyed by the umpire or arbiter metaphors sits uncomfortably with the way that Canada’s federal system develops in practice. The courts play an important role in the federal system, at least in certain contexts, at certain times. But, the political branches play a vital, and often underappreciated, role in the federal system as well, not simply by deciding which initiatives to pursue, and how, but also by working out their own solutions, in the intergovernmental arena, both directly and indirectly, where questions arise about how jurisdiction is and should be allocated. The umpire and arbiter metaphors obscure the role they play in doing so.

The image conveyed by the umpire or arbiter metaphors also sits uncomfortably with the role that the Court has carved out for itself in its recent division of powers decisions. These decisions cast the courts as facilitators of “cooperative federalism”⁴ – or what I call “intergovernmental

³ See *Reference re Firearms Act (Can.)* [2000] 1 S.C.R. 783 (gun registration); *R. v. Hydro-Québec* [1997] 3 S.C.R. 213 (environmental regulation); *Can. v. PHS Community Services Society* [2011] 3 S.C.R. 134 (safe injection site for intravenous drug users); *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 (assisted human reproduction); *Reference re Securities Act* [2011] 3 S.C.R. 837 (national securities regulator); and *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 (same-sex marriage).

⁴ See, e.g., *Canadian Western Bank v. Alta.* [2007] 2 S.C.R. 3, para. 24 (suggesting the courts “must facilitate, not undermine what this Court has called ‘co-operative federalism’” (citing *Husky Oil Operations v. M.N.R.* [1995] 3 S.C.R. 453, para. 162; and *Reference re Employment Insurance Act (Can.), ss. 22 and 23* [2005] 2 S.C.R. 669, para. 10)).

dialogue”. Intergovernmental dialogue refers to allocations of jurisdiction that are worked out by the political branches on their own, without judicial intervention. As facilitator, the Court limits its role in imposing particular substantive outcomes, and attempts to encourage, accommodate and (to some extent) reward the occurrence of intergovernmental dialogue. The umpire and arbiter metaphors also obscure this facilitative approach.

This doctoral dissertation challenges, and moves beyond, the umpire or arbiter metaphors. It examines the political safeguards available to the provinces in Canada to prevent, or limit, perceived federal encroachments on provincial jurisdiction, in the process highlighting the role that the political branches play in Canada in working out their own allocations of jurisdictions, outside of the courts. It describes, and critically evaluates, the facilitative role carved out by the Court in its recent division of powers decisions, identifying various reasons to be skeptical of a facilitative role that casts the courts as facilitators of intergovernmental dialogue. In doing so, it emphasizes one of the key elements of this facilitative role – the idea that the courts should facilitate intergovernmental dialogue by deferring to it where it occurs. Finally, and with an eye to future research, it briefly outlines an alternative role that focuses on facilitating deliberation about the division of powers implications of particular initiatives, arguing it would be premature to dismiss facilitative approaches to judicial review altogether.

The dissertation is divided into three articles. Each article takes a different theoretical and methodological approach. The first article takes a doctrinal approach, carefully combing the Court’s recent decisions for evidence of the facilitative role described earlier. The second article, which discusses the political safeguards, takes an interdisciplinary, comparative approach, drawing heavily upon political science research about Canada’s intergovernmental process, and the American political safeguards of federalism literature. The third article, which critically evaluates this facilitative role, turns to normative constitutional theory, including process, shared and dialogic theories of judicial review. However, the articles are strongly linked, not least by the conviction that legal scholars in Canada should engage more with the role that the political branches do, could and should play in Canada’s federal system, and the implications that this role does and should have for judicial review. This introduction provides a brief overview of the three articles, and explains how they are linked.

The first article in this dissertation, entitled “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada”,⁵ describes the facilitative theory of judicial review that has animated the Court’s decision-making in recent years. It draws heavily on the Court’s 2007 decision in *Canadian Western Bank v.*

⁵ This article was previously published: © 2010 LexisNexis Canada. First Published in the *Supreme Court Law Review*, Vol. 51. Reprinted with Permission.

Alberta,⁶ because that decision provided (and to date still provides) the most detailed account of this theory of judicial review. However, that decision simply made explicit a theory of judicial review that had been quietly animating the Court's decision-making for a number of years. Accordingly, the article also analyzes the division of powers decisions of the McLachlin Court from 2000 to early 2010, showing how this theory is reflected in these decisions, and combing them for further insight about what it entails.

Under this theory of judicial review, the Court encourages the political branches to take the lead in defining the division of powers, by working out their own mutually acceptable allocations of jurisdiction, outside of the courts. The Court limits its role in imposing particular substantive outcomes, and attempts to facilitate this intergovernmental dialogue, by encouraging, accommodating and (to some extent) rewarding its occurrence. Where the political branches fail to work out their own mutually acceptable allocations of jurisdiction, the Court reverts to its traditional role as umpire or arbiter, by resolving the particular dispute, while in various ways also trying to encourage intergovernmental dialogue in the future. This theory of judicial review allocates the courts two different roles: a facilitative role and a conventional umpire or arbiter role, with the facilitative role emphasized over the umpire or arbiter role.

⁶ See note 4, above.

This article describes this theory of judicial review, and analyzes how it manifests in the Court's decision-making. It argues that it manifests most obviously in the approach that the Court adopts where there is evidence of intergovernmental dialogue. The approach that the Court has adopted where this occurs is to acknowledge and celebrate the occurrence of intergovernmental dialogue, and to embrace a deferential standard of review, invariably resulting in the initiative being held to be consistent with the division of powers. Questions remain about how much leeway the Court has given and will give the political branches, but the rhetoric used, and the results reached, suggest that the Court is prepared to give the political branches a healthy amount of leeway. The assumption seems to be that the courts can facilitate intergovernmental dialogue, now and in the future, by encouraging, celebrating and (to some extent) rewarding it where it occurs.

It argues that this theory of judicial review also manifests, less obviously, in the Court's overall approach to the division of powers – an approach that sees the Court adopt a deferential posture that embraces jurisdictional overlap, downplays hard substantive limits, and emphasizes the role of the federal paramountcy doctrine in managing the regulatory conflicts that may result, while also promoting intergovernmental dialogue as a vehicle to resolve disputes and provide clarity about jurisdiction, as the need arises. The assumption seems to be that this will facilitate

intergovernmental dialogue, because if the courts embrace jurisdictional overlap and eschew hard substantive limits, both orders of government will have to work out their own mutually acceptable allocations of jurisdiction.

The article concludes by highlighting several issues that the Court's theory of judicial review raises. One issue that it highlights is the need for further legal scholarship about the role that the political branches play in Canada in setting the balance of power, outside of the courts, and the ability of the political branches (particularly the provinces) to safeguard their own jurisdiction. This is examined in the second article, discussed next.

The second article in this dissertation, entitled "The Political Safeguards of Canadian Federalism", examines the political safeguards that are available in Canada to safeguard (especially provincial) jurisdiction, in the process highlighting the role that the political branches play in Canada in working out their own allocations of jurisdictions, outside of the courts. In doing so, it challenges the view, articulated by a variety of Canadian legal scholars, that the provinces are typically ill equipped to protect their own jurisdiction outside of the courts. This account is important for various reasons, including because it has implications for the deferential, facilitative role described in the first article, speaking to concerns that it may work to the disadvantage of the provinces and provincial jurisdiction, and it also helps clarify precisely what it is that the Court seems intent on facilitating.

The article begins by introducing the idea of political safeguards, reviewing the literature, justifying the article's focus on the ability of the provinces to protect provincial jurisdiction from federal encroachments, and addressing several questions about how they work and should be assessed.

The article then turns to an account of Canada's political safeguards. It argues that these political safeguards do not arise from the sorts of 'intragovernmental safeguards of federalism' that some scholars have emphasized in the United States, like the Senate. It argues, rather, that these political safeguards arise, in large part, from the intergovernmental apparatus that has been established to manage federal-provincial relations, which it calls the 'intergovernmental safeguards of federalism'. It describes the capacity, opportunities, and leverage that these intergovernmental safeguards provide the provinces to limit, or block, perceived federal encroachments, and provides two detailed case studies of situations where they were utilized. It does not argue that these intergovernmental safeguards sufficiently protect provincial jurisdiction, and thus that judicial review is unnecessary; on the contrary, it highlights various reasons to give these intergovernmental safeguards only 'two cheers', including the mixed nature of the incentives that the provinces have to resist federal encroachments, and the unreliable nature of the sources of leverage upon which they rely. It argues, though, that these intergovernmental safeguards do provide the

provinces with the means to check federal encroachments and influence federal policy in some cases, by blocking federal initiatives altogether in some situations, and influencing their design and implementation in others.

The third article in this dissertation, entitled “Courts as Facilitators: Intergovernmental Dialogue, Deference and Judicial Review of the Division of Powers in Canada”, engages critically with the facilitative role described in the first article. In doing so, it also draws at various points on aspects of the second article. The article focuses largely on the idea that, as facilitators, the courts should defer to intergovernmental dialogue where it occurs. This idea provides a useful way to expose and explore the promise and pitfalls of this facilitative role, because it is the primary, as well as the most obvious, way that this facilitative role manifests in the Court’s decision-making.

Before engaging critically with the idea that the courts should defer to intergovernmental dialogue, the article introduces the umpire and arbiter metaphors, briefly describes the role that the courts are allocated as facilitators of intergovernmental dialogue, and compares and contrasts this role with the role that they are allocated as umpires or arbiters. It updates the account of the facilitative role provided in the first article, discussing a variety of decisions, released since that article was published, that sent mixed signals about the Court’s commitment to, and the implications of, this facilitative role, arguing that, despite initial impressions to the contrary,

these decisions are not inconsistent with this facilitative role. It also introduces the idea that the courts should defer to intergovernmental dialogue, describing the different ways that intergovernmental dialogue has manifested in division of powers cases, and how the Court has responded to them when they have manifested. It suggests that, while the Court insists that intergovernmental dialogue is not determinative, it regularly (and often quite explicitly) grants it a more deferential standard of review, invariably leading to the initiative in question being upheld – and might even be treating it as conclusive in practice, even if it is hesitant to say so openly.

The article then critically examines the idea that the courts should defer to intergovernmental dialogue. It highlights the arguments that seem to weigh in favor of the idea, including that it acknowledges and capitalizes on the role the political branches already play in working out their own allocations of jurisdiction; that it seems to address, or at least mitigate, the primary criticisms of judicial review (that it raises serious reasonable pluralism, democratic, and institutional competence concerns), primarily by limiting the role of the courts where the political branches work out their own allocations of jurisdiction; and that it seems to address, or at least mitigate, one of the primary arguments for judicial review (that it is necessary to safeguard – especially provincial – jurisdiction), since federal and provincial actors may seem unlikely to agree to instances of

intergovernmental dialogue that they perceive to encroach on the jurisdiction of their governments.⁷ It argues that many of these arguments do not hold up when subjected to closer scrutiny, and that there are a variety of reasons for the courts to be skeptical of the idea, and thus to reject it.

First, it argues, it is far from obvious that the idea addresses the argument that judicial review is necessary to safeguard jurisdiction, since federal and provincial actors are not necessarily always inclined to safeguard the jurisdiction of their governments, or adequately equipped to do so. Second, it argues, the extent to which the idea addresses, or mitigates, the criticism from democracy is open to question, since various democratic concerns have been, or can be, raised about intergovernmental dialogue as well. Third, it argues, it is far from obvious that the idea addresses, or even mitigates, the criticism from reasonable pluralism and institutional competence, since the courts would have to decide when, to whom, and how much to defer, raising precisely the sorts of choices that underlie these criticisms, some of which would take the courts into largely uncharted, and likely unwelcome, territory. Finally, it argues, the idea raises a variety of other concerns, including about stability and predictability.

⁷ There is evidence of this thinking in the Court's unanimous decision in *Siemens v. Man.* [2003] 1 S.C.R. 6, paras. 34-35 per Major J. (suggesting that, while not conclusive, "given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration").

The article concludes with a few brief comments about the Court's overall facilitative role, arguing that there are good reasons to be cautious about an approach that casts courts as facilitators of intergovernmental dialogue. It argues, however, that it may be premature to dismiss any sort of facilitative role for the courts, and identifies one alternative facilitative role that the courts might explore, with an eye to future research. This facilitative role would cast the courts as facilitators of deliberation, within and between governments, about the division of powers implications of particular initiatives, rather than facilitators of intergovernmental dialogue.

FIRST ARTICLE:
FACILITATING INTERGOVERNMENTAL DIALOGUE:
JUDICIAL REVIEW OF THE DIVISION OF POWERS IN THE
SUPREME COURT OF CANADA*

A cursory review of any Canadian law review tells the story: the *Charter*¹ is ‘in’ and the division of powers is ‘out.’ Since 1982, when the *Charter* came into force, there has been a vast amount of writing about the Supreme Court of Canada’s *Charter* decisions. However, its division of powers decisions, once the staple of constitutional law scholars, are now routinely ignored, particularly in English Canada.² This trend has been noted before, with little effect. Writing at the turn of the century, Wayne MacKay, for example, lamented the lack of attention that constitutional law scholars now pay to the division of powers.³ Ten years later, however, the situation is not significantly different. The Supreme Court released a number of important division of powers decisions in this period. Some

* © 2010 LexisNexis Canada. First Published in the Supreme Court Law Review, Vol. 51. Reprinted with Permission. The article reflects the state of the case law and academic literature as of early 2010, the year in which the article was published.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

² The Supreme Court’s division of powers decisions garner significantly more attention in the French-Canadian scholarship: see, e.g., E. Brouillet, *La négation de la nation — L’identité culturelle québécoise et le fédéralisme canadien* (Sainte-Foy, QC: Septentrion, 2005).

³ A.W. MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” (2001) 80 Can. Bar Rev. 241, 242; see also D. Greschner, “The Supreme Court, Federalism and Metaphors of Moderation” (2000) 79 Can. Bar Rev. 47, 48.

work has been done discussing particular decisions and criticizing doctrinal developments⁴; some decisions have been considered briefly in the context of discussions about a specific area of regulation (e.g., the environment) or issue (e.g., the scope of the spending power);⁵ but little has been written about the theory of judicial review⁶ that appears to be animating the Supreme Court's decision-making.⁷

This article aims to fill this gap in the academic literature, by providing a novel account of the Supreme Court's theory of judicial review of the division of powers. Under this theory, the Supreme Court encourages

⁴ The gold standard remains P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007+) (with yearly updates on the Supreme Court's constitutional decisions). The Supreme Court's division of powers decisions are also briefly reviewed in the annual "Developments in Constitutional Law" article published in the *Supreme Court Law Review*: see, e.g., C. Mathen, "Developments in Constitutional Law: The 2008-2009 Term" (2009) 48 S.C.L.R. (2d) 71.

⁵ See, e.g., P.W. Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 *Alta. L. Rev.* 507; and (2008-2009) 34 *Queen's L.J.* (various articles discussing the federal spending power).

⁶ I distinguish in this article between theories of federalism and theories of judicial review. By theories of federalism, I mean theories that describe how governmental power ought to be allocated in a federal system. By theories of judicial review, I mean theories that describe the role, if any, that the courts ought to play in reviewing (and setting limits on) allocations and exercises of governmental power in a federal system.

⁷ The major exceptions are E. Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" (2006) 34 S.C.L.R. (2d) 308; B. Ryder, "The End of Umpire?: Federalism and Judicial Restraint" (2006) 34 S.C.L.R. (2d) 345; G. Baier, "The Courts, the Division of Powers, and Dispute Resolution", in H. Bakvis & G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 2d ed. (Oxford: Oxford University Press, 2008), ch. 2; H. Bakvis, G. Baier, and D. Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009), ch. 5; J. Leclair, "The Supreme Court of Canada's Understanding of Federalism" (2003) 28 *Queen's L.J.* 411; and J. Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 *U.B.C. L. Rev.* 355.

the political branches to take the lead in defining the division of powers, by working out a mutually-acceptable allocation of jurisdiction in each particular regulatory area. The Supreme Court limits itself, primarily, to facilitating intergovernmental dialogue about the division of powers and resolving the conflicts that result where the political branches fail to agree, and only secondarily, to ensuring that neither order of government dramatically upsets the balance of power.

This theory of judicial review is gleaned from two sources. The first is the recent decision of the Supreme Court in *Canadian Western Bank v. Alberta* (2007).⁸ In *Canadian Western Bank*, the majority of the Supreme Court significantly restricted the application of the doctrine of interjurisdictional immunity (described below). In doing so, it provided rare but important insight into its theory of judicial review. The decision has been discussed by several others; however, little of any substance has been written about the theory of judicial review described in, and animating, the decision.⁹ The second is the pre-*Canadian Western Bank* division of

⁸ [2007] 2 S.C.R. 3. *Canadian Western Bank* was released concurrently with *B.C. v. Lafarge Canada* [2007] 2 S.C.R. 86. I focus here on the decision in *Canadian Western Bank*, because it contains the bulk of the majority's legal and theoretical analysis.

⁹ See R. Elliot, "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters – Again" (2008) 43 S.C.L.R. (2d) 433, 472 (noting that the theoretical aspect of the decision "warrants critical scrutiny", and expressly limiting this article to the decision's doctrinal aspects); P.W. Hogg and R. Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 S.C.L.R. (2d) 623 (focusing largely on doctrine); J.G. Furey, "Interjurisdictional Immunity: The Pendulum Has Swung" (2008) 42 S.C.L.R. (2d) 597 (focusing largely on doctrine); and E. Edinger,

powers decisions of the Supreme Court under Chief Justice McLachlin (2000 to present) (the “McLachlin Court”).¹⁰ The theory of judicial review described in *Canadian Western Bank* was not new. The Supreme Court merely made explicit a theory of judicial review that had quietly been at work in its division of powers decisions for a number of years.¹¹ Looked at in retrospect, and with the benefit of *Canadian Western Bank*, these decisions provide important insight into the theory of judicial review later outlined in *Canadian Western Bank* itself.¹²

“Back to the Future with Interjurisdictional Immunity: *Canadian Western Bank v. Alberta; British Columbia v. Lafarge Canada Inc.*” (2008) 66 Adv. 553 (focusing largely on doctrine).

¹⁰ I limit my discussion to the division of powers decisions of the McLachlin Court, because this provided a convenient way of restricting my discussion. In doing so, I should not be taken as suggesting that the theory of judicial review that I describe is wholly unique to the McLachlin Court’s division of powers decisions. Important aspects of the approach to the division of powers that I describe were evident in earlier Supreme Court division of powers decisions, including, in particular, the division of powers decisions of Chief Justice Dickson (1973-1990) and the Supreme Court during the tenure of Chief Justice Lamer (1990-2000). For discussion of the division of powers decisions of Dickson C.J., see, in particular, K. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), ch. 10; J.T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002), ch. 11; and G. Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: University of British Columbia Press, 2006), ch. 5. For discussion of the division of powers decisions of the Supreme Court under Lamer C.J., see, in particular, MacKay, note 3, above; Saywell, this note, ch. 11; and Baier, this note, ch. 5.

¹¹ Some of these decisions are discussed in the sources listed in note 7. However, these sources tend to overlook or underestimate the role that intergovernmental dialogue plays in the decisions.

¹² Two important exceptions should be noted. First, I consider *only* the decisions (or parts of the decisions) dealing with the division of powers in ss. 91 and 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict. C. 3, reprinted in R.S.C. 1985, App. II, No. 5. Second, I *do not* consider the division of powers decisions that touch upon, directly or indirectly, s. 91(24), the federal legislative power over “Indians, and Lands reserved for the Indians.” (The decisions are: *Lovelace v. Ont.* [2000] 2 S.C.R. 950; *Kitkatla Band v. B.C.* [2002] 2

The notion of intergovernmental dialogue figures prominently in this theory of judicial review. Dialogue is a term that is now ubiquitous in writing about constitutional law in Canada and elsewhere.¹³ In Canada, it has been used mostly in connection with cases decided under the *Charter*.¹⁴ In that connection, it has been taken to refer, narrowly, to the ability of the competent legislative body to respond, legislatively, to a judicial decision striking down a law for violating the *Charter*.¹⁵ I used the term in that narrower sense in a previous article.¹⁶ But the term dialogue also can, and has, been used in a broader sense, to describe the interactions that occur between the various branches of government (and indeed society as a

S.C.R. 146; *Paul v. B.C.* [2003] 2 S.C.R. 585; and *R. v. Morris* [2006] 2 S.C.R. 915.) These cases raise unique and difficult issues – in particular, issues of self-government and the interaction between s. 91(24) and s. 88 of the federal *Indian Act*, R.S.C. 1985, c. I-5, which operates to make certain otherwise constitutionally inapplicable provincial laws applicable to “Indians” – not encountered in the other division of powers cases; for that reason, my view is that they ought to be addressed separately. See B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism” (1990-1991) 36 McGill L.J. 308, 362-380 (advocating a unique approach to s. 91(24) cases).

¹³ See C. Bateup, “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2005-2006) 71 Brook. L. Rev. 1109, 1109 (describing dialogue as ubiquitous).

¹⁴ But see J. Kelly and M. Murphy, “Shaping the Constitutional Dialogue on Federalism” (2005) 35(2) *Publius* 217 (using the term in connection with the Supreme Court’s aboriginal rights decisions and its decision in the *Quebec Secession Reference* [1998] 2 S.C.R. 217).

¹⁵ P.W. Hogg and A.A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such A Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75.

¹⁶ P.W. Hogg, A.A. Bushell Thornton, and W.K. Wright, “*Charter* Dialogue Revisited – Or Much Ado About Metaphors” (2007) 45 *Osgoode Hall L.J.* 1, 45.

whole) in the area of constitutional decision-making.¹⁷ I use the term in that broader sense in this article.¹⁸ However, unlike the dialogue that occurs in connection with the *Charter*, which is in large measure *intra*-governmental (or horizontal), the dialogue that I describe here is primarily *inter*-governmental (or vertical).¹⁹ By dialogue, I mean the federal-provincial agreement, not judicial-legislative and/or judicial-executive agreement, about particular exercises of legislative power that the Supreme Court seems intent on facilitating.

The article is organized in three parts. In Part I, I outline the basic features of the theory of judicial review described in *Canadian Western Bank*. I then discuss how this theory is reflected in the account of division of powers doctrine provided in the decision. In Part II, I analyze the key pre-*Canadian Western Bank* division of powers decisions. I demonstrate

¹⁷ The dialogue literature is sizeable. For a good summary, see C. Bateup, “The Dialogic Promise”, note 13, above; and C. Bateup, “Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective” (2007) 21 *Temp. Int. & Comp. L.J.* 1.

¹⁸ The manner in which my colleagues and I used the term dialogue in “*Charter* Dialogue Revisited” has been criticized: see, for example, Bateup, note 13, above. It is beyond the scope of this article to respond to this criticism here, but briefly, my view that there is no necessary inconsistency between the narrow and broad definitions of dialogue. The trend described in that article remains, in my view, an important part of the dialogue story, but it is not, I accept, the only story.

¹⁹ I say *primarily* because the courts still play a role, but that role is secondary and facilitative. See K. Swinton, “Federalism Under Fire: The Role of the Supreme Court of Canada” (1992) 55 *Law & Comtemp. Probs.* 121, 138 (suggesting that the Supreme Court “has a role to play in managing conflict and change in the federalism system, but its role is secondary and, ideally, facilitative”).

how the theory of judicial review described in Part I is reflected in these decisions, and also comb the decisions for further insight into this theory of judicial review. Finally, in Part III, I anticipate three potential criticisms of this theory of judicial review, and a possible answer to these criticisms. I demonstrate the importance of these criticisms by referring to several recent cases that have reached the Supreme Court.

**I. FACILITATING INTERGOVERNMENTAL DIALOGUE:
*CANADIAN WESTERN BANK v. ALBERTA***

In Canada, the banking industry falls within federal jurisdiction, under the federal power over “Banking”, (s. 91(15)), and the insurance industry falls within provincial jurisdiction, under the provincial power over property and civil rights (s. 92(13)). Traditionally, banks were not authorized to promote or to sell insurance. However, in 1991, Parliament amended the federal banking legislation²⁰ in order to permit banks to promote, but not sell, various types of creditors’ insurance, all of which, in some form or another, secured various types of bank loans. Following these amendments, the issue became whether banks would be required to comply with the existing web of provincial legislation regulating the insurance industry. The province of Alberta left no room for doubt. It amended its

²⁰ *Bank Act*, S.C. 1991, c. 46 (and related regulations).

insurance legislation,²¹ requiring banks that promoted insurance in Alberta to comply with certain licensing and consumer protection requirements.

Several large banks responded by seeking a declaration that banks that promoted insurance in Alberta did not need to comply with these requirements.²² On appeal, the Supreme Court refused to grant the declaration. Binnie and LeBel JJ., writing for six of the seven judges that sat on the case,²³ emphasized that “[t]he fact that Parliament allows a bank to enter into a provincially regulated line of business ... cannot ... unilaterally broaden the scope of the exclusive legislative power granted by the *Constitution Act, 1867*.” Rather, banks that take part in provincially regulated activities will, they stressed, be required to comply with all

²¹ *Insurance Act*, R.S.A. 2000, c. I-3 (and related regulations).

²² The banks relied heavily on *Bank of Nova Scotia v. B.C.* (2003) 11 B.C.L.R. (4th) 206 (C.A.), leave to appeal refused, [2003] 3 S.C.R. viii.

²³ Strictly speaking, at present, the reasoning in *Canadian Western Bank* can be said to represent the views of only eight of the nine members of the Supreme Court: Binnie and LeBel JJ., who wrote the decision; McLachlin C.J. and Fish, Abella and Charron JJ., who concurred in the decision; Deschamps J., who did not sit on *Canadian Western Bank*, but who concurred in the decision in *Lafarge*, note 8, above, in which Binnie and LeBel JJ., writing for the majority, explicitly adopted their reasoning in *Canadian Western Bank*; and Rothstein J., who did not sit on either *Canadian Western Bank* or *Lafarge*, but who did concur in the Supreme Court’s recent unanimous judgment in *Chatterjee v. Ont.* [2009] 1 S.C.R. 624, in which it explicitly affirmed its reasoning in *Canadian Western Bank* (see para. 2). Bastarache J. wrote a concurring opinion in both *Canadian Western Bank* and *Lafarge*. Although he did not disagree with the result in either case, he did disagree with Binnie and LeBel JJ.’s reasoning on the doctrine of interjurisdictional immunity and the doctrine of paramountcy. Bastarache J. has now retired and been replaced by Cromwell J. of the Nova Scotia Court of Appeal. At present it remains unclear whether he agrees with the views expressed by the majority in *Canadian Western Bank*.

applicable federal and provincial legislation.²⁴

A. The Supreme Court’s Theory of Judicial Review

The Supreme Court’s division of powers cases are typically grounded largely in formalistic legal reasoning, in references to text, doctrine and precedent. But in *Canadian Western Bank*, in three brief paragraphs, Binnie and LeBel JJ. felt moved to reflect on Canadian federalism. Their discussion provides unusual but interesting insight into the Supreme Court’s theory of judicial review in division of powers cases.

a. “The Principle of Federalism”

Under the heading “The Principle of Federalism”, Binnie and LeBel JJ. suggest, in one paragraph, and with little explanation or support (judicial or academic), that Canadian federalism had, and still has, three “fundamental objectives.”²⁵ The first will be familiar to those with some knowledge of the Supreme Court’s previous division of powers decisions: this is the idea that federalism in Canada was a “legal response” to the “political and cultural realities that existed at Confederation”, a mechanism for reconciling the diversity of the “original members” with the desire for

²⁴ *Canadian Western Bank*, note 8, above, para. 4.

²⁵ *Id.*, para. 22.

national unity.²⁶ The second is also not entirely unfamiliar: this is the idea that a “fundamental objective” of federalism in Canada was, and is, to “promote democratic participation by reserving meaningful powers to the local or regional level.”²⁷ The third, though, will be unfamiliar: this is the idea that a “fundamental objective” of federalism in Canada was, and is, “to foster co-operation among governments and legislatures for the common good.”²⁸

In the next paragraph, Binnie and LeBel JJ. then suggest that, in order to attain these three fundamental objectives, “a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential.”²⁹ But foreshadowing the changes

²⁶ See *Quebec Secession Reference*, note 14, above, para. 43 (“The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members..., and manifested a concern to accommodate that diversity within a single nation”); see also *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] A.C. 437, 441-42 (P.C., Can.).

²⁷ See *Quebec Secession Reference*, note 14, above, para. 58 (“The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective...”).

²⁸ *Canadian Western Bank*, note 8, above, para. 22. For a similar claim from the High Court of Australia about the Australian Constitution, see *R. v. Duncan; Ex parte Australian Iron and Steel Pty.* (1983) 158 C.L.R. 535 (Aust. H.C.), 589 per Deane J. (noting that co-operation is a “positive objective of the [Australian] Constitution”); and *R. v. Hughes* [2000] 202 C.L.R. 535 (Aust. H.C.), para. 53 per Kirby J. (referring to co-operation as an “elemental feature of the federal system of government”); see also *Gould v. Brown* (1998) 193 C.L.R. 346 (Aust. H.C.), para. 277 per Kirby J.; but see *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511 (Aust. H.C.), 556 per McHugh J. (“co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power. ... Where constitutional power does not exist, no cry of co-operative federalism can supply it”).

²⁹ *Canadian Western Bank*, note 8, above, para. 23.

they introduce to the doctrine of interjurisdictional immunity, they also indicate that the interpretation of the division of powers “must evolve and must be tailored to the changing political and cultural realities of Canadian society.”³⁰

Binnie and LeBel JJ. then make three points about the key division of powers doctrines. First, these doctrines “permit an appropriate balance to be struck” between the “inevitable overlap” in jurisdiction “while recognizing the need to preserve sufficient predictability in the operation of the division of powers.”³¹ Second, these doctrines “must be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity.”³² Finally, these doctrines must “include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments”, and that they “must facilitate, not undermine ... ‘co-operative federalism.’”³³

In a few short paragraphs, and with relatively little fanfare, the Supreme Court provides important insight into its theory of judicial review of the division of powers. On my reading, three key ideas figure

³⁰ *Id.*, para. 23.

³¹ *Id.*, para. 24.

³² *Id.*

³³ *Id.*

particularly prominently in this theory of judicial review. The first is deference to the political branches, the idea that the Supreme Court will accommodate the fact that “the task of maintaining the balance of powers in practice falls primarily to governments.”³⁴ The second is what I call intergovernmental dialogue, the idea that the Supreme Court will work to facilitate “co-operative federalism”, which I take to mean “co-operation among governments and legislatures for the common good.”³⁵ The third is predictability, the idea that “a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential.”³⁶

These three ideas are discussed in more detail in the three sections that follow.

b. Deference to the Political Process

There are, roughly speaking, two views of the role of the courts in a federal system. The traditional view is that the courts play a necessary role in a federal system.³⁷ Advocates of this view, in Canada and elsewhere,

³⁴ *Id.*

³⁵ *Id.*, paras. 22, 24.

³⁶ *Id.*, para. 23; see also para. 24.

³⁷ This was the view of the celebrated English constitutional scholar Albert V. Dicey. Dicey wrote that “under every federal system there must *almost of necessity* exist some body of persons who can decide whether the terms of the federal compact have been observed”: *Introduction to the Study of the Law of the Constitution*, 8th ed. (London:

often do not attempt to justify it; judicial review is simply assumed to be a necessary element of a federal system.³⁸ However, those that do attempt to justify this view often place considerable weight on the argument that the political process cannot be trusted to protect the federal balance.³⁹

The alternative view is that the courts have little (if any) role to play in protecting the federal balance. One argument commonly made for this view is that judicial review is *undesirable*, because decision-making in division of powers cases is inescapably political, and accordingly ought to be left to politics. This argument is prominent in the Canadian academic literature.⁴⁰ Another argument commonly made for this view is that judicial

Macmillan, 1915), xcv-xcvi [emphasis added]. For Dicey, this was an important reason to eschew a federal system in favor of a unitary system. See also K.C. Wheare, *Federal Government* (Oxford: Oxford University Press, 1963), 58-66; and W.S. Livingston, *Federalism and Constitutional Change* (London: Clarendon, 1956), 10-11.

³⁸ Ryder, note 7, above, 347 (making a similar observation).

³⁹ In Canada, see Swinton, note 10, above, 40-55 (focusing on the shortcomings of the political process in criticizing the argument of several Canadian commentators that the courts properly have a very limited role to play in federalism cases). In the United States, see S.B. Prakash and J.C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories" (2001) 79 *Tex. L. Rev.* 1459; L.A. Baker & E.A. Young, "Federalism and the Double Standard of Judicial Review" (2001) 51 *Duke L. J.* 75; and M.A. Hamilton, "Why Federalism Must Be Enforced: A Response to Professor Kramer" (2001) 46 *Vill. L. Rev.* 1069.

⁴⁰ P. Weiler, *In The Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974), ch. 6 (arguing that judicial review of federalism issues should be limited to determining whether: a) there is a direct conflict between federal and provincial legislation; and b) provincial action discriminates against extra-provincial products and citizens, because, in part, the judiciary lacks the competence to deal with federalism issues); and P. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 23 *U.T.L.J.* 47 (arguing that, because federalism issues are inescapably political, they should be left to the political process); but see P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), ch. 10 (arguing that judicial review of federalism issues might not be a problem after all, because

review is *unnecessary*, because the “political safeguards of federalism” (certain structural features of the political process) reduce the need for judicial oversight of the federal balance. This argument is particularly prominent in the United States.⁴¹

In *Canadian Western Bank*, the Supreme Court demonstrated considerable sympathy for the second view, that judges in a federal system have a limited role to play in protecting the federal-provincial balance of power. This is succinctly illustrated in one brief passage, in which the Supreme Court suggests that decision-making in division of powers cases must “recognize” and, in turn, accommodate the fact that “the task of maintaining the balance of powers in practice falls primarily to governments.”⁴²

Notice the language used by the Supreme Court. On the one hand, the Supreme Court clearly indicates that it intends to let the task of setting the balance of powers fall primarily to governments; restraint will be its

federalism decisions typically have very little real impact in practice).

⁴¹ See, e.g., H. Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government” (1954) 54 *Colum. L. Rev.* 543; J. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); and L. Kramer, “Putting the Politics Back into the Political Safeguards of Federalism” (2000) 100 *Colum. L. Rev.* 215. This argument was adopted by the majority of the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985), but was implicitly rejected in later cases: see J.C. Yoo, “The Judicial Safeguards of Federalism” (1997) 70 *S. Cal. L. Rev.* 1311.

⁴² *Canadian Western Bank*, note 8, above, para. 24.

posture in division of powers cases. On the other hand, the Supreme Court does not say that the task of setting the balance of powers falls *exclusively* to governments; indeed, earlier in the same paragraph, it refers to the courts as the “the final arbiters of the division of powers.”⁴³ It says, rather, that the task of setting the balance of powers will fall *primarily* to governments. The Supreme Court clearly still believes that it still has *some* role to play in division of powers cases.

The Supreme Court did not explicitly justify this posture of restraint in division of powers cases in the decision itself. It did, however, provide a case reference that does, on further examination, shed some light on its thinking. The reference is to a paragraph in the Supreme Court’s unanimous judgment in the *Employment Insurance Reference* (2005).⁴⁴ In that paragraph, Deschamps J., for the Supreme Court, provided an unusually candid assessment of judicial decision-making in division of powers cases. She wrote that judicial decision-making in division of powers cases “will often depend on a given court’s view of what federalism is. What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal

⁴³ *Id.*, para. 24.

⁴⁴ *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23 [2005] 2 S.C.R. 669.

notions.”⁴⁵ In the very next sentence, she then wrote that “[t]he task of maintaining the balance between federal and provincial powers falls primarily to governments.”⁴⁶

In this passage, the idea that it is appropriate to defer to the political branches in division of powers cases is juxtaposed with the idea that decision-making in division of powers cases will often be informed by a particular vision of federalism, a vision that will, in turn, often be informed by political, not legal considerations.⁴⁷ Although the Supreme Court does

⁴⁵ *Id.*, para. 10.

⁴⁶ *Id.* This passage is discussed in H. Kong, “The Forms and Limits of Federalism Doctrine” (2007-2008) 13 *Rev. Const. Stud.* 241, 264-265.

⁴⁷ Eugénie Brouillet suggests that this passage “illustrates the absence of a federal theory” in the Supreme Court: see note 7, above, 320. I do not agree.

Theories of federalism (and remembering the distinction I draw between theories of federalism and theories of judicial review) can be organized roughly into two groups: substantive theories of federalism and process theories of federalism. Substantive theories of federalism work from the fundamental premise that there is an ideal (and for some, a permanently fixed) balance of power between the federal and provincial governments. Substantive theories dominate the Canadian scholarship about federalism (although recent advocates are more likely to concede that the boundaries of legislative power, whatever they may be, leave generous space for legislative discretion). Unfortunately, in a good deal of this scholarship, very little attempt is made to justify why a particular balance of power is ideal – a balance of power is simply asserted as ideal and a particular allocation of power is criticized (or defended) on the basis that it is inconsistent (or consistent) with this ideal balance of power. However, where an attempt is made to justify a particular balance of power, an appeal is often made to original intent (the original bargain struck by the framers of the division of powers) and/or one or more of the values that federalism is thought to serve (these include, usually, democracy, efficiency and/or autonomy).

Process theories of federalism, in contrast, work from the fundamental premise that there is no objectively ideal balance of power. Advocates of process theories of federalism do not necessarily deny that federalism may serve particular values, but they do argue that it is not possible to glean an ideal balance of power from these values because reasonable people will disagree, first, about the values that federalism actually serves, and second, about the weight to be placed on those values. In the absence of a substantive theory, process theorists look to the political branches to set the balance of power, and resolve jurisdictional disputes. See A. Stone, “Judicial Review Without Rights: Some

not say so explicitly, the implication is clear. The Supreme Court worries that any line that it might draw between federal and provincial legislative power will be informed by politics. For that reason, it is considerably more comfortable leaving such line-drawing exercises to the political branches, inasmuch as possible.

c. Facilitating “Co-operative Federalism”

The first idea that figures prominently in *Canadian Western Bank*, then, is that the Supreme Court, in division of powers cases, will act with restraint, and defer to the political branches. This is important, but it is only part of the picture. The Supreme Court also makes it clear in *Canadian Western Bank* that it is not prepared to be entirely passive in its division of powers decisions: that it is content to let the political branches take the lead in defining the division of powers, but that it will also work to facilitate a particular model of political-branch driven federalism, called “co-operative federalism.”⁴⁸

What does the Supreme Court mean by co-operative federalism?

Problems for the Democratic Legitimacy of Structural Judicial Review” (2008) 28 O.J.L.S. 1 (arguing that those who hold democracy-based objections to constitutional rights should reconsider, and perhaps oppose, federal judicial review).

The Supreme Court does seem to have a theory of federalism - a *process* theory called ‘co-operative federalism’, discussed below. With that said, it would seem that the Supreme Court cannot quite bring itself to abandon the idea that there are fixed boundaries on legislative power that it needs to patrol.

⁴⁸ *Canadian Western Bank*, note 8, above, para. 24.

Unfortunately, the Supreme Court does not tell us. However, co-operative federalism appears to refer, at a minimum, to a federalism in which the federal and provincial governments agree to exercises of jurisdiction in particular regulatory areas, without recourse to the courts.

This can be gleaned from two sources. The first is a reference, in the decision itself, to a passage in the dissenting reasons of Iacobucci J. in *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995).⁴⁹ In that passage, Iacobucci J. referred to the “theory of ‘co-operative federalism’ upon which (particularly post-war) Canada has been built.” As in *Canadian Western Bank*, Iacobucci J. did not define what he meant by co-operative federalism. However, the term co-operative federalism is ubiquitous in the academic literature. Like Iacobucci J., academic commentators generally use the term to describe the division of powers as it has operated in Canada, in particular areas, and at particular times.⁵⁰ The term is used by some commentators in a broad sense, by others in a narrow sense. In its broader sense, co-operative federalism typically refers to a federalism in which the

⁴⁹ [1995] 3 S.C.R. 453, para. 162.

⁵⁰ See, e.g., Hogg, note 4, above, sec. 6.9 (“In Canada, the centralized form of federalism which developed during and after the Second World War has been replaced by a form of cooperative federalism in which the provinces have autonomy to influence the outcome of federal provincial relationships”); G. Baier, “The EU’s Constitutional Treaty: Federalism and Intergovernmental Relations – Lessons from Canada” (2005) 15(2) Reg. & Fed. Studies 205, 207-208 (“the Canadian federal system has been much more reliant on cooperative behavior of governments”). The complete story is told in R. Simeon and I. Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), chs. 6-9.

federal and provincial governments agree to the exercise of federal and provincial legislative power in particular policy areas, without resorting to litigation,⁵¹ by relying on a vast network of formal and informal mechanisms and relationships developed for this purpose.⁵² In its narrower sense, co-operative federalism is distinguished from collaborative federalism. Both refer to a federalism in which the federal and provincial governments agree to exercises of federal and/or provincial legislative power in particular policy areas. But with co-operative federalism, there is a hierarchy between the two orders of government: the federal government exercises a considerable degree of political and financial leadership.⁵³ In

⁵¹ W.R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981), 300 (“[t]he essence of co-operative federalism is federal-provincial agreement, whether tacit or explicit, about complementary uses of federal and provincial powers and resources”); and J. Cameron, “Federalism, Treaties, and International Human Rights under the Canadian Constitution” (2002) 48 *Wayne L. Rev.* 1, 39 (“[co-operative federalism] describes a relationship between the executive branches of the two levels of government and is also referred to as ‘executive federalism.’ The relationship is one of direct negotiation between the ‘First Ministers’ of the federal government and the provinces, and its object is to forge agreement on issues over which neither level of government has exclusive control or jurisdiction”); see also J. McConvill and D. Smith, “Interpretation and Cooperative Federalism: *Bond v. R.* From a Constitutional Perspective” (2001) 29 *Fed. L. Rev.* 75, 75 (“Co-operative federalism is the process by which the Commonwealth and the States organise for their overlapping constitutional powers to be exercised concurrently in order to achieve national outcomes through consensual processes”).

⁵² Hogg, above, note 4, sec. 5.8 (“The essence of cooperative federalism is a network of relationships between the executives of the central and regional governments. Through these relationships mechanisms are developed ... which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process”); and D. Cameron and R. Simeon, “Intergovernmental relations in Canada: The emergence of collaborative federalism” (2002) 32(2) *Publius* 49, 50-51 (linking “cooperative federalism” with the “relationships developed among provincial and federal officials and ministers within specific policy areas”).

⁵³ This is the sense in which the term is usually used in the U.S. literature: see, e.g., D.

contrast, with collaborative federalism, there is no such hierarchy between the two orders of government: the two orders of government work together as equals.⁵⁴ This distinction between the narrow sense of co-operative federalism and collaborative federalism is discussed in the final section of the article. For now, it is sufficient to note that intergovernmental agreement about the exercise of federal and provincial legislative power (what I call intergovernmental dialogue) is fundamental to co-operative federalism, in both its broad and narrow sense. By indicating its intention to facilitate co-operative federalism, the Supreme Court can be understood to be declaring its intention to facilitate intergovernmental dialogue about the exercise of federal and provincial legislative power.

This is confirmed by the second source of insight, the language of the decision itself. Two passages in particular are illuminating. In the first, the Supreme Court suggests that one of three “fundamental objectives” of Canadian federalism was, and still is, “to foster co-operation among legislatures and governments for the common good.”⁵⁵ In the second, the Supreme Court suggests, referring back to these three “fundamental

Elazar, “Cooperative Federalism”, in D. Kenyon and J.C. Kincaid, eds., *Competition Among State and Local Governments* (Washington: Urban Institute Press, 1991), ch. 4; and Philip J. Weiser, “Towards a Constitutional Architecture for Cooperative Federalism” (2001) N.C. L. Rev. 663.

⁵⁴ Cameron and Simeon, note 52, above, 49.

⁵⁵ *Canadian Western Bank*, note 8, above, para. 22.

objectives”, that “the main constitutional doctrines ... should be construed so as to facilitate the achievement of the objectives of Canada’s federal structure.”⁵⁶ The meaning of these two passages, taken together, is plain: the Supreme Court, in its division of powers decisions, will attempt to facilitate “co-operation among legislatures and governments for the common good” – in other words, intergovernmental dialogue.⁵⁷

This is interesting. In acting with restraint, and accommodating broad exercises of jurisdiction, the Supreme Court seems to have in mind a model of federalism in which the two orders of government work out a mutually-acceptable allocation of responsibility in each regulatory area. In practice, this might mean that, in some regulatory areas, the federal government will take the lead; in others, that the provincial governments will take the lead; and in still others, that the two orders of government will establish complementary regulatory schemes. Provided both orders of government agree to the allocation of responsibility, the Supreme Court seems content. It may be that it prefers agreement that results from actual *direct negotiation and consultation*. However, as I demonstrate below, with reference to several pre-*Canadian Western Bank* decisions, it also seems

⁵⁶ *Id.*, para. 24.

⁵⁷ See also *Que. v. Moses* [2010] 1 S.C.R. 557, para. 29 (efforts at harmonization of federal and provincial environmental assessments “an exercise in cooperative federalism”); see also paras. 13 (majority), 84 (dissent) (formal intergovernmental agreement an example of cooperative federalism).

prepared to accept agreement that results *indirectly*, from an organic process of *action and response*, with legislative power exercised unilaterally, and the exercise of jurisdiction agreed to by the other level of government after-the-fact, in a court challenge.

What justification does the Supreme Court provide for this approach? The answer is – virtually none. The Supreme Court merely asserts that co-operative federalism ought to inform the division of powers as it operates in the courts. It is implicit in this assertion that, for the Supreme Court, intergovernmental co-operation is best suited to adapting the division of powers to a changing society and to resolving intergovernmental disputes about jurisdiction. But, the Supreme Court provides no justification for this assertion, by, say, grounding co-operative federalism in the text or history of the Constitution or (with one exception, a reference to a dissent) the precedents of the Supreme Court. Similarly, it leaves unaddressed the competing view that co-operative federalism is neither descriptively accurate⁵⁸ nor normatively attractive.⁵⁹ The Supreme

⁵⁸ See, e.g., D. Brown, “Getting Things Done in the Federation” in *Constructive and Co-operative Federalism?* (2003) I.I.G.R. 1, 4, 8 (suggesting that competition is the norm in Canada).

⁵⁹ See, e.g., Royal Commission on the Economic Union and Development Prospects for Canada, Report (Ottawa, 1985), Supp. Statement by Albert Breton, Vol. 3, 486-526 (advocating a theory of “competitive federalism”); J. Leclair, “‘Please, Draw Me a Field of Jurisdiction’: Regulating Securities, Securing Federalism” (2010) 51 S.C.L.R. (2d) 555 (referring to the “legitimate and fruitful interprovincial competition” that federalism in Canada is designed to promote); but see Elazar, note 53, above, ch. 4 (suggesting that co-operative and competitive federalism are not mutually exclusive, because ‘co-operative’

Court simply asserts, without explanation, that co-operative federalism ought to be facilitated by the courts.

d. Predictability in the Division of Powers

The second idea that figures prominently in *Canadian Western Bank*, then, is that the Supreme Court, in its division of powers cases, will actively attempt to facilitate intergovernmental dialogue about the exercise of legislative power. But would the Supreme Court tolerate a radical adjustment of legislative power, absent a formal amendment, provided there was intergovernmental agreement about the adjustment? The answer, it would seem, is no. This is where the third idea comes into play, that “a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential.”⁶⁰ This must be read together with the idea that the division of powers must be permitted to change to meet new political and cultural realities, and that a court should adopt a posture of restraint, and defer to the political branches in setting the scope of federal and provincial legislative power. Taken together, the Supreme Court can be understood as saying: that the division of powers must be permitted to change to meet the needs of a changing society; that the political branches must take the lead in determining the

refers to the need of governments to work together, not *how* governments do so).

⁶⁰ *Canadian Western Bank*, note 8, above, para. 23.

pace and the extent of that change; but that there is a limit on the pace and the extent of the change that the Supreme Court will tolerate. The Supreme Court does not articulate this limit, but the implication is that it will not tolerate at least some, particularly dramatic, attempts to upset the existing balance of power.

Taking the three ideas outlined above together, the Supreme Court's theory of judicial review can be summarized as follows. The Supreme Court encourages the political branches to take the lead in defining the federal-provincial division of powers. The Supreme Court limits itself, primarily, to facilitating intergovernmental dialogue about the division of powers and managing the conflicts that result where the political branches fail to reach agreement, and only secondarily, to ensuring that the political branches do not egregiously upset the existing federal-provincial balance of power. This theory of judicial review is reflected in the overall approach to division of powers doctrine described in *Canadian Western Bank*. In the next section, I describe that approach, and also link it to the theory of judicial review described above.

B. The Supreme Court's Theory of Federalism at Work

There are three different ways to attack a legislative measure on division of powers grounds.⁶¹ The first is to challenge its *validity*. This is

⁶¹ Hogg, note 4, above, sec. 15.8(a).

the subject of the first stage of a division of powers analysis. The analysis varies, depending on whether the validity of an entire legislative measure or only part of a legislative measure is challenged. If the validity of an entire legislative measure is challenged, the operative doctrine is the “pith and substance doctrine.” The court is first required to identify the essential character (the “pith and substance”) of the legislation, and is then required to assign the legislation to a federal or provincial head of legislative power.⁶² If the essential character of the legislation is related to a head of legislative power that has been allocated to the enacting legislature, it is valid (“*intra vires*”); if not, it is invalid (“*ultra vires*”). In contrast, if the validity of only part of a legislative measure is challenged, the operative doctrine is the “ancillary doctrine” (or “necessarily incidental doctrine”).⁶³ The court is first required to determine whether the provision encroaches on

⁶² In identifying the essential character of legislation, both the purpose and the legal and practical effect of the legislation are relevant. The purpose will typically be decisive, but the legal and/or practical effects are also relevant, in shedding light on the purpose of the legislation, and will be decisive where they suggest that the legislation actually has an entirely different purpose.

⁶³ Until recently, the pith and substance doctrine was applied in cases involving a challenge to both an entire legislative measure and only part of a legislative measure. The Supreme Court now applies a different approach where only part of a legislative measure is challenged – the ancillary doctrine. However, it remains unclear how the ancillary doctrine is to be applied; in particular, it is not clear how a court is to determine whether a provision encroaches on the jurisdiction of the other order of government at step 1. In two cases, the Supreme Court seemed to apply the pith and substance doctrine: see *Global Securities Corp. v. B.C.* [2000] 1 S.C.R. 494, paras. 19-20; and *Kitkatla*, note 11, above, paras. 65-71. However, in a later case, the Supreme Court seemed to apply a different approach: see *Kirkbi AG v. Ritvik Holdings* [2005] 3 S.C.R. 302, paras. 19-27. See also *General Motors of Canada v. City National Leasing* [1989] 1 S.C.R. 641, 666-669.

the jurisdiction of the other level of government. If not, the provision is *intra vires* the enacting legislature. But if so, the provision may nonetheless still be *intra vires* the enacting legislature if: a) it is part of a valid legislative scheme; and b) it is sufficiently integrated into that legislative scheme. The final step turns on the seriousness of the encroachment: where the encroachment is minimal, it is sufficient if the provision is “functionally related” to the legislative scheme; but where the encroachment is not minimal, the provision must be “truly necessary” or “integral” to the legislative scheme.

The second way to challenge a legislative measure on division of powers grounds is to challenge its *applicability*. The operative doctrine here is the doctrine of interjurisdictional immunity. The doctrine of interjurisdictional immunity restricts the extent to which otherwise valid legislation of general application enacted by one order of government can interfere with the “basic core” of any subject that is under the jurisdiction of the other order of government.⁶⁴ Where it applies, the law is not struck down as invalid; rather, the law is valid in most of its applications, but is interpreted in such a manner that it will not apply to the subject matter that is under the jurisdiction of the other order of government. This process is

⁶⁴ This has parallels with the U.S. idea of intergovernmental immunity, which limits the ability of the states to regulate federal instrumentalities: see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (U.S. S.C.) (Maryland state tax on the Bank of the United States unconstitutional).

referred to as “reading down.”

The third way to challenge a legislative measure on division of powers grounds is to challenge its *operability*. The operative doctrine here is the paramountcy doctrine. The paramountcy doctrine deals with situations of conflict between otherwise valid, but overlapping, federal and provincial legislation. Where there is a conflict, the federal legislation prevails; the provincial legislation is rendered inoperative, not entirely, but to the extent of the inconsistency between the federal and provincial legislation.

In *Canadian Western Bank*, after reflecting on “the principle of federalism”, the Supreme Court outlined in detail its preferred approach to these doctrines. The theory of judicial review outlined by the Supreme Court is reflected in this doctrinal approach. The Supreme Court acts with restraint, by tolerating significant overlap in federal and provincial legislative power.⁶⁵ It does so by permitting both orders of government to

⁶⁵ The courts have fluctuated between two different approaches to the division of powers (often in the same period, but in different subject areas). Bruce Ryder refers to these two approaches as the “classical paradigm” and the “modern paradigm”: note 12, above. Under the “classical paradigm”, the emphasis is placed on exclusivity of legislative power; overlap in federal-provincial legislative power is limited, to the greatest extent possible, and federal-provincial legislative power is relegated to “watertight compartments.” Accordingly, if the federal government is entitled to act, the provinces are not, and vice versa. In contrast, under the “modern paradigm”, much less emphasis is placed on exclusivity of federal-provincial legislative power; overlap in legislative power is tolerated, even encouraged. Accordingly, permitting one order of government to act does not necessarily preclude the other order of government from acting; rather, in those many areas where overlap is tolerated, it merely *supplements* the legislative power of the other order of government. The approach set out in *Canadian Western Bank* is entirely consistent with the modern paradigm.

enact legislation that substantially impacts the jurisdiction of the other order of government; by applying the double aspect doctrine to permit both orders of government to regulate a given subject area; and by restricting the application of the doctrine of interjurisdictional immunity. The Supreme Court largely limits itself to managing overlapping federal and provincial legislation to avoid legislative conflict. The key doctrine here is the paramountcy doctrine. However, the Supreme Court restricts its reach, by interpreting overlapping legislation to avoid conflict in operation, if possible, and applying the doctrine in the situations that remain. The operative assumption appears to be that permitting overlap between federal and provincial legislative power will act as an incentive to intergovernmental dialogue about particular exercises of that legislative power. The Supreme Court does not entirely forswear a role in defining the scope of federal and provincial legislative power, but it openly encourages the political branches to take the lead in this regard, indicating that it will be prepared to intervene only where one order of government significantly upsets the existing balance of power.

a. Validity: The Pith and Substance Doctrine and the Ancillary Doctrine

The Supreme Court did not discuss the ancillary doctrine in *Canadian Western Bank*. However, in keeping with its recent decisions, it

did outline an approach to the pith and substance doctrine that accommodates significant overlap in jurisdiction.

The approach outlined by the Supreme Court to the problem of extra-jurisdictional effects is representative. Under this approach, the essential character of legislation is determinative. Legislation is permitted to have “incidental” effects on the jurisdiction of the other order of government, provided its essential character is related to a legislative power that has been allocated to the enacting legislature. “Incidental” is defined broadly to include “effects that may be of *significant* practical importance.”⁶⁶ A court working in the classical paradigm would limit the ability of both orders of government to impact the jurisdiction of the other order of government. The Supreme Court not only eschews this approach, it sets out an approach that permits each order of government to impact “significantly” the jurisdiction of the other order of government. The result is to accommodate substantial overlap in federal and provincial jurisdiction.

The approach outlined by the Supreme Court to the problem of overlap in the heads of legislative power is also representative. The heads of legislative power granted to the federal Parliament and the provincial legislatures overlap considerably; as a result, it is often possible to relate a given legislative measure to either a federal *or* a provincial head of

⁶⁶ *Canadian Western Bank*, note 8, above, para. 28 [emphasis added].

legislative power. The classic example is dangerous driving. Legislative measures directed at dangerous driving seem to relate to both the federal criminal law power (on the basis that they are directed at public safety) and the provincial property and civil rights power (on the basis that they are directed at the regulation of provincial roads).⁶⁷ The response of the classical paradigm to this problem is to “mutually modify” the legislative heads of power: the relevant legislative head of power of one order of government would be interpreted as *including* jurisdiction over dangerous driving, and the relevant legislative head of power of the other order of government would be interpreted as *excluding* jurisdiction over dangerous driving. The response of the modern paradigm to this problem is the “double aspect” doctrine: the federal legislative measure would be sustained under the federal criminal law power, as a measure directed at public safety, and the provincial legislative measure would be sustained under the provincial property and civil rights power, as a measure directed at the regulation of provincial roads; the ultimate effect is to assign jurisdiction over dangerous driving to both the federal and provincial governments.⁶⁸ In *Canadian Western Bank*, the Supreme Court did not mention the mutual

⁶⁷ See P.W. Hogg, “Canada: Privy Council to Supreme Court”, in J. Goldsworthy, ed., *Interpreting Constitutions* (Oxford: Oxford University Press, 2006), 68; and generally 66-69. This example was cited by the Supreme Court in *Canadian Western Bank*, note 8, above, para. 30.

⁶⁸ *O’Grady v. Sparling* [1960] S.C.R. 804.

modification doctrine, but it did affirm the role of the double aspect doctrine in responding to the problem of overlap in the heads of legislative power. It noted that “some matters are by their very nature impossible to categorize under a single head of power”, and in response, it extolled the virtues of the double aspect doctrine, which, it said, “ensures that the policies of the elected legislators of both levels of government are respected.”⁶⁹ As with the pith and substance doctrine, the result is to accommodate significant overlap in federal and provincial jurisdiction.⁷⁰

b. Applicability: The Doctrine of Interjurisdictional Immunity

The most significant aspect of the Supreme Court’s discussion of doctrine in *Canadian Western Bank* is its discussion of the doctrine of interjurisdictional immunity. The Supreme Court reformulated its approach to the doctrine in three ways.⁷¹ First, it raised the threshold to engage the

⁶⁹ *Canadian Western Bank*, note 8, above, para. 30.

⁷⁰ I treat the double aspect doctrine and the pith and substance doctrine as allowing overlap in federal-provincial jurisdiction, but in theory, only the pith and substance doctrine actually impacts on the exclusivity of the two lists of legislative powers. The double aspect doctrine purports to respect the exclusivity of the two lists, by treating only the *subject matter* of the impugned legislation as concurrent. However, the practical effect is the same – jurisdictional overlap. Both orders of government are permitted to enact legislation dealing with ‘different’ aspects of an issue, as in the dangerous driving example.

⁷¹ As noted, Bastarache J. wrote a concurring opinion, disagreeing with the majority’s analysis, but not with its result. Bastarache J. argued that the doctrine of interjurisdictional immunity should always be considered before the paramountcy doctrine, and that the doctrine of interjurisdictional immunity should be engaged where provincial legislation impacts on the core of a federal power, such that federal legislative authority is “‘attacked,’ ‘hindered,’ or ‘restrained’”: note 8, above, para. 123.

doctrine. The doctrine will now apply only if the “basic, minimum and unassailable” core of a legislative power granted to one order of government would be *impaired* by a legislature measure enacted by the other level of government.⁷² (Prior to *Canadian Western Bank*, the threshold was merely *affects*, not *impairs*.⁷³) Second, it held that the doctrine should generally “be reserved for situations already covered by precedent.”⁷⁴ Finally, it said that the doctrine should now normally be considered *after* the federal paramountcy doctrine, at least in “the absence of prior case law favouring its application to the subject matter at hand.”⁷⁵ (Prior to *Canadian Western Bank*, the doctrine was usually considered *before* the paramountcy doctrine.)

These changes are significant, because the basic concern of the doctrine of interjurisdictional immunity is exclusivity of jurisdiction, and the doctrine as it was framed had the potential to limit significantly the overlap allowed under the pith and substance doctrine. A legislative measure enacted by one order of government was permitted to substantially impact the jurisdiction of the other order of government, provided that, in

⁷² *Canadian Western Bank*, note 8, above, paras. 35-68.

⁷³ *Bell Canada v. Quebec* [1988] 1 S.C.R. 769.

⁷⁴ *Canadian Western Bank*, note 8, above, para. 77.

⁷⁵ *Id.*, paras. 69-78.

doing so, it did not *affect* the core of a legislative power assigned to that other order of government. Following *Canadian Western Bank*, a legislative measure enacted by one order of government will be permitted to impact substantially the jurisdiction of the other order of government, provided that, in doing so, it does not *impair* the core of a legislative power assigned to that other order of government. This “leaves more room for the concurrence of federal and provincial jurisdiction.”⁷⁶

The Supreme Court offered a number of reasons for this stricter approach to the doctrine of interjurisdictional immunity. The first reason offered is that recent division of powers jurisprudence in Canada has allowed for “a fair amount of interplay and indeed overlap between federal and provincial powers.”⁷⁷ This trend, we are told, “finds its principled underpinning” in the belief that courts “should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government”, and “avoid blocking the application of laws which are taken to be enacted in the furtherance of the public interest.”⁷⁸ For the Supreme Court, strong reliance on the doctrine of interjurisdictional immunity is inconsistent with this trend in the jurisprudence.

⁷⁶ Hogg and Rodil, note 9, above, 635.

⁷⁷ *Canadian Western Bank*, note 8, above, para. 36 [citation omitted].

⁷⁸ *Id.*, para. 37.

The second reason offered speaks to “the importance of co-operation among government actors to ensure that federalism operates flexibly.”⁷⁹ Although the Supreme Court does not attempt to clarify exactly why this is so, it suggests that excessive reliance on the doctrine of interjurisdictional immunity is “inconsistent” with the “flexible federalism” that the Court is attempting to promote in its division of powers decisions.⁸⁰

The third reason offered is the need to ensure certainty in the scope of the division of powers. Excessive reliance on the doctrine of interjurisdictional immunity would, it is suggested, “create serious uncertainty”, because the doctrine requires judges to define the core of the legislative powers. This is problematic, because the core often lacks determinate scope. The Supreme Court concedes that this problem could be addressed, at least in part, if judges were willing to develop “abstract definitions” of the cores of the legislative powers, but this, it responds, would be inconsistent “with the tradition of Canadian constitutional interpretation, which favours an incremental approach.”⁸¹

The fourth reason offered is the need to avoid legal vacuums (the absence of legal regulations in a certain area), which are said to be “not

⁷⁹ *Id.*, para. 42.

⁸⁰ *Id.*

⁸¹ *Id.*, para. 43.

desirable.”⁸² Excessive reliance on the doctrine of interjurisdictional immunity risks creating legal vacuums, because laws enacted by one order of government cannot effect the core of the jurisdiction of the other order of government, even in the absence of a law enacted by that order of government.

The fifth reason offered is that the doctrine of interjurisdictional immunity has tended to operate asymmetrically, in favour of federal jurisdiction and at the expense of provincial legislation, a practice that runs the risk of unintentionally centralizing legislative power. For the Supreme Court, this would be “incompatible with the flexibility and co-ordination required by contemporary Canadian federalism”; undesirable as a matter of policy, because “so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level”; and inconsistent with “the principles of subsidiarity, i.e. that decisions are ‘best [made] at a level of government that is not only effective, but also closest to the citizens affected.’”⁸³

The final reason offered is that the doctrine is unnecessary, because it is always open to Parliament to enact legislation in areas that it wishes to regulate that triggers the doctrine of paramountcy, by making it

⁸² *Id.*, para. 44.

⁸³ *Id.*, para. 45.

“sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation.”⁸⁴

The idea of intergovernmental co-operation plays a key role in the reasons given for embracing this new approach to the doctrine of interjurisdictional immunity. The Supreme Court says that “co-operation among government actors” is important, because it “ensure[s] that federalism operates flexibly.”⁸⁵ It also says that the doctrine of interjurisdictional immunity should be restricted because: it has tended to lead to the centralization of legislative power in the federal Parliament, which “is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism”; and a “broad application” is “inconsistent” with the “flexible” co-operative federalism that the Court is attempting to promote.⁸⁶ The Supreme Court does not explain its thinking in any detail. However, its key assumptions appear to be that permitting a fair measure of overlap in federal-provincial legislative power will: ensure that the federal-provincial governments can flexibly work out different allocations of legislative power in different contexts, at different times, as

⁸⁴ *Id.*, para. 46.

⁸⁵ *Id.*, para. 42.

⁸⁶ *Id.*, paras. 42, 45.

deemed appropriate;⁸⁷ and encourage intergovernmental dialogue about the exercise of those legislative powers in particular regulatory areas.⁸⁸

This assumption, that accommodating overlap in legislative power will encourage intergovernmental dialogue about particular exercises of those legislative powers, requires further exploration. The idea seems counterintuitive. Why would one order of government need to engage in a process of intergovernmental dialogue with the other order of government if it has the legislative power to act? Is it not more likely that it would simply act unilaterally?⁸⁹ The Supreme Court seems inclined to believe that this will not be the net result. Why might it hold this view? The benefits of overlap in jurisdiction in a federal system have been noted by several federalism scholars in recent years. One benefit that has been claimed is that overlap operates as a kind of democratic safeguard, allowing one order of government to respond to a particular problem where the other order of government fails to act, either effectively or at all. This argument figures in

⁸⁷ This assumption is shared by others: see, e.g., Kramer, note 41, above, 289 (“the optimal level at which to do things depends on complicated circumstances that change over time. It follows ... that the domain of concurrent legislative jurisdiction must be broad enough to permit authority to be allocated and reallocated”).

⁸⁸ Again, this assumption is shared by others: see, e.g., D. Weinstock, “Liberty and Overlapping Federalism” in S. Choudhry et al., eds., *Dilemmas of Solidarity: Rethinking Distribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006), 171-72 (“When overlap and redundancy are built into the system ... [c]ompromises must be made”).

⁸⁹ Elliot, note 9, above, 489; and Leclair, note 59, above, 578-79.

the work of American constitutional scholar Erwin Chemerinsky, who refers to the benefits of “enhancing” and “empowering”, not limiting, legislative power.⁹⁰ It also seems to be at work in *Canadian Western Bank*, in the concern to avoid “legislative vacuums.”⁹¹ However, another benefit⁹² that has been claimed for overlap in jurisdiction is that it can foster co-operation about particular exercises of legislative power. The argument is this: overlap in legislative power inevitably gives rise to situations in which both orders of government wish to provide the same or similar goods and services to the same constituents; this, in turn, gives rise to situations of redundancy, where the involvement of *both* orders of government may be of no (or even negative) benefit to those constituents; governments, seeking to avoid these situations of redundancy, will be inclined to work together, perhaps due to political forces, or simply a desire to provide public goods and services more efficiently, in an attempt to ensure that this does not

⁹⁰ E. Chemerinsky, *Enhancing Government: Federalism for the 21st Century* (Stanford: Stanford University Press, 2008); see also M. Landau, “Redundancy, rationality and the problem of duplication and overlap” (1969) 29(4) *Pub. Adm. Rev.* 346 (an earlier work making similar arguments).

⁹¹ *Canadian Western Bank*, note 8, above, para. 44. This argument also reflects an unmistakably pro-government viewpoint: government power is not to be limited, at least not on federalism grounds, but to be empowered, as it is particularly well situated to respond to social/economic problems.

⁹² This is not seen as a benefit by all: see L.J. O’Toole, “Theoretical development in public administration: Implications for the study of federalism” (1990) 3(4) *Governance: An International Journal of Policy Administration* 394 (warning that overlap may lead to “endless cycles of bargaining”).

occur.⁹³ It is unclear whether the Supreme Court has this particular idea in mind, but it does seem clearly to be working from the fundamental assumption that accommodating overlap will indeed operate to “facilitate, not undermine” intergovernmental dialogue.

With these benefits, why not abandon the doctrine of interjurisdictional immunity altogether? The Supreme Court’s answer to this question is decidedly subdued: it says that the doctrine is rooted in the text of the Constitution, pointing to various references to “exclusive” legislative power in the text of ss. 91 and 92; it also says that the doctrine is rooted in “the principles of federalism”, but makes no attempt to expand on this point.⁹⁴ However, although it does not say so explicitly, the answer likely has a good deal to do with the Supreme Court’s concern about predictability in the division of powers. Recall the Supreme Court’s direction that the doctrine should generally only be applied to protect exclusive jurisdiction in those areas already covered by precedent. This seems an odd limitation to place on a division of powers doctrine. If the doctrine is grounded in the text of the Constitution and the principles of federalism, why limit it to situations covered by precedent? However, if

⁹³ These themes are explored in more detail in R. Hollander, “Rethinking Overlap and Duplication: Federalism and Environmental Assessment in Australia” (2009) 40(1) *Publius* 136.

⁹⁴ *Canadian Western Bank*, note 8, above, para. 33.

predictability is the concern, the limitation makes much more sense: the Supreme Court is worried about significantly upsetting settled expectations about exclusive jurisdiction, so it refrains from abandoning the doctrine altogether; but it also is not interested in recognizing new areas of exclusive jurisdiction, so it limits the doctrine to situations covered by precedent. The message is clear: change in jurisdiction will be tolerated, but any change must be incremental.

c. Operability: The Paramountcy Doctrine

The Supreme Court concluded its discussion of division of powers doctrine in *Canadian Western Bank* with the paramountcy doctrine. It said that, “[i]n the absence of conflicting enactments of the other level of government”, the courts “should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.”⁹⁵ It then cited this passage from an important article by Paul Weiler:

... the court should refuse to try to protect alleged, but as yet unoccupied, enclaves of governmental power against the intrusions of another representative legislature which has ventured into the area. Instead, the court should try to restrict itself to the lesser but still important role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which are left.⁹⁶

⁹⁵ *Id.*, para. 37 [emphasis added].

⁹⁶ *Id.* (citing P. Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 U.T.L.J. 307, 308).

For the Supreme Court, the paramountcy doctrine is clearly to occupy pride of place in a division of powers analysis. This is not especially surprising. The function of the paramountcy doctrine is to manage overlapping regulation. A court, like the Supreme Court, that is inclined to accommodate overlap in legislative power is likely to downplay the importance of doctrines that privilege exclusivity of legislative power, and to emphasize the importance of doctrines that function to manage any operational conflicts that arise; hence the limits placed on the doctrine of interjurisdictional immunity and the emphasis placed on the paramountcy doctrine. However, the Supreme Court also emphasized that the doctrine should be applied with restraint, because it ultimately operates at the expense of provincial jurisdiction and also reduces legislative overlap.

This call for restraint is evident in the Supreme Court’s discussion of the definition of conflict. The Supreme Court affirmed, citing recent precedent, that there are in fact two definitions of conflict: a *narrow* impossibility of dual compliance test, which applies where it is impossible to comply with both laws;⁹⁷ and a *broader* “frustration of federal purpose” test, which applies where the operation of a provincial law would frustrate the purpose of a federal law.⁹⁸ However, it urged courts not to apply the

⁹⁷ *Id.*, para. 71 [citation omitted].

⁹⁸ *Id.*, para. 73.

broader “frustration of federal purpose” test too enthusiastically, and cited the following guiding principles: that conflict is not triggered merely by overlapping legislation; that federal and provincial statutes should be construed to avoid conflict, if at all possible; and that an intention should not be imputed to Parliament to “occupy a field” absent “very clear statutory language.”⁹⁹ Restraint is also evident in the Supreme Court’s application of the doctrine to the facts of the case. The federal legislation permitted banks to promote insurance, but prohibited banks from acting “as agent for any person in the placing of insurance”; the provincial legislation required banks to hold a “restricted insurance agent’s certificate” in order to promote insurance in the province. There seemed to be an operative conflict. However, the Supreme Court interpreted the definition of “agent” in the federal legislation narrowly, so that it was possible to hold a “restricted insurance agent’s certificate” for the purposes of the provincial legislation, without also then being an “agent” (as the provincial certificate seemed to suggest) under the federal legislation.

* * *

The theory of judicial review described in *Canadian Western Bank* is reflected in this doctrinal approach. The Supreme Court acts with restraint, by accommodating overlap in federal and provincial legislative

⁹⁹ *Id.*, paras. 72-74 [citations omitted].

power, and largely limits itself to managing overlapping federal-provincial regulation in order to avoid conflicts in operation. The assumption appears to be that permitting overlap between federal and provincial legislative power will act as an incentive to intergovernmental dialogue about particular exercises of that legislative power. The Supreme Court does not entirely forswear a role in defining the scope of federal and provincial legislative power, but it openly encourages the political branches to take the lead, indicating that it will be prepared to intervene only where one order of government significantly upsets the existing balance of power.

II. THE DIVISION OF POWERS IN THE MCLACHLIN COURT PRE-CANADIAN *WESTERN BANK*

In this section, I discuss the leading pre-*Canadian Western Bank* division of powers decisions of the McLachlin Court. This discussion serves two related purposes.

The first purpose is to offer a fresh perspective on these decisions. The theory of judicial review described above was not new to *Canadian Western Bank*. The Supreme Court simply made explicit the theory of judicial review that had quietly been animating its decision-making in division of powers cases for a number of years. I trace the manner in which this theory is reflected in these decisions. In doing so, I augment existing accounts, which tend to emphasize the degree to which the Supreme Court

defers to the political branches, but overlook its attempts to facilitate intergovernmental dialogue.¹⁰⁰

The second purpose is to identify what else can be learned from these decisions about the theory of judicial review described in, and animating, *Canadian Western Bank*. Although important, the decision in *Canadian Western Bank* leaves many important questions unanswered. The pre-*Canadian Western Bank* decisions provide useful answers to some of the questions left open in *Canadian Western Bank* itself.

A. Expressions of Intergovernmental Dialogue About Jurisdiction

The theory of judicial review described in *Canadian Western Bank* is reflected fairly overtly in those cases where the McLachlin Court was faced with a specific manifestation or expression of intergovernmental dialogue about jurisdiction.

Intergovernmental dialogue has taken three forms in the cases. The first form that it has taken is an intervention, in a constitutional challenge initiated by a private party, in which the order of government that is not before the court supports the constitutionality of the legislation of the order of government that is before the court.¹⁰¹ The intergovernmental dialogue

¹⁰⁰ See the sources cited in note 7, above.

¹⁰¹ The federal and provincial Attorney Generals are given notice and intervention rights in all Canadian jurisdictions: see Hogg, note 4, above, sec. 59.6(a).

here is indirect and after-the-fact: there is no evidence that the enacting order of government consulted or negotiated with the non-enacting order of government pre-enactment, but the non-enacting order of government intervenes in any event to make the point that it supports the exercise of jurisdiction being challenged. This has occurred with some frequency in division of powers cases before the McLachlin Court. The Supreme Court repeatedly stressed that it will “exercise caution” before finding a legislative measure unconstitutional where this occurs.¹⁰² The implication seems to be that the Supreme Court will apply two standards of review: a more searching standard of review where there is no intergovernmental agreement about an exercise of jurisdiction, and a less searching standard of review where there is intergovernmental agreement about an exercise of jurisdiction. This is reflected in the outcome of the cases: in not one of the decisions reviewed did the Supreme Court find a constitutional infirmity where there was agreement of this sort about an exercise of jurisdiction.

¹⁰² *Kitkatla*, note 12, above, para. 73 (“the Attorney General of Canada has intervened in support of the view of the British Columbia government with respect to the latter’s right to legislate in this area. While this is not determinative ... it does invite the Court to exercise caution before it finds that the impugned provisions of the Act are *ultra vires*”); see also *R. v. Demers* [2004] 2 S.C.R. 489, para. 28; and *Rothmans, Benson & Hedges v. Sask.* [2005] 1 S.C.R. 188, para. 26. This idea is not new: see *Schneider v. The Queen* [1982] 2 S.C.R. 112, 138 per Dickson J. (“A factor which plays no part in the determination of the constitutional validity of the Act, but which, as a practical matter, is not negligible, is the support of both the provincial and federal authorities for the validity of the legislation. Although it does not resolve the constitutional issue it is interesting to observe that in these proceedings a provincial statute is being attacked on the ground that it falls within federal competence yet the Attorney General of Canada is not contesting the constitutionality of the provincial statute. He would like to see the provincial legislature remain in place”); and *Ont. v. OPSEU* [1987] 2 S.C.R. 2, 19-20 per Dickson C.J. (dissenting) (cited in full below).

The second form that intergovernmental dialogue has taken is a legislative measure structured to accommodate interlocking federal-provincial regulation. As with the first example, there is no evidence that the enacting order of government actually consulted or negotiated with the non-enacting order of government pre-enactment; and agreement is expressed in the form of an intervention supporting the legislation at issue. However, unlike with the first example, the legislation is positively structured by the enacting order of government to accommodate complementary regulation.

The Supreme Court considered a legislative measure of this sort in *Siemens v. Manitoba (Attorney General)* (2003).¹⁰³ At issue was the constitutionality of Manitoba legislation¹⁰⁴ that authorized municipalities to hold a plebiscite to ban video lottery terminals from the municipality. If such a plebiscite was held, and the majority of electors voted to ban video lottery terminals, an automatic prohibition of video lottery gaming in the municipality was triggered. Siemens challenged the provincial legislation, arguing (among other things) that it encroached on the federal government's jurisdiction over criminal law (s. 91(24)). The Supreme Court, per Major J., held that the legislation was a valid exercise of the provincial power over

¹⁰³ [2003] 1 S.C.R. 6.

¹⁰⁴ *The Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44.

property and civil rights (s. 92(13)) and matters of a local nature in the province (s. 92(16)). In support, Major J. noted that the federal government had intervened in support of the legislation. Major J. said that “governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that legislation is *intra vires*”, but that, “given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be given careful consideration by the courts.”¹⁰⁵ This was the familiar call for deference seen in other cases. But Major J. then added an additional gloss. He noted that the federal *Criminal Code*¹⁰⁶ specifically established an exception to the gaming and betting offences where a lottery scheme has been established by a province. The legislative record suggested that this was included to allow each province to determine whether it wished to establish a provincial lottery scheme. Major J. suggested that deference was particularly appropriate where the federal government “has intentionally designed a structure ... that ... promotes federal-provincial cooperation.”¹⁰⁷

The third form that intergovernmental dialogue has taken is interlocking legislation actually resulting from direct negotiation and

¹⁰⁵ *Siemens*, note 103, above, para. 34.

¹⁰⁶ *Criminal Code*, R.S.C. 1985, c. C.46, s. 207 [rep. & sub. c. 52 (1st Supp.), s. 3].

¹⁰⁷ *Siemens*, note 103, above, para. 35.

consultation.¹⁰⁸ This form of intergovernmental dialogue is unique, because here, there is actually evidence that the two orders of government worked together to establish complementary regulation.

The Supreme Court considered a legislative measure of this sort in *Fédération des producteurs de volailles du Québec v. Pelland* (2005).¹⁰⁹ At issue in *Pelland* was the constitutionality of a federal-provincial chicken marketing scheme crafted co-operatively by the federal and provincial governments. Under the scheme, a federal marketing agency (operating under authority granted to it by federal legislation) set a national chicken quota for each province, and a provincial marketing agency (operating under authority granted to it by provincial legislation) divided the quota up between individual producers in that province, making sure that it did not exceed the quota set by the federal marketing agency. Neither the quota set by the federal marketing agency nor the quota set by the provincial marketing agency distinguished between chickens destined for the interprovincial market and chickens destined for the intra-provincial market. As a result, producers were free to market their chickens inter-provincially

¹⁰⁸ For prior comments from the Supreme Court on federal-provincial co-operative schemes, see *Coughlin v. Ont.* [1968] S.C.R. 569, 576 per Cartwright J.; *Re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198, 1296 per Pigeon J. These cases are discussed in G. Tremblay, “The Supreme Court of Canada: Final Arbiter of Political Disputes” in I. Bernier et al., eds., *The Supreme Court of Canada as an Instrument of Political Change* (Toronto: University of Toronto Press, 1986).

¹⁰⁹ [2005] 1 S.C.R. 292.

and/or intra-provincially. Pelland, a chicken producer in the province of Quebec, challenged the provincial legislation in Quebec authorizing the provincial marketing agency to set the individual quotas, on the basis that it related to interprovincial trade, a matter falling within federal jurisdiction, under the federal trade and commerce power (s. 91(2)). The provincial legislation did seem to authorize the provinces to set quotas that would, in some cases, relate to chickens sold only outside the province. This would typically have been unconstitutional, but did the co-operative nature of the scheme make a difference? Abella J., writing for the Supreme Court, seemed to indicate that it did. She said that it was open to the provinces to regulate the marketing of chickens without regard to destination, at least within the context of a federal-provincial marketing scheme. Why? Because the legislation was devoted to the “organization of the production and marketing of chicken within Quebec *and [the] control [of] chicken production to fulfill provincial commitments under a cooperative federal-provincial agreement.*”¹¹⁰ The desire to accommodate a scheme resulting from federal-provincial co-operation is striking; indeed, the decision seems to imply that provincial legislation enacted in order to satisfy provincial commitments under a federal-provincial agreement is, for that reason alone, constitutional. Abella J. praised the federal-provincial scheme as a

¹¹⁰ *Id.*, para. 37 [emphasis added].

“reflection” and “reification” of “Canadian federalism’s constitutional creativity and co-operative flexibility”, and practically rejoiced that she could identify “no principled basis for disentangling what has proven to be a successful federal-provincial merger.”¹¹¹

The theory of judicial review described in *Canadian Western Bank* is evident in these decisions. As in *Canadian Western Bank*, the Supreme Court did not completely eschew a role in defining the division of powers. The Supreme Court said, repeatedly, that intergovernmental dialogue is not determinative of constitutionality. The clear implication is that Supreme Court believes that it still has a role to play in division of powers cases, even in the face of intergovernmental agreement about jurisdiction.

However, as in *Canadian Western Bank*, the Supreme Court is content to let the political branches take the lead in setting the balance of power. This is particularly true where the political branches agree about an exercise of jurisdiction in a particular regulatory area. The Supreme Court is reluctant to intervene, because this would involve the Supreme Court substituting its vision of the ideal federal-provincial balance of power for the vision of the political branches. This would be inappropriate, because

¹¹¹ *Id.*, paras. 15, 38. For a similar comment in a similar context, see *Re Agricultural Products Marketing Act*, note 108, above, 1296 per Pigeon J. (“when after 40 years a sincere cooperative effort has been accomplished, it would be really unfortunate if it was all brought to nought. While I adhere to the view that provinces may not make use of their control over local undertakings to affect extraprovincial marketing, this does not, in my view, prevent the use of provincial control to complement federal regulation of extraprovincial trade”) [emphasis added].

division of powers cases engage political notions, and accordingly, ought to be left to politics.¹¹²

Finally, as in *Canadian Western Bank*, while the Supreme Court is not anxious to play a major role in setting the balance of power, it is plainly concerned to facilitate intergovernmental dialogue about the balance of power. The Supreme Court consistently deferred to expressions of intergovernmental dialogue about exercises of jurisdiction in particular regulatory areas. This encourages, or provides an incentive to, future intergovernmental dialogue. In that sense, the Supreme Court is simultaneously adopting a passive role (deferring to *past* expressions of intergovernmental dialogue about jurisdiction) and an active role (encouraging *future* intergovernmental dialogue).¹¹³

These decisions also provide more insight into what intergovernmental dialogue (or “co-operative federalism”) actually means to the Supreme Court. In short, it appears to mean, simply, agreement about an exercise of jurisdiction. The Supreme Court may prefer a model of intergovernmental dialogue in which the federal and provincial governments actually engage in a direct form of negotiation and consultation, particularly where a legislative proposal has important

¹¹² *Employment Insurance Reference*, note 44, above, para. 10.

¹¹³ For a particularly strong call for future intergovernmental dialogue regarding national class actions, see *Canada Post. Corp. v. Lépine* [2009] 1 S.C.R. 549, paras. 56-57.

implications for the other order of government; it heaped praise on just such a scheme in *Pelland*. However, in the vast majority of the cases, intergovernmental dialogue took a different form. It took the form of an *indirect*, organic process of action and response, with legislative power exercised unilaterally, and the exercise of jurisdiction agreed to by the other level of government after-the-fact, in a court challenge. The Supreme Court seemed equally prepared to accept this form of intergovernmental dialogue, suggesting that agreement is paramount.

B. Accommodating Overlap, Managing Conflict: Pre-*Canadian Western Bank*

The theory of judicial review described in *Canadian Western Bank* is also reflected, albeit less overtly, in the McLachlin Court's overall approach to decision-making in earlier division of powers cases. I discuss how in the section that follows.

a. Accommodating Overlap: The Pith and Substance Doctrine

One of the core aspects of the theory of judicial review described in *Canadian Western Bank* is deference to the political branches. This posture of deference is reflected in the Supreme Court's discussion of the pith and substance doctrine. Little attempt is made to place strict limits on federal or provincial legislative power. Rather, the Supreme Court articulates an approach to the pith and substance doctrine that accommodates significant

overlap in jurisdiction, leaving it to the political branches to determine how legislative power will actually be exercised in particular regulatory areas.

The McLachlin Court consistently adopted a similar approach to the pith and substance doctrine in its pre-*Canadian Western Bank* division of powers decisions. It did so in two ways later discussed in *Canadian Western Bank*: by permitting both orders of government to enact legislation that substantially impacts the jurisdiction of the other order of government; and by allowing both orders of government to regulate a particular area of mutual concern, under the double aspect doctrine. But it also did so in one important way not later discussed in *Canadian Western Bank*: by giving a generous reading to particular heads of legislative power, by eschewing evidence of original intent.

i. Challenges to the Validity of Federal Legislation

The first two methods of accommodating overlap in jurisdiction are evident in the Supreme Court's decision in the *Firearms Reference* (2000).¹¹⁴ At issue in that case were the provisions in the federal government's gun control legislation¹¹⁵ requiring owners to register, and obtain a license to own, "ordinary firearms" (for example, hunting rifles). The gun control law was controversial. The government of Alberta,

¹¹⁴ *Reference re Firearms Act (Can.)* [2000] 1 S.C.R. 783.

¹¹⁵ *Firearms Act*, S.C. 1995, c. 39, amending the *Criminal Code*, R.S.C. 1985, c. C-46.

representing a constituency that is hostile to gun control, referred the law to the Alberta Court of Appeal for an “advisory opinion”¹¹⁶ on its constitutionality. Alberta argued that the law was *ultra vires* the federal government, on the basis that it fell within the scope of the provincial power over property and civil rights (s. 92(13)). The federal government defended the law, arguing that it was *intra vires* the federal government, on the basis that it fell within the scope of its criminal law power (s. 91(27)) and/or its general residuary power to legislate for the “Peace, Order and Good Government” of Canada (s. 91).

It is well established that a federal law must satisfy three criteria in order to be valid as an exercise of the federal criminal law power: the federal law must prohibit certain activity; the prohibition must be backed by a penalty; and the prohibition/penalty must have a valid criminal law purpose.¹¹⁷ The majority (3 to 2) of the Alberta Court of Appeal held that the federal gun control law satisfied these three requirements.¹¹⁸ The

¹¹⁶ The Supreme Court of Canada and the provincial appellate courts have the jurisdiction, by statute, to provide advisory opinions on legal questions referred to them by the federal and provincial governments. Legal questions from the federal government are referred directly to the Supreme Court; legal questions from provincial governments are referred to the relevant provincial appellate court, but can be appealed to the Supreme Court. An advisory opinion is not binding, strictly speaking, but it is usually treated as binding in practice. See Hogg, note 4, above, sec. 8.6.

¹¹⁷ *Reference Re Validity of s. 5(a) of Dairy Industry Act (Can.)* [1949] S.C.R. 1, 49 per Rand J. Rand J.’s reasons were adopted on appeal by the Privy Council: (1950), [1951] A.C. 179 (P.C., Can.).

¹¹⁸ (1998) 164 D.L.R. (4th) 513, 65 Alta. L.R. (3d) 1 (Alta. C.A.).

federal law contained a prohibition (both unregistered firearms and unlicensed ownership of firearms); this prohibition was backed by a penalty (violation of either prohibition was punishable as a summary conviction offence); and the prohibition/penalty had a valid criminal law purpose (enhancing public safety by controlling access to dangerous firearms). Alberta appealed to the Supreme Court. The Supreme Court, writing per curiam, agreed with the majority of the Court of Appeal and denied the appeal.

Alberta raised a number of concerns about the federal law before the Supreme Court, but one of the primary concerns that it raised was that the law inappropriately trespassed on provincial jurisdiction, and in so doing, dramatically upset the balance of power. The Supreme Court agreed that it was important to take account of the balance of power in deciding the case, but said that it would intervene to protect that balance only where the provincial effects of a federal law were so substantial that it was clear that the law was actually in “pith and substance” directed to a matter falling within provincial jurisdiction (or vice versa). The federal gun control law did not upset the balance of power in this manner; on the contrary, its extra-jurisdictional effects were merely incidental. The most significant extra-jurisdictional effect of the law was that it would eliminate the ability of provinces like Alberta *not* to regulate ordinary firearms at all. However,

this was not a problem, because “overlap of legislation [was] to be expected and accommodated in a federal state”,¹¹⁹ and the double aspect doctrine “permit[ted] both levels of government to legislate in one jurisdictional field for two different purposes.”¹²⁰

In reaching this result, the Supreme Court was untroubled that the law regulated a particular type of property. “Exercises of the criminal law power often”, it said, “affect property ..., as many aspects of the criminal law deal with property and its ownership.”¹²¹ What mattered was the purpose of the law, and here, the law was aimed directly at enhancing public safety, and only indirectly at regulating property. The Supreme Court was also untroubled that the law created a complex regulatory regime enabling a federal official (the chief firearms officer) to regulate a particular type of property. The answer was the Supreme Court’s decision in *R. v. Hydro-Québec* (1997).¹²² In that case, a five-judge majority of the Supreme Court upheld a federal law¹²³ that established a complex scheme for the regulation of toxic substances. Unlike that law, the prohibitions in this law

¹¹⁹ *Firearms Reference*, note 114, above, para. 26.

¹²⁰ *Id.*, para. 52.

¹²¹ *Id.*, para. 50.

¹²² [1997] 3 S.C.R. 213. La Forest J. wrote for the majority, L’Heureux-Dubé, Gonthier, Cory and McLachlin JJ. concurring; Lamer C.J. and Iacobucci J. dissented, with Major and Sopinka JJ.

¹²³ *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.).

were not defined by an administrative body, but stated clearly in the legislation; moreover, the discretion granted to the chief firearms officer was constrained by the legislation itself. If the law in *Hydro-Québec* was valid, this law was certainly valid as well. Finally, the Supreme Court was also untroubled that the legislation did not outright prohibit, but merely regulated, ordinary firearms. The answer was the Supreme Court's decision in *RJR-MacDonald v. Canada* (1995).¹²⁴ In that case, a seven-judge majority of the Supreme Court upheld a federal law¹²⁵ prohibiting (with exceptions) the advertising and promotion, but not sale, of tobacco products under the criminal law power. Parliament was free here, as there, to regulate indirectly under its criminal law power.

This decision contains the hallmarks of the approach later outlined in *Canadian Western Bank*. The Supreme Court upheld a law that has a substantial impact on provincial jurisdiction over property, and dismissed as incidental the effects that the legislation has on provincial jurisdiction. It also rejected the claim that it ought to protect the ability of the provinces to leave particular jurisdictional fields *unregulated*, in whole or in part; the answer to this claim was the double aspect doctrine, which permits both

¹²⁴ [1995] 3 S.C.R. 199. The law was challenged on division of powers and *Charter* grounds. The division of powers challenge was rejected, but the *Charter* challenge was successful. La Forest J. wrote the lead judgment on the division of powers issue, with the support of Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci and McLachlin JJ.; Major J. dissented, Sopinka J. concurring.

¹²⁵ *Tobacco Products Control Act*, S.C. 1988, c. 20.

orders of government to regulate ‘different’ aspects of a particular issue.¹²⁶

The third method of accommodating overlap in jurisdiction – interpreting federal heads of legislative power generously, by eschewing original intent – is clearly evident in two decisions.¹²⁷ The first is the decision of the Supreme Court in the *Same-Sex Marriage Reference*.¹²⁸ Legislative jurisdiction in Canada relating to marriage is divided between the federal and provincial governments. The federal government is given jurisdiction over “marriage and divorce” (s. 91(26)) and the provincial governments are given jurisdiction over “the solemnization of marriage” (s. 92(12)). According to judicial interpretation, s. 91(26) confers on the federal government legislative competence to regulate the legal capacity to marry (essential validity), whereas s. 92(12) confers on the provincial governments legislative competence to regulate the formal ceremonial or

¹²⁶ See also *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698, para. 32 (federal legislation recognizing same-sex marriage upheld, notwithstanding that it would affect provincial jurisdiction, by requiring the provinces to issue marriage licenses, register marriages, provide civil solemnization services to same-sex couples, and make available a “host of legal incidents attendant upon marital status”; these effects were incidental, and thus irrelevant); and *Employment Insurance Reference*, above, note 44 (federal legislation granting maternity and paternity benefits to mothers and parents respectively upheld, even though the legislation had the effect of allowing mothers and parents to take time off; because the provisions did not actually grant the legal right to take maternity or paternity leave, but only replacement income, if maternity or paternity leave were otherwise available under provincial legislation or employment contract, these effects as well were incidental, and thus irrelevant).

¹²⁷ See also *Ward v. Can.* [2002] 1 S.C.R. 569 (broadly interpreting the federal power over fisheries (s. 91(12)), and rejecting a narrower interpretation offered by the Nfld. Court of Appeal).

¹²⁸ *Same-Sex Marriage Reference*, note 126, above.

evidentiary requirements of marriage (formal validity).¹²⁹ In 2003/04, the federal government drafted legislation, to have effect across the country, reformulating the different-sex definition of marriage to include same-sex couples.¹³⁰ Anticipating a constitutional challenge from several provinces, the federal government then referred the proposed legislation to the Supreme Court, asking it to consider whether it fell within the legislative authority of the federal government over “marriage and divorce.”¹³¹

The Supreme Court, writing per curiam, concluded that the federal government did indeed have the legislative authority to change the definition of marriage.¹³² The Supreme Court rejected the argument that the meaning of “marriage” was constitutionally fixed, necessarily incorporating a different-sex requirement. This, it said, was “frozen concepts” reasoning

¹²⁹ *In Re Marriage Laws* (1912) 46 S.C.R. 132.

¹³⁰ The complete story is told in W.K. Wright, “The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales” (2006) 20 *Int. J. Law Pol. & Family* 249, 251-258.

¹³¹ The Supreme Court was also asked to consider whether: a) section 1 of the proposed legislation, redefining marriage, was consistent with the *Charter*; b) whether freedom of religion protects religious officials from being compelled to perform a same-sex marriage; and (a question added later) c) whether the opposite-sex definition of marriage violated the *Charter*.

¹³² In an attempt to allay the concerns of religious officials opposed to same-sex marriage, the legislation also provided that ‘[n]othing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs’ (s. 2). The Supreme Court held that s. 2 was *ultra vires* the federal government because it legislated an exemption to existing solemnization requirements. The Supreme Court rejected the argument of the federal government that the provision served merely to make it clear that the federal government wanted the legislation to be read consistently with the division of powers; this, the Supreme Court said, was a matter for the courts.

that ran “contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”¹³³ The different-sex definition of marriage “spoke to a society of shared social values where marriage and religion were thought to be inseparable”, but Canada was now a pluralistic society, and what was “natural” to marriage was contested.¹³⁴ It could not be said that “‘marriage’ ... read expansively ... excludes same-sex marriage.”¹³⁵

This is a striking example of a generous reading of a federal head of power. Applying a presumption of constitutionality, the Supreme Court placed the burden on those arguing against the legislation to demonstrate that the term “marriage”, read generously, *could not* include same-sex marriage. Evidence that “marriage” in 1867 would have been understood to include only different-sex marriage was insufficient. The heads of power must, it said, be given a generous interpretation, so that the “Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in

¹³³ *Same-Sex Marriage Reference*, note 126, above, para. 22.

¹³⁴ *Id.*, para. 22.

¹³⁵ *Id.*, para. 29.

which it was crafted.”¹³⁶

The broad reading of federal legislative power evident in the *Same-Sex Marriage Reference* was also prominently on display in the *Employment Insurance Reference*.¹³⁷ At issue were the provisions in the federal *Employment Insurance Act*¹³⁸ relating to maternity leave and parental leave benefits for eligible employees. The provisions granted maternity benefits to women who were absent from work by reason of pregnancy and parental benefits to parents who were absent from work in order to care for a newborn child. In 2001, the government of Quebec announced its own maternity leave and parental leave benefit program, and initiated a constitutional challenge to the federal program, by asking the Quebec Court of Appeal, on a reference, to consider whether the provisions in the federal legislation were *ultra vires* the federal government.¹³⁹ Quebec argued that the maternity leave and parental leave benefits were

¹³⁶ *Id.*, para. 23.

¹³⁷ Note 44, above.

¹³⁸ S.C. 1996, c. 23, ss. 22 and 23.

¹³⁹ The federal government and the Quebec government reached an agreement after the decision of the Quebec Court of Appeal was released, but before the decision of the Supreme was released. The federal government agreed to exempt the province of Quebec from the federal parental leave benefits scheme. It amended the federal legislation, providing that federal parental leave benefits would be reduced or eliminated where “benefits are payable to a claimant ... for the same reasons under a provincial law...”: *Employment Insurance Act*, S.C. 1996, c. 23, s. 23, as am. by S.C. 2005, c. 30, s. 130. The federal legislation already contained a similar provision relating to provincial maternity leave: s. 22(3).

really social assistance measures that fell within provincial competence under s. 92(13), the provincial power over property and civil rights. The federal government responded that the maternity leave and parental leave benefits were really temporary income support measures, and that it was open to it to enact such measures under s. 91(2A), the federal power over unemployment insurance. The Quebec Court of Appeal agreed with Quebec and struck down the provisions.¹⁴⁰ The Supreme Court, however, agreed with the federal government, and allowed the appeal, upholding the provisions under s. 91(2A).¹⁴¹

Both courts adopted a radically different approach. The Court of Appeal adopted an original intent approach, focusing on whether the provision of maternity leave and parental leave benefits by the federal government was consistent with the bargain struck by the federal and provincial governments in 1940, when the *Constitution Act, 1867* was amended to grant the federal government jurisdiction over unemployment insurance.¹⁴² It began by noting that welfare and social security measures typically come under provincial jurisdiction. It then proceeded to analyze a

¹⁴⁰ (2004) D.L.R. (4th) 515 (Que. C.A.).

¹⁴¹ *Employment Insurance Reference*, note 44, above.

¹⁴² This head of power was added by constitutional amendment in 1940, after the first federal statute establishing an unemployment insurance regime was declared unconstitutional, on the basis that unemployment insurance was a matter of “property and civil rights in the province”, and therefore within provincial competence: see *A.-G. Can. v. A.-G. Ont.* [1937] A.C. 335 (P.C., Can.).

number of period documents, to determine whether, in amending the division of powers, the federal and provincial governments intended to subtract jurisdiction over maternity and parental leave benefits from provincial jurisdiction, by giving that jurisdiction to the federal government. It concluded that no such intent was evident. On the contrary, these documents demonstrated conclusively that “the amendment was aimed at enabling federal authorities to set up a plan to insure individuals against lost income following the loss of their job for economic reasons, not following the interruption of their employment for personal reasons.”¹⁴³ Applying this reading, the conclusion was obvious. The benefits conferred were “not paid further to the loss of a job for economic reasons; rather, they [were] paid further to the interruption of an individual’s employment because of a personal inability to work.”¹⁴⁴ Accordingly, the provisions conferring these benefits were invalid.

Allowing the appeal, the Supreme Court, per Deschamps J., adopted a “living tree” approach, and strongly criticized the Court of Appeal for its “original intent approach to interpreting the Constitution.”¹⁴⁵ While evidence as to original intent was relevant, it was not to be treated as

¹⁴³ *Employment Insurance Reference*, note 140, above, para. 72.

¹⁴⁴ *Id.*, para. 75.

¹⁴⁵ *Employment Insurance Reference*, note 44, above, para. 9.

conclusive. The Supreme Court also implicitly criticized the Court of Appeal for adopting a mutual modification approach to the heads of legislative power. “Where a specific power has been detached from a more general head of power, the specific power cannot be evaluated in relation to the general power, because any evolution would then be regarded as an encroachment.” The proper approach was to “consider the essential elements of the power and to ascertain whether the impugned measure [was] consistent with the natural evolution of that power.”¹⁴⁶

Applying this approach, the Supreme Court held that the purpose (the “pith and substance”) of the impugned provisions was to provide *replacement income* to pregnant women (maternity leave) and parents (parental leave) when their employment was interrupted by a decision to take maternity leave or parental leave, not the actual provision of maternity leave or parental leave itself; and that this fell within the scope of the federal unemployment insurance power. That power was not limited, as suggested by the Court of Appeal, to legislation dealing with *involuntary* unemployment. A court must take “a progressive approach to ensure that Confederation can be adapted to new social realities.”¹⁴⁷ In this case, those new social realities included “the evolution of the role of women in the

¹⁴⁶ *Id.*, para. 44.

¹⁴⁷ *Id.*, para. 9.

labour market and the role of fathers in child care.”¹⁴⁸ The federal legislative power over unemployment insurance extended to legislation aimed, as here, at maintaining economic security, by paying temporary income replacement benefits in the event of an interruption of employment, whether voluntary or involuntary.¹⁴⁹

This is another striking example of the generous reading of a federal head of power. In 1940, when the amendment was drafted, maternity and paternity leave benefits were not contemplated. The prevailing assumptions at that time were that women would not work after marriage, and that they would take on primary childcare responsibilities. However, the social reality had changed, and so too, said the Supreme Court, should the scope of the federal government’s legislative jurisdiction. The result is that both the federal and provincial governments now have the authority to enact legislation dealing with maternity and parental leave benefits. The Supreme Court was predictably comfortable with this result. “It is rare”, it said, “that all the subjects dealt with in a statute fall entirely under a single head of power.” Moreover, “[t]he power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the

¹⁴⁸ *Id.*, para. 62.

¹⁴⁹ *Id.*, paras. 48, 62.

other level to control another aspect within its own jurisdiction.”¹⁵⁰

ii. *Challenges to the Validity of Provincial Legislation*

These cases are typical of the manner in which the McLachlin Court applied the pith and substance doctrine where the validity of *federal* legislation was at issue: overlap in jurisdiction was accommodated, not eschewed. The McLachlin Court adopted a similar approach to the pith and substance doctrine where the issue was the validity of *provincial* legislation.¹⁵¹ However, it did not do so by offering a broader reading of provincial heads of legislative power, as it did in the *Same-Sex Marriage Reference* and the *Employment Insurance Reference* with federal legislation. This is unsurprising. The vast majority of the McLachlin Court’s division of powers cases have turned on the interaction between one or more of the federal heads of legislative power hand and the provincial

¹⁵⁰ *Id.*, para. 8. See also *Confédération des syndicats nationaux v. Can.* [2008] 3 S.C.R. 511 (embracing an even broader reading of the federal unemployment insurance power).

¹⁵¹ Bruce Ryder, writing before *Canadian Western Bank*, suggested that the Supreme Court is particularly concerned to permit the growth of federal legislative power: note 7, above, 351. If the implication is that the Supreme Court has not expanded the scope of provincial *heads of power*, I agree; but if the implication is that the Supreme Court is not also concerned to give a generous scope to provincial legislative power, I do not agree. The current Supreme Court seems inclined to give a broad scope to federal *and* provincial legislative power. (Strong evidence of this can be found in the Supreme Court’s recent decision in *Consolidated Fastfrate v. Western Canada Council of Teamsters* [2009] 3 S.C.R. 407.) However, because the provincial power over property and civil rights was already interpreted broadly, it had no need to do so by expanding its reading of provincial heads of legislative power. I reserve judgment in this article about the impact that the Supreme Court’s generous approach to federal legislative power is likely to have, *in practice*, on provincial jurisdiction.

legislative power over property and civil rights. The provincial legislative power over property and civil rights had already been interpreted broadly by the courts. Where the issue was the validity of provincial legislation, the McLachlin Court accommodated overlap in jurisdiction by permitting the provincial legislatures to enact legislation that substantially impacts federal jurisdiction, and/or by allowing both orders of government to regulate in particular areas, under the double aspect doctrine.

The decision of the Supreme Court in *Global Securities Corp. v. British Columbia (Securities Commission)* (2000) is typical.¹⁵² At issue was a provision in British Columbia's *Securities Act*¹⁵³ that authorized the British Columbia Securities Commission to order registered brokers in the province to produce records "to assist in the administration of the securities laws of another jurisdiction."¹⁵⁴ The respondent challenged the provision, on the basis that its pith and substance was the enforcement of the securities laws of another jurisdiction, a matter falling within federal jurisdiction.

The Supreme Court, per Iacobucci J., rejected the challenge, holding that the provision fell within provincial jurisdiction. The essential character of the provision was the enforcement of British Columbia's securities laws,

¹⁵² Note 63, above.

¹⁵³ R.S.B.C. 1996, c. 418.

¹⁵⁴ *Id.*, s. 141(1)(b).

not the enforcement of the securities laws of another jurisdiction, for two reasons. First, in order to enforce British Columbia's securities laws, the Commission would require access to records held outside the province. Iacobucci J. emphasized the "indispensable" need for interjurisdictional cooperation among securities regulators, and said that this would be forthcoming only if the Commission reciprocated.¹⁵⁵ Second, the Commission had an interest in facilitating the investigation of possible wrongdoing outside of the province by a British Columbia registered broker, because this would be relevant to the fitness of that broker to continue trading in the province. The Commission could, of course, conduct its own investigation, but it could also "choose to have that task carried out by a foreign regulator, which is presumably in a better position to conduct such an investigation."¹⁵⁶ Iacobucci J. had little difficulty with the next stage of the analysis; it had long been established that securities regulation fell within provincial jurisdiction, as a matter of property and civil rights in the province (s. 92(13)). Significantly, Iacobucci J. did not disagree that the provision had extra-provincial effects; it did, after all, permit the Commission to order the production of records located in the province, which could then be used in an *extra*-provincial investigation.

¹⁵⁵ *Global Securities Corp.*, note 63, above, para. 27.

¹⁵⁶ *Id.*, para. 36.

However, these effects were said to be “clearly incidental” to the dominant purpose of the provision – *intra*-provincial enforcement.¹⁵⁷

The decision of the Supreme Court in *Krieger v. Law Society of Alberta* (2002) is to similar effect.¹⁵⁸ As in all provinces, the Alberta government delegated its power to regulate the legal profession to a provincial regulatory body, the Law Society of Alberta.¹⁵⁹ The Law Society enacted rules of professional conduct for lawyers practicing law in that province. One rule, specifically addressed to Crown attorneys in the province, required “timely disclosure” to defence counsel “of all known relevant facts and witnesses, whether tending towards guilt or innocence.”¹⁶⁰ This rule was accompanied by commentary, explaining that it would apply only where there was an allegation of dishonesty or bad faith.¹⁶¹ At issue was whether this rule was *intra vires* the province. *Krieger*, a Crown attorney in Alberta who was alleged to have violated the rule, argued that the answer was no. The purpose of the rule, he said, was to regulate Crown disclosure during the course of a prosecution, by establishing more onerous obligations to disclose information than exists at

¹⁵⁷ *Id.*, paras. 37-38.

¹⁵⁸ [2002] 3 S.C.R. 372.

¹⁵⁹ *Legal Profession Act*, S.A. 1990, c. L-9.1 (now R.S.A. 2000, c. L-8).

¹⁶⁰ Crown disclosure is constitutionally required: *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

¹⁶¹ *Alberta Code of Professional Conduct*, Rule 28(d).

law; accordingly, it fell within the scope of the federal power over criminal law and criminal procedure, s. 91(27). The Law Society of Alberta, however, argued that the purpose of the rule was to establish an ethical standard; accordingly, it fell within the scope of the provincial power in relation to property and civil rights (s. 92(13)) or the administration of civil and criminal justice (s. 92(14)).

The Supreme Court, in an opinion written jointly by Iacobucci and Major JJ., held that the rule fell within the scope of the provincial power in relation to property and civil rights in the province under s. 92(13). Iacobucci and Major JJ. noted that there was “a strong possibility of overlap between the provincial and federal spheres”, because the federal government was granted jurisdiction over criminal law and criminal procedure under s. 91(27), which includes the authority to determine the procedures that govern criminal trials, and the provincial governments were granted jurisdiction to license and regulate lawyers under s. 92(13), which includes the authority to deal with breaches of ethics.¹⁶² However, the rule was valid, because it was situated in the provincial rules of professional conduct; it was authorized by the relevant delegating legislation; it was limited to dishonest or bad faith breaches; and the commentary indicated that it was not intended to establish more onerous disclosure obligations

¹⁶² *Krieger*, note 158, above, para. 33.

than already existed at law. The result is more overlap in jurisdiction. Timely disclosure is now a legal requirement, falling within the federal government's power in relation to criminal law and criminal procedure, as well as a professional responsibility requirement, falling within the provincial government's power in relation to the regulation of professions.¹⁶³

b. Accommodating Overlap: The Ancillary Doctrine

The ancillary doctrine is of relatively recent origin, and it has not been applied with any consistency by the Supreme Court.¹⁶⁴ However, the ancillary doctrine did play a prominent role in two of the McLachlin Court's pre-*Canadian Western Bank* division of powers decisions. In both

¹⁶³ The following cases are also representative of the generous approach that the McLachlin Court consistently took to provincial exercises of jurisdiction: *Siemens*, note 103, above (described above); *Pelland*, note 109, above (described above); *UL Canada v. Que.* [2005] 1 S.C.R. 143 (affirming a judgment of the Quebec Court of Appeal, concluding that a provision in provincial legislation prohibiting the sale of yellow-color margarine was valid under the provincial property and civil rights power, notwithstanding that it applied to imported as well as locally manufactured margarine; the pith and substance of the legislation was framed as the regulation of *intra*-provincial trade); *B.C. v. Imperial Tobacco Canada* [2005] 2 S.C.R. 473 (upholding provincial legislation that authorized an action by the government of British Columbia against tobacco product manufacturers for the recovery of the health care expenses it incurred in treating individuals exposed to those products, and altered the common law rules to make it easier for the government to succeed on such an action, notwithstanding that the legislation authorized claims against companies 'located' mostly outside the province, for exposure to tobacco products that occurred primarily outside of the province); and *Chatterjee*, note 23, above (a post-*Canadian Western Bank* decision upholding a provincial civil forfeiture law that largely replicated a federal law, and counseling a second look at *Canadian Western Bank* and *Lafarge*, decisions which discouraged "[r]esort to a federalist concept of proliferating jurisdictional enclaves").

¹⁶⁴ See further, Hogg, note 4, above, sec. 15.9(c).

of these decisions, the Supreme Court affirmed that the ancillary doctrine will be applied to accommodate broad exercises of jurisdiction.

The first decision in which the ancillary doctrine was applied by the McLachlin was *Global Securities*, discussed above. As noted, in that case, the Supreme Court, per Iacobucci J., sustained a provision in the British Columbia *Securities Act* authorizing the provincial securities regulator to order registered brokers in that province to produce records to assist in an out-of-province securities investigation. Iacobucci J. decided the case by applying the pith and substance doctrine. However, in *obiter*, Iacobucci J. also said that the provision could be sustained under the ancillary doctrine, on the basis that it was sufficiently integral to an otherwise valid provincial legislative scheme.

Two aspects of this decision are important here. First, prior to this case, the ancillary doctrine had been applied only in cases considering the validity of a provision in federal legislation. In this case, Iacobucci J. said that it applied equally to provincial legislation. Second, Iacobucci J. clearly implied that the ancillary doctrine can be used to sustain provisions that might otherwise be unconstitutional under the pith and substance doctrine.¹⁶⁵ If so, the ancillary doctrine is not merely an alternative to the pith and substance doctrine, used to determine the validity of only part of a

¹⁶⁵ *Global Securities Corp.*, note 63, above, para. 45 (“even if s. 141(1)(b) were not in pith and substance provincial, it would clearly be justified under the ancillary doctrine”).

legislative scheme. Rather, it permits governments to encroach on the jurisdiction of the other order of government, in a manner that would otherwise violate the division of powers, provided that the provision doing so is sufficiently integral to an otherwise valid scheme.

The pivotal question in applying the ancillary doctrine is the level of scrutiny that will be applied by the court to the challenged provision. This question is pivotal, because where the encroachment is minimal, it is sufficient if the provision is “functionally related” to the legislative scheme, but where the encroachment is not minimal, the provision must be “truly necessary” or “integral” to the legislative scheme. Obviously a provision that encroaches only minimally on the jurisdiction of the other order of government has a much greater chance of surviving a constitutional challenge.¹⁶⁶

The importance of this determination is evident in the Supreme Court’s decision in *Kirkbi AG v. Ritvik Holdings Inc.* (2005),¹⁶⁷ a case dealing with the scope of the federal trade and commerce power (s. 91(2)).¹⁶⁸ At issue in *Kirkbi* was the passing-off provision (s. 7(b)) in the

¹⁶⁶ Earlier decisions seem to treat the degree of encroachment question as a sliding scale, not a question that admits of only two answers – minimal or more than minimal intrusion: see, in particular, the decision of Dickson C.J. in *General Motors*, note 63, above. However, more recent decisions (which are admittedly far from clear) seem to approach the question in this manner: see *Kirkbi*, note 63, above.

¹⁶⁷ Note 63, above.

¹⁶⁸ It has long been established that the trade and commerce power authorizes two types of

federal *Trade-marks Act*.¹⁶⁹ This provision permitted the holder of an unregistered trademark to recover losses resulting from a person directing “public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada ... with the wares, services or business of another.” Ritvik (the manufacturer of Mega Bloks) was engaged in a long-running dispute with Kirkbi (the manufacturer of Lego) over the marketing and sale around the world of Micro Mega Bloks, which closely resembled Lego. Kirkbi, claiming an unregistered trademark in the Lego design, attempted to restrain Ritvik from marketing Micro Mega Bloks in Canada, by bringing an action under the passing-off provision. Ritvik responded by (among other things) challenging the constitutional validity of the passing-off provision.

An earlier Supreme Court decision seemed to pose a serious

federal legislation: a) legislation directed at international or interprovincial trade; and b) legislation directed at the “general regulation of trade affecting” Canada as a whole: *Citizens Insurance Co. of Canada v. Parsons* (1881) 7 App. Cas. 96, 113 (P.C., Can.). However, before *General Motors*, note 63, above, the general trade branch of the trade and commerce power was largely ignored or rejected as a basis for sustaining federal legislation. In *General Motors*, the Supreme Court said that federal legislation would be sustained under the general trade branch of the trade and commerce power if five conditions were satisfied: note 63, above, 662-63. Applying this approach, the Supreme Court, per Dickson C.J., held (for the first time) that the federal *Combines Investigation Act* R.S.C. 1970, c. C-23 (now the *Competition Act* R.S.C. 1985, c. C-34) was valid as an exercise of the general trade branch of the trade and commerce power. This decision opened up many more legislative options to Parliament, including civil remedies, such as damages. See further Hogg, note 4, above, sec. 18.7.

¹⁶⁹ R.S.C. 1985, c. T-13, s. 7(b).

challenge to the passing-off provision.¹⁷⁰ In that decision, Laskin C.J. held that a provision in the federal *Trade-marks Act* creating, as here, a civil cause of action was invalid; the creation of civil causes of action of a contractual or tortious nature fell within provincial jurisdiction, under property and civil rights, s. 92(13). But he suggested several times, in *obiter*, that the result might have been different if the provision establishing the civil cause of action was included in valid federal legislation creating a “regulatory scheme” administered by a “federally-appointed agency.”¹⁷¹ In doing so, he seemed to place particular emphasis on the idea that the enforcement of the cause of action created by the provision must *not* be “left to the chance of private redress without public monitoring by the continued oversight of a regulatory agency.”¹⁷² The passing-off provision seemed to suffer from this exact flaw. The provision was included in a federal regulatory scheme, but the enforcement of the provision was left entirely to the chance of private redress. Only the provisions relating to *registered* trademarks were subject to federal regulatory oversight.

However, LeBel J., writing for the Supreme Court, held that the passing-off provision was valid under the general trade branch of the trade

¹⁷⁰ *MacDonald v. Vapor Canada* [1977] 2 S.C.R. 134. Laskin C.J. wrote the lead opinion.

¹⁷¹ *Id.*, 156, 158, 163, 165, 167.

¹⁷² *Id.*, 165.

and commerce power. In reaching this conclusion, he played down the fact that enforcement of the passing-off provision was entirely left to private actors, and played up the role of the provision in the legislative scheme as a whole. The legislative scheme was directed at protecting registered *and unregistered* trademarks: “without this provision there would be a gap in the legislative protection of trade-marks”, and this “would create inconsistencies in the protection of registered and unregistered trade-marks and lead to uncertainty.”¹⁷³

The result is that passing off is now subject to both federal jurisdiction, under the trade and commerce power, and provincial jurisdiction, under the property and civil rights power. Yet again, the Supreme Court was unbothered by this result. LeBel J. acknowledged that the provision “essentially codifies the common law tort of passing off”, and that, “[s]tanding alone, it appears to encroach on provincial power.” He also conceded, citing *General Motors*, that the provincial power over property and civil rights “is a significant power and one that is not lightly encroached upon.”¹⁷⁴ Nonetheless, the encroachment here was somehow merely minimal.¹⁷⁵ Accordingly, it was enough that the provision was merely related to an otherwise valid federal legislative scheme.

¹⁷³ *Kirkbi*, note 63, above, para. 36.

¹⁷⁴ *Id.*, para. 23.

¹⁷⁵ *Id.*, paras. 23-27.

* * *

This discussion demonstrates the extent to which the McLachlin Court accommodated overlap in jurisdiction in considering challenges to the validity of federal and provincial legislation. In applying the pith and substance doctrine, it permitted both orders of government to enact legislation that substantially impacts the jurisdiction of the other order of government; it allowed both levels of government to enact legislation in particular subject areas, under the double aspect doctrine; and it offered broad new interpretations of (in particular) federal heads of legislative power, by eschewing evidence of original meaning, where this would narrow the scope of a head of legislative power. In applying the ancillary doctrine, it held that the doctrine would apply to both federal and provincial legislation, and it indicated that it might sustain provisions in both federal and provincial legislation that would otherwise be unconstitutional, provided they were sufficiently integral to a legislative scheme that was valid as a whole.

In some cases, the McLachlin Court broke new ground. For example, the ancillary doctrine had not been applied to provincial legislation before the decision in *Global Securities Corp.* In many cases, new ground was not broken. For example, the courts have long held that incidental effects are irrelevant to the constitutionality of legislation under

the pith and substance doctrine.¹⁷⁶ But in all cases, division of powers doctrine, new and old, was applied to accommodate overlap in legislative jurisdiction.

The McLachlin Court did not completely eschew a role in defining the boundaries of federal and provincial legislative power. In the *Firearms Reference*, for example, it said that it would intervene where the impact of a legislative measure on the jurisdiction of the other order of government was so substantial that it was absolutely clear that the legislative measure was actually directed to a matter falling within the jurisdiction of that order of government. Similarly, in the *Employment Insurance Reference*, it said that the scope of the heads of legislative power may change to meet new political, social and economic realities, but that the change must be consistent with the “natural” evolution of the power. However, in both rhetoric and result, the message was fairly clear: the legislative branches have considerable flexibility to set the federal-provincial balance of power; the Supreme Court will intervene to limit the scope of legislative power, but only where one order of government dramatically upsets the existing balance of power.

¹⁷⁶ Hogg, note 4, above, sec. 15.5(a).

c. Accommodating Exclusivity?: The Interjurisdictional Immunity Doctrine

The doctrine of interjurisdictional immunity has figured prominently in debates, judicial and academic, about the proper balance of power, and the judicial role in protecting that balance of power. For those who believe that there are (at least some) zones of *exclusive* federal jurisdiction (or federal *and* provincial jurisdiction) that must be respected, the doctrine of interjurisdictional immunity has an important role to play in a division of powers analysis – and the courts, in turn, have a role to play in applying it.¹⁷⁷ However, for those who believe that there are very few (or no) zones of *exclusive* federal jurisdiction (or federal *and* provincial jurisdiction) that must be respected, the doctrine of interjurisdictional immunity has a limited (or no) role to play in a division of powers analysis – and the courts, in turn, have a limited (or no) role to play in applying it.¹⁷⁸

In *Canadian Western Bank*, the Supreme Court significantly restricted the application of the doctrine of interjurisdictional immunity. Consistent with its approach to the pith and substance doctrine and the ancillary doctrine, it did so, ostensibly, in order to limit zones of exclusive

¹⁷⁷ See, e.g., R. Elliot, Comment (1988) 67 Can. Bar Rev. 523 (defending the doctrine of interjurisdictional immunity); and *Bell Canada*, note 73, above, paras. 248-304 per Beetz J. (same).

¹⁷⁸ See, e.g., D. Gibson, Comment (1990) 69 Can. Bar Rev. 339 (criticizing the doctrine); and *O.P.S.E.U.*, note 102, above, 17-22 per Dickson C.J. (dissenting) (same).

jurisdiction, and to accommodate overlap in jurisdiction.

Although important, this change ought not to have been entirely unexpected, for two reasons. The first is the decision in *Law Society of British Columbia v. Mangat* (2001),¹⁷⁹ the only non-section 91(24) decision of the McLachlin Court to address the doctrine of interjurisdictional immunity prior to *Canadian Western Bank*.¹⁸⁰ In that case, the Supreme Court expressed doubts about the doctrine of interjurisdictional immunity, and said that it was preferable to look to the paramountcy doctrine in deciding the case.¹⁸¹ This was so for two reasons. The first was that the doctrine of interjurisdictional immunity “would exclude provincial jurisdiction, even if Parliament did not legislate in the area”; it was

¹⁷⁹ [2001] 3 S.C.R. 113.

¹⁸⁰ The McLachlin Court did consider the doctrine of interjurisdictional immunity in four s. 91(24) decisions prior to *Canadian Western Bank*: see *Lovelace*, note 12, above, paras. 109-111; *Kitkatla*, note 12, above, paras. 67-71; *Paul*, note 12, above, paras. 14-34; and *Morris*, note 12, above, paras. 41-43. Concerns about the doctrine of interjurisdictional immunity were not raised by the Supreme Court in any of these decisions. However, I am reluctant to draw any conclusions from this fact. As noted above (see note 12), the federal legislative power provided for in s. 91(24) raises unique considerations. It may simply be the case that the Supreme Court was hesitant to apply its larger concerns about the interjurisdictional immunity doctrine to s. 91(24), because it was reluctant to circumscribe the operation of the doctrine in relation to s. 91(24) without a discussion of the unique considerations at play in that context. However, even if I am wrong about this, my analysis would not change. The Supreme Court did not completely discard the doctrine of interjurisdictional immunity in *Canadian Western Bank*; it said, rather, that it should be applied with considerable caution. Even the most superficial analysis of these four s. 91(24) decisions reveals a similarly cautious approach. With the exception of *Morris*, the Supreme Court did not even consider whether the core of federal competence was affected or impaired, because the core was said not to be engaged at all; and in *Morris*, where the core *was* engaged and immunity *was* granted, the majority used the stricter language of impairs, not affects (see paras. 42-43).

¹⁸¹ *Mangat*, note 179, above, paras. 52-54. I discuss the case in further detail below.

preferable to rely on the paramountcy doctrine, because it did not lead to regulatory vacuums of this sort. The second was that the doctrine of interjurisdictional immunity might lead to bifurcated regulation; it was preferable to rely on the paramountcy doctrine, because it would protect federal and provincial jurisdiction.¹⁸²

It is tempting to treat *Mangat* as an anomaly. It is only one decision; in the 1990s, the Supreme Court did treat the doctrine of interjurisdictional immunity as an accepted feature of a division of powers analysis in a series of decisions;¹⁸³ and in two of these decisions, one released as recently as 1998, the Supreme Court actually applied the doctrine and read down provincial laws.¹⁸⁴ However, just years earlier, in 1987, Dickson C.J. (Lamer J. concurring) argued that the doctrine ought to be applied cautiously, because it operated to limit the “fair amount of interplay and indeed overlap between federal and provincial powers” that was the hallmark of the Canadian division of powers.¹⁸⁵ And in 1989,¹⁸⁶ the

¹⁸² *Id.*, para. 52.

¹⁸³ *Friends of the Oldman River Society v. Can.* [1992] 1 S.C.R. 3 (immunity from federal law denied); *Ontario Hydro v. Ont.* [1993] 3 S.C.R. 327 (same); *Ont. v. Canadian Pacific* [1995] 2 S.C.R. 1028 (immunity from provincial law denied); *Air Canada v. Ont.* [1997] 2 S.C.R. 581 (same).

¹⁸⁴ *Can. v. CTCQ* [1990] 2 S.C.R. 838 (immunity from provincial law granted); and *Ordon Estate v. Grail* [1998] 3 S.C.R. 437 (same).

¹⁸⁵ *OPSEU*, note 102, above, 17-22.

¹⁸⁶ *Irwin Toy v. Que.* [1989] 1 S.C.R. 927, 955-957. *Irwin Toy* was released only 11

Supreme Court signaled its dissatisfaction with the doctrine, by introducing a nonsensical qualification that restricted its application.¹⁸⁷ Although the Supreme Court seemed to put its concerns about the doctrine to rest in the 1990s, *Mangat* indicated that these concerns remained, or had, in the least, resurfaced.

However, *Mangat* aside, there is another, even more compelling reason that *Canadian Western Bank* ought not to have come as a big surprise. In restricting the application of the doctrine of interjurisdictional immunity, the Supreme Court was merely squaring the manner in which it applied the doctrine with its overall theory of judicial review. As noted, the doctrine of interjurisdictional immunity operates to protect exclusive enclaves of legislative power, and it does so, whether or not the other level of government has enacted overlapping legislation in that area. However, in both rhetoric and result, the McLachlin Court consistently accommodated overlap in jurisdiction in its division of powers cases, in applying both the pith and substance doctrine and the ancillary doctrine. It would be incongruous for the Supreme Court to embrace overlap in applying the pith and substance and the ancillary doctrines, but to reject it in applying the

months after *Bell Canada*, and four of the five judges who sat on *Irwin Toy* also sat on *Bell Canada* (including Beetz J., who wrote the judgment in *Bell Canada*). The case raised a division of powers and a *Charter* issue. The bench was unanimous on the division of powers issue, but split on the *Charter* issue. The lead judgment on the division of powers issue was written by Dickson C.J.

¹⁸⁷ See *Canadian Western Bank*, note 8, above, para. 49 (affirming this reading).

doctrine of interjurisdictional immunity.¹⁸⁸ Taken in context, the decision in *Canadian Western Bank* was not unexpected – doctrine was merely being squared with theory.

d. Managing Intergovernmental Conflict: The Paramountcy Doctrine

In 1988, in *Bell Canada*, Beetz J., writing for the Supreme Court, cautioned that the pith and substance doctrine and the double aspect doctrine must be applied with great caution because there is a “risk that these two fields of exclusive powers [in ss. 91 and 92 of the *Constitution Act, 1867*] will be combined into a single more or less concurrent field of power governed solely by the rule of paramountcy of federal legislation.”¹⁸⁹ Twenty years later, in *Canadian Western Bank*, the Supreme Court threw caution to the wind and basically adopted this approach. The Supreme Court made it clear that it would largely limit itself, not to imposing absolute limits on jurisdiction, but to managing jurisdictional overlap, by interpreting overlapping legislation to avoid conflict in operation, if possible, and applying the paramountcy doctrine in the situations that

¹⁸⁸ For those who believe that the courts ought to protect exclusive enclaves of federal and provincial power, such an approach is likely to be seen as anything but incongruous. My point here is merely that it would be incongruous for a court that seems intent on accommodating significant overlap in federal and provincial jurisdiction to embrace it in applying one doctrine (the pith and substance doctrine), but to eschew it in applying another (the interjurisdictional immunity doctrine).

¹⁸⁹ *Bell Canada*, note 73, above, 766.

remain. This approach was already firmly entrenched in the McLachlin Court's prior division of powers decisions.

The paramountcy doctrine figured prominently in three decisions released by the McLachlin Court prior to *Canadian Western Bank: 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* (2001);¹⁹⁰ *Mangat*;¹⁹¹ and *Rothmans, Benson & Hedges v. Saskatchewan* (2005).¹⁹² One aspect of these decisions is emphasized in the academic literature – namely, the extent to which the McLachlin Court affirmed two extensions of the definition of conflict.¹⁹³ It is understandable that this aspect of these decisions has received considerable attention. The Supreme Court did affirm that a conflict will not be triggered merely where it is impossible to comply with both a federal and a provincial law, but that a conflict will also be triggered where the operation of a provincial law would frustrate the

¹⁹⁰ [2001] 2 S.C.R. 241.

¹⁹¹ Note 179, above.

¹⁹² Note 102, above. See also *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629, paras. 50-53 (discussing the paramountcy doctrine briefly; the case did not turn on the paramountcy doctrine, but on unjust enrichment, so I do not discuss it here); and *D.I.M.S. Construction Inc. (Trustee of) v. Que.* [2005] 2 S.C.R. 564 (finding that two provisions in Québec legislation did not affect the order of priorities in bankruptcy proceedings in a manner inconsistent with the federal bankruptcy legislation, and thus that there was no conflict; the paramountcy doctrine is not specifically mentioned).

¹⁹³ P.W. Hogg, "Paramountcy and Tobacco" (2006) 34 S.C.L.R. (2d) 355 (emphasizing this element of the decisions); R. Elliot, "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 S.C.L.R. 26 (2d) 629 (same); Brouillet, note 7, above, 325-332 (same); and Ryder, note 7, above, 369-372 (same).

purpose of a federal law.¹⁹⁴ It also affirmed that the stricter impossibility of dual compliance test will not be engaged merely where a citizen cannot comply with both laws, but that it will also be engaged where a government decision-maker cannot comply with (or give effect to) both laws.¹⁹⁵ By expanding the definition of conflict in these two ways, the Supreme Court did increase the situations in which federal law might pre-empt provincial law. However, it seems to me that a different, and equally important, aspect of these decisions has largely been ignored in the academic literature. This aspect of the decisions emerges, not so much from what the Supreme Court says, but from what it does. Shifting the focus to results, away from the rhetoric, the *primary* concern of the Supreme Court seems to be *intergovernmental* conflict (meaning conflicts in the positions taken by the relevant government actors), *not legislative* conflict (meaning conflicts stemming from the operation of the legislation). The Supreme Court seems to be concerned with legislative conflict only secondarily, where there is an intergovernmental conflict about jurisdiction; where there is no intergovernmental conflict, the Supreme Court is reluctant to find a legislative conflict.

¹⁹⁴ *Mangat*, note 179, above, paras. 70, 72 (citing *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121).

¹⁹⁵ *Id.*, paras. 71-72 (citing *M & D Farm v. Manitoba Agricultural Credit Corporation* [1999] 2 S.C.R. 961).

How is this reflected in the decisions? Consider *Rothmans*. In that case, federal legislation prohibited the promotion, anywhere in Canada, of tobacco products, except as authorized elsewhere in the legislation (s. 19), and it later provided that “a person may display, at retail, a tobacco product” (s. 30(1)).¹⁹⁶ However, Saskatchewan legislation prohibited the advertising, promotion *and display* of tobacco products in any premises in the province in which persons under the age of 18 were permitted (s. 6).¹⁹⁷ At issue was whether the Saskatchewan legislation was rendered inoperative by the paramountcy doctrine. A number of major tobacco companies, including Rothmans, Benson and Hedges, argued that the answer was yes; the government of Saskatchewan (supported by the federal government and several provinces) argued that the answer was no.

The Supreme Court, per Major J., agreed with the province. There was no concern about impossibility of dual compliance. The federal legislation did not create a “positive entitlement” to display tobacco products, but merely circumscribed the general prohibition on promotion; accordingly, it was possible for a retailer to comply with both provisions (either by refusing to admit persons under 18 or not displaying tobacco products) and for a judge to give effect to both provisions (by proceeding on

¹⁹⁶ *Tobacco Act*, S.C. 1997, c. 13.

¹⁹⁷ *The Tobacco Control Act*, S.S. 2001, c. T-14.1.

the assumption that the provincial legislation simply prohibits what the federal legislation does not prohibit).¹⁹⁸ In addition, there was no concern about frustrating the federal purpose. The provincial legislation did not frustrate either the general purpose of the federal legislation (“to address a national health problem”) or the specific purpose of the challenged provision (“to circumscribe the [federal legislation’s] general prohibition on promotion of tobacco products”).¹⁹⁹ On the contrary, the provincial legislation furthered “at least two of the stated purposes of the [federal legislation,] namely, ‘to protect young persons and others from inducements to use tobacco products (s. 4(b)), and ‘to protect the health of young persons by restricting access to tobacco products’ (s. 4(c))”.²⁰⁰

The Supreme Court gave short shrift to two arguments supporting the opposite conclusion,²⁰¹ both of which were accepted by the Saskatchewan Court of Appeal.²⁰² The first argument was that the provincial legislation frustrated the *specific* purpose of the provision in the federal legislation permitting retail display. The choice *seemed* to be quite simple: a retail establishment that wanted to display tobacco products (as

¹⁹⁸ *Rothmans*, note 102, above, paras. 18-20, 22-23.

¹⁹⁹ *Id.*, para. 25.

²⁰⁰ *Id.*

²⁰¹ See Hogg, note 4, above, sec. 16.3(b).

²⁰² (2003) 232 D.L.R. (4th) 495, 238 Sask. R. 530 (Sask. C.A.), paras. 69-88.

permitted by the federal legislation) could comply with both the federal and provincial legislation by excluding persons under 18 from the establishment (as required by the provincial legislation). However, given the impracticality in many cases of excluding persons under 18, many retail establishments had little choice but to refrain from displaying tobacco products. For these establishments, the provincial legislation effectively negated the exception in the federal legislation relating to retail display. The second argument was that the provincial legislation frustrated a *general* purpose of the federal legislation. In *RJR-MacDonald*, the majority of the Supreme Court held that the predecessor to the federal legislation at issue in *Rothmans* unjustifiably infringed the right to freedom of expression in s. 2(b) of the *Charter*, and in so doing, expressed concerns about an absolute ban on promotion.²⁰³ The federal government responded by enacting legislation that prohibited the promotion of tobacco products, but permitted retail display. However, Saskatchewan then enacted legislation restricting retail display. There was an argument that, in doing so, the provincial legislation frustrated a general purpose of the federal legislation – to regulate tobacco products in a manner that complied with the *Charter*.

The Supreme Court did not accept either argument. It simply ignored the *Charter* argument, and it asserted, without explanation, that the

²⁰³ Note 124, above, paras. 164, 191.

specific purpose of the provision in the federal legislation permitting retail display was not frustrated by the provincial legislation. The Supreme Court was clearly reluctant to find the provincial law inoperative under the paramountcy doctrine. But why? The answer may lie, in part, in the fact that the Supreme Court simply agreed with the provincial law; ‘big tobacco’ has not fared well in the Supreme Court in recent years.²⁰⁴ However, the answer likely also lies, at least in part, in the fact that this was a case in which there was no intergovernmental conflict. The federal government intervened to support the law, arguing that it was enacted for the same health-related purpose as the federal law. The Supreme Court noted that it was influenced by the federal government’s submissions.²⁰⁵

Now consider *Mangat*. One of the issues in *Mangat* was whether a provincial law that had the effect of preventing non-lawyers from appearing for a fee before the federal Immigration and Refugee Board (“IRB”) was rendered inoperative, under the paramountcy doctrine, by a federal law that authorized non-lawyers to appear before the IRB for a fee. The Supreme Court, per Gonthier J., said yes. There was no conflict, applying the narrow impossibility of dual compliance test: those appearing before the IRB could

²⁰⁴ See, e.g., *Imperial Tobacco*, note 163, above (rejecting a constitutional challenge to a provincial law making it considerably easier for the provincial government to recover its tobacco-related healthcare costs); and *Can. v. JTI-Macdonald Corp.* [2007] 2 S.C.R. 610 (rejecting a constitutional challenge to a federal statute placing significant restrictions on tobacco advertising).

²⁰⁵ *Rothmans*, note 102, above, para. 26.

comply with both provisions, either by becoming a lawyer or by not charging a fee for their services. But, there was nonetheless still a conflict in operation, for two reasons. First, the purpose of the federal rule was to provide an informal, accessible and speedy process before the IRB, in which clients could be represented by those who spoke their language, understood their culture, and were inexpensive; that purpose would be frustrated if only lawyers were permitted to appear before the IRB. And second, “it would be impossible for a judge or an official of the IRB to comply with both acts.”²⁰⁶

Of the three cases listed above, *Spraytech*, *Mangat*, and *Rothmans*, *Mangat* was the only case in which the Supreme Court held that there *was* a conflict sufficient to trigger the paramountcy doctrine. What might account for this different result? Unlike *Spraytech* and *Rothmans*, this was a case where there *was* an intergovernmental conflict. The federal government intervened before the Supreme Court, emphasizing the important role that immigration consultants played in proceedings before the IRB, and arguing that it would frustrate the purpose of the federal legislation to apply the provincial legislation to prohibit non-lawyer immigration consultants from appearing for a fee before the IRB. The Supreme Court agreed, and held the provincial legislation to be inoperative.

²⁰⁶ *Mangat*, note 179, above, para. 72.

Results speak louder than words in these cases. Where there is no intergovernmental conflict, the Supreme Court is reluctant to find provincial legislation inoperative under the paramountcy doctrine: it strives, where possible, to ensure the ordinary operation of the legislation of *both* levels of government, by interpreting the legislation to avoid conflict (*Rothmans*). However, where there is intergovernmental conflict, the Supreme Court is less reluctant to find provincial legislation inoperative under the paramountcy doctrine (*Mangat*). It is not especially surprising to see this dynamic at work in the paramountcy decisions. Why? A central concern of a paramountcy analysis is now avoiding the frustration of federal legislative purpose. A court, like the current Supreme Court, that is content to let the political branches take the lead in defining the balance of power is unlikely to be keen on substituting its view for the federal government's view of federal purpose, particularly in a case where there is no intergovernmental conflict, and the federal government supports the operation of a provincial law. Rightly or wrongly,²⁰⁷ such a court is likely to take the view that the federal government is better positioned to determine the purpose of *federal* legislation.

²⁰⁷ Of course, there are often good reasons to be skeptical of a government's statement of legislative purpose. For example, the government in power at the time of the case might be a very different one than was in power when the legislation was enacted – it might even have opposed the legislation – and its motives in taking the position it takes regarding legislative purpose might be of a highly political nature. However, that issue is beyond the scope of this article, and not critical to the point I am making here.

The role that intergovernmental conflict now plays in the Supreme Court's paramountcy decisions is demonstrated particularly clearly in *British Columbia (Attorney General) v. Lafarge Canada Inc.* (2007), released concurrently with *Canadian Western Bank*. At issue was a proposal to build an integrated ship offloading/concrete batching facility. The facility was to be built on land owned by the Vancouver Port Authority (the "VPA"), but situated within the City of Vancouver. The stage was set for a jurisdictional struggle: the regulatory regime established by the federal *Canada Marine Act*²⁰⁸ authorized the VPA to regulate land use on port lands managed and owned by the VPA, but the City of Vancouver had also enacted a zoning and development by-law regulating land use within Vancouver city limits.²⁰⁹ However, as might be expected, the case was not initiated by either the VPA or the City of Vancouver: the Lafarge proposal was approved in principle by both. The case was initiated by a group of local ratepayers opposed to the construction of the facility in their neighborhood. The basis of their legal claim was the failure of the City of Vancouver to require a development permit, in accordance with its own zoning and development by-law. Lafarge and the VPA argued in response that a development permit was not required, by virtue of the doctrine of

²⁰⁸ S.C. 1998, c. 10.

²⁰⁹ City of Vancouver Zoning and Development Bylaw No. 3575.

interjurisdictional immunity (on the basis that the VPA had the exclusive jurisdiction to deal with land-use regulation on VPA-owned land) and/or the paramouncy doctrine (on the basis that the VPA and the City of Vancouver land-use controls conflicted).

Surprisingly, the Supreme Court, per Binnie and LeBel JJ., held that there *was* a conflict between the federal and municipal land-use regimes. In so concluding, the Supreme Court seemed to abandon the posture of restraint articulated in *Canadian Western Bank* and its earlier paramouncy decisions. There would seem to be no impossibility of dual compliance simply where both a federal law and a municipal by-law require separate zoning and development approvals. The conflict will arise only where one order of government withholds its approval. If both orders of government consent, there would be no conflict, and it should (in theory, at least) be possible to obtain the consent of both orders of government, by complying with the stricter standards. However, the Supreme Court said nonetheless that the impossibility of dual compliance test of conflict was satisfied on these facts, due to simple differences in height restrictions and noise and pollution standards. It also said that the frustration of federal purpose test of conflict was satisfied, although the purpose of the federal law was never identified.

What might account for this result? The answer seems to be the

Supreme Court's desire to accommodate intergovernmental dialogue. The federal government had delegated regulatory authority to the VPA and the provincial government had delegated regulatory authority to the City of Vancouver, and both the VPA and the City had approved the Lafarge proposal. This seemed to be decisive for the Supreme Court. This passage from the Supreme Court's decision is particularly striking in this regard:

A successful harbour in the 21st century requires federal provincial cooperation. The courts should not be astute to find ways to frustrate rather than facilitate such cooperation where it exists if this can be done within the rules laid down by the Constitution.

Here the VPA and the City worked out a cooperative framework. The Lafarge project, although opposed by the Ratepayers, complied with the land use envisaged by both levels of government in their respective planning documents.

Of course, consent cannot confer jurisdiction where none exists. In this case, however, the project was found by those most closely concerned ... to be dealt with through federal rather than municipal procedures. No reason has been shown for us to interfere.

...

Where the VPA and the City are in disagreement, of course, the courts will have to resolve the difference. But that is not this case.²¹⁰

The Supreme Court is clearly anxious to facilitate intergovernmental dialogue, and in this case, interestingly enough, this compels the Supreme

²¹⁰ *Lafarge*, note 8, above, paras. 86-88, 90.

Court to act. The Supreme Court finds a conflict between the federal and the municipal regulatory regime, in order to preserve the fruits of the co-operation of these two stakeholders.²¹¹ The ratepayers are, it seems, mere busybodies, insufficiently ‘closely concerned’ to justify ‘interfering.’

This brings to the surface an important implication of the Supreme Court’s theory of judicial review. The traditional view is that both governments and private parties are entitled to hold governments to the division of powers, and that courts should take seriously division of powers challenges initiated by private parties. This view was challenged over thirty years ago by Paul Weiler.²¹² Working from an assumption that the division of powers engages individual interests in a limited way, if at all, Weiler argued that courts should generally refuse to entertain non-government division of powers claims. Thirty years later, Weiler’s argument seems to hold considerable purchase with the Supreme Court. The Supreme Court did continue to hear division of powers cases initiated by private parties; it regularly denied that federal-provincial agreement about jurisdiction is

²¹¹ The Supreme Court is being somewhat slippery here. In *Lafarge*, the government of British Columbia defended the position of the ratepayers that there was no conflict between the federal and the municipal regulatory regime; this pitted the ratepayers and the government of British Columbia against the City of Vancouver (the municipal regulatory authority, granted that authority by the province), the VPA (the federal regulatory authority), and the federal government (which intervened). In finding a conflict, the Supreme Court was, in fact, preserving *federal-municipal*, not *federal-provincial* co-operation.

²¹² Weiler, note 40, above, ch. 6.

determinative of constitutionality; and in one case, it even explicitly disclaimed the view that the division of powers does not engage private interests.²¹³ However, it also said, time and again, that it would be particularly hesitant to strike down a legislative measure in the face of intergovernmental dialogue. Moreover, private citizens have regularly failed in challenging legislation absent intergovernmental conflict. The implication seems fairly clear. For the Supreme Court, there is a sharp distinction between judicial review under the *Charter* and the division of powers: *Charter* review is seen to engage individual interests, whereas federalism review is not, at least not directly. For that reason, private division of powers challenges that do not garner the support of the non-enacting order of government are approached with caution.

* * *

In its division of powers decisions, the McLachlin Court consistently adopted the approach it later outlined in *Canadian Western Bank*. It regularly accommodated overlap in jurisdiction in the manner in

²¹³ *Kitkatla*, note 12, above, para. 72 (citing *OPSEU*, note 102, above, 19-20 per Dickson C.J. (dissenting)) (“The distribution of powers provisions ... do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has enacted legislation based on the same constitutional approach adopted by Ontario”) [emphasis added].

which it applied both the pith and substance doctrine and the interjurisdictional doctrine. It largely limited itself to managing overlapping legislation: where there was no intergovernmental conflict, it was reluctant to find a legislative conflict, and typically attempted to ensure the operation of the legislation of both orders of government, by interpreting the legislation to avoid conflict in operation; where there was an intergovernmental conflict, it still attempted to interpret legislation to limit conflict in operation, but it was less reluctant to apply the paramountcy doctrine.

The approach adopted in these decisions is reflective of the theory of judicial review outlined by the Supreme Court in *Canadian Western Bank*. As in *Canadian Western Bank*, the Supreme Court, in these decisions, did not entirely leave the division of powers to the political branches. It encouraged the political branches to take the lead in setting the balance of power, but implied that it would still be prepared to intervene in situations where either order of government dramatically upset the balance of power.

The last element of the theory of judicial review outlined in *Canadian Western Bank*, facilitating intergovernmental dialogue, is reflected less overtly. However, on closer inspection, it is also quietly at work in these decisions as well. The paramountcy decisions are particularly interesting. The Supreme Court was reluctant to find a conflict in operation

where there was no intergovernmental conflict about jurisdiction, but it was less reluctant to do so where there was an intergovernmental conflict. As in *Canadian Western Bank*, the motivation seemed to be to facilitate intergovernmental dialogue.

These decisions also provide further insight into this theory of judicial review. For example, under this theory, private litigants have a reduced chance of success, particularly where the legislation at issue reflects some form of intergovernmental dialogue. The paramountcy cases demonstrate the point – the Supreme Court has been reluctant to find an operative conflict absent intergovernmental conflict. The decisions also provide insight into the Supreme Court’s understanding of intergovernmental dialogue. In short, it appears to mean, simply, agreement. Little emphasis is placed on how agreement is reached; what matters most, it seems, is the mere fact of agreement. Finally, these decisions highlight an interesting role for judicial review: court challenges now seem to serve as an opportunity for intergovernmental dialogue about jurisdiction.

III. FUTURE DIRECTIONS?: POST-*CANADIAN WESTERN BANK*

The theory of judicial review described in *Canadian Western Bank* continues to animate the Supreme Court’s subsequent division of powers

decisions.²¹⁴ However, in these decisions the Supreme Court is increasingly being forced to grapple with difficult questions flowing from its embrace of this theory of judicial review. In this section, I outline three such questions. I then anticipate an argument that would, if convincing, answer, or in the least change the nature of the debate about, these questions. I do not consider the strengths or weaknesses of this argument here; that is left to a future article.

A. The Role of Intergovernmental Dialogue

One important question that the Supreme Court has failed to address in an authoritative manner is the role that intergovernmental dialogue will (and should) actually play in division of powers cases. A court asked to consider the constitutionality of a legislative measure reflecting some element of intergovernmental dialogue could adopt one of four different approaches. First, it could hold that the division of powers forbids all legislative measures resulting from intergovernmental dialogue. On this

²¹⁴ See *Confédération des syndicats*, note 150, above (embracing an even broader reading of the federal unemployment insurance power, and upholding various measures directed, not at income replacement, as per the *Employment Insurance Reference*, but at improving access to the labour market); *Chatterjee*, note 23, above (upholding a provincial civil forfeiture law that largely replicates a federal criminal forfeiture law, and dismissing the argument challenging the law's constitutionality as "based ... on an exaggerated view of the immunity of federal legislation in relation to matters that may, in another aspect, be the subject of provincial legislation", and counseling a second look at *Canadian Western Bank* and *Lafarge*); but see *Consolidated Fastfrate*, note 151, above (finding that the employees of a freight forwarding company fell within provincial jurisdiction, and affirming the basic principles of *Canadian Western Bank*, para. 29-30, but placing more emphasis on original intent than has traditionally been evident in prior decisions, which elicited a strong dissent from Binnie J., one of the co-authors of *Canadian Western Bank*).

view, intergovernmental dialogue is a negative factor in assessing constitutionality. Second, it could hold that the division of powers does not forbid legislative measures resulting from intergovernmental dialogue, but insist that all such legislative measures must respect the division of powers as it stands. On this view, intergovernmental dialogue is at best a neutral factor in assessing constitutionality. Third, it could hold, not only that the division of powers does not forbid legislative measures resulting from intergovernmental dialogue, but that the division of powers should actually be altered, in some cases, at least, to accommodate intergovernmental dialogue. On this view, intergovernmental dialogue is a positive factor in assessing constitutionality. Or fourth, it could hold that intergovernmental dialogue should be decisive in all cases. The Supreme Court has sent mixed signals as to which approach it supports. There is language in Supreme Court decisions supporting the second approach; this is reflected in its claim that intergovernmental agreement is not determinative of constitutionality.²¹⁵ However, there is strong evidence that the Supreme Court is actually inclined to the third approach: intergovernmental dialogue is not necessarily decisive, but it is a positive factor to take into account in determining whether an exercise of jurisdiction is constitutional.²¹⁶

²¹⁵ See note 213, above.

²¹⁶ It seems fairly clear that intergovernmental dialogue is not a condition precedent (a necessary condition) to constitutionality: see *Firearms Reference*, note 114, above, para. 56

This question is raised squarely in *Attorney General of Canada v. Attorney General of Quebec*. At issue in that case is the constitutionality of various provisions in the federal *Assisted Human Reproduction Act*.²¹⁷ That legislation establishes a detailed federal framework for the regulation of assisted human reproduction. In 2007, Quebec tabled its own legislation, and then referred various provisions in the federal legislation to the Quebec Court of Appeal. The Court of Appeal agreed with the province that the provisions in question were unconstitutional.²¹⁸ The federal government appealed. The Supreme Court heard argument in the case in April of last year and reserved judgment.²¹⁹

The case raises the question of intergovernmental dialogue, because the federal legislation includes a provision (s. 68) that allows certain provisions in it to be suspended in a province by agreement, provided that province has enacted “equivalent”, but not necessarily identical, regulatory standards. In prior cases, the Supreme Court seemed to take comfort in

(rejecting an argument that the lack of consultation by the federal government with the provinces before enacting federal gun control legislation reflected negatively on the legislation’s constitutionality); see also *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, 421 (rejecting a similar argument about federal anti-inflation legislation).

²¹⁷ S.C. 2004, c. 2.

²¹⁸ (2008) 298 D.L.R. (4th) 712 (Que. C.A.).

²¹⁹ Case No. 32750 (Appeal heard April 24, 2009).

provisions of this sort in finding federal legislation to be constitutional.²²⁰ However, the Quebec Court of Appeal adopted quite a different approach. It suggested, in essence, that s. 68 actually counted against, not in favour of, the provisions. Its reasoning is difficult to follow, but the general thrust seems to be that, by contemplating the possibility of “equivalent” standards, Parliament effectively conceded that its purpose was the regulation of health, an area falling within provincial jurisdiction.²²¹

The government of Quebec did not pursue this particular argument before the Supreme Court.²²² Rather, it argued that provisions of this sort can have no bearing on constitutionality, by rendering constitutional an otherwise unconstitutional exercise of legislative power. In support, it pointed to s. 94 of the *Constitution Act, 1867*, a little known and rarely discussed constitutional provision that allows the federal Parliament to legislate, with provincial consent, “for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick.”²²³ This argument goes directly to the question of the

²²⁰ See, e.g., *Siemens*, note 103, above; and *Confédération des syndicats*, note 150, above.

²²¹ Note 218, above, para. 145.

²²² See Factum of the Attorney General of Québec (16 March 2009) (available online: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=32750>) (accessed 2 April 2010).

²²³ Section 94 was recently discussed at length in M.A. Adam, “The Spending Power, Co-operative Federalism and Section 94” (2008) 34 *Queen’s L.J.* 175.

effect of intergovernmental dialogue on constitutionality. The argument is, in essence, that it is inappropriate for the Supreme Court to take intergovernmental dialogue into account in a division of powers case, because the text of the Constitution itself imposes certain procedural and substantive limits on the ability of Parliament to legislate outside its jurisdiction. Intergovernmental dialogue, on this argument, is at best a neutral factor in considering constitutionality.

Before the Supreme Court, the federal government limited itself to confronting the Quebec Court of Appeal's argument that s. 68 actually counted *against* the impugned provisions.²²⁴ It argued that the federal Parliament actually had the jurisdiction to enact the provisions under its criminal law power, and pointed to previous cases in which the Supreme Court seemed to suggest that s. 68-type provisions were a valid response to the need for a certain degree of cooperation and coordination between federal and provincial authorities in fields where, as here, both orders of government have jurisdiction.

Quebec raises an interesting point. What is the importance of s. 94 in considering the effect of intergovernmental dialogue on constitutionality? Does it count against the argument that it is appropriate for the Supreme

²²⁴ Factum of the Attorney General of Canada (16 January 2009) (available online: <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=32750>) (accessed 2 April 2010).

Court to bend the division of powers to facilitate intergovernmental dialogue, on the basis that it sets particular textual limits on the ability of governments to agree to otherwise unconstitutional exercises of legislative power by the other order of government? Or does it actually count in favour of the argument that it is appropriate for the Supreme Court to do so, on the basis that it shows that intergovernmental dialogue was actually a positive objective of the drafters?

This feeds into even broader questions about the effect of intergovernmental dialogue on constitutionality. Is intergovernmental dialogue a positive or neutral factor in determining constitutionality? In answering this question, does it matter that the federal legislation purports to apply in a province until that province decides to legislate in respect of assisted human reproduction? Does it matter that a province may not opt-out of the federal legislation until it has in force “equivalent” regulations, which coerces the provinces into accepting, roughly, the minimum federal standards?²²⁵ Does it matter that legislation is structured to accommodate

²²⁵ The United States Supreme Court has found unconstitutional certain attempts by the federal government to coerce the states: see, e.g., *N.Y. v. U.S.*, 505 U.S. 144, 188 (1992) (concluding that it was “clear” that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program”, and striking down a federal law that provided that state governments would “take title” to radioactive waste within borders that were not disposed of by a certain date); and *Printz v. U.S.*, 521 U.S. 898 (1997) (reaffirming *N.Y. v. U.S.*, and striking down a federal law that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers); but see *Reno v. Condon*, 528 U.S. 141 (2000) (refusing to strike down a federal law that prohibited a state from disclosing personal information gained by its department of motor vehicles; the law was acceptable, because it did not impose a duty to act, but merely

interlocking provincial legislation, if a province(s) objects to the exercise of federal jurisdiction on the whole?

The case highlights these important questions about the role that intergovernmental dialogue will and ought to play in determining the constitutionality of an exercise of legislative power. It would not be especially surprising to see the Supreme Court avoid providing a definitive answer (or at all). However, if it does decide to speak to these questions, in whole or in part, it would not be particularly surprising to see it claim fidelity to the view, expressed in previous decisions, that intergovernmental dialogue is not determinative of constitutionality, while continuing to let the idea play a role, quietly, in its decision-making. The reason is this: the idea that the political branches have a role to play in actually defining the balance of power, rather than working within the boundaries set by the courts, sits uncomfortably with the traditional view that it is “emphatically the province and duty of the judiciary to say what the law is.”²²⁶ It would be surprising to see the Supreme Court openly acknowledge that the political branches have a role to play in the setting of constitutional meaning itself.²²⁷

prohibited conduct).

²²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²²⁷ The accuracy of the traditional view has been called into question in recent years,

B. Boundaries on Legislative Power

The Supreme Court has recently acted with restraint in division of powers cases, but it refused to abandon entirely its role in policing the boundaries of federal and provincial legislative power. This begs two questions: first, what role, if any, does the Supreme Court intend to play in setting absolute limits on legislative power?; and second, where the Supreme Court is faced with a stark choice between competing federal and provincial legislation, what considerations will it take into account in making its choice? In other words, what role does the Supreme Court intend to play in a system where “the task of maintaining the balance of powers in practice falls primarily to governments”?²²⁸ These questions may force the Supreme Court to confront even more difficult questions about how different tasks should be allocated “within one and the same policy field.”²²⁹

The recent decision of the Supreme Court in *Consolidated Fastfrate*

particularly in the United States. For a sample of the academic literature, see N. Devins & L. Fisher, *The Democratic Constitution* (Oxford: Oxford University Press, 2004); L. Fisher, *Constitutional Dialogues: Interpretation as a Political Process* (Princeton: Princeton University Press, 1988); B. Friedman, “Dialogue and Judicial Review” (1993) 91 Mich. L. Rev. 577; R.C. Post, “Foreword: Fashioning the Legal Culture: Culture, Courts and Law” (2003) 117 Harv. L. Rev. 4; L. Kramer, “Popular Constitutionalism, Circa 2004” (2004) 92 Cal. L. Rev. 959; the articles in (2006) 81 Chi.-Kent L. Rev. 1173 (from a symposium on “The People Themselves: Popular Constitutionalism”); and the articles in J. Balkin and R. Siegel, eds., *The Constitution in 2020* (Oxford: Oxford University Press, 2009).

²²⁸ *Canadian Western Bank*, above, note 8, para. 24.

²²⁹ T. Hueglin, “The Principle of Subsidiarity”, in I. Peach, ed., *Constructing Tomorrow’s Federalism* (Winnipeg: University of Manitoba Press, 2007), 212.

is interesting in this regard. In that case, both a federally-regulated and a provincially-regulated union attempted to be certified as the bargaining unit for the employees of a freight forwarding company. The issue was not the constitutionality of the underlying legislation; the issue, rather, was which legislative scheme, federal or provincial, applied to the company's employees. The Supreme Court was faced with a choice between federal and provincial jurisdiction. If the federal legislation applied, the federally-regulated union was properly certifiable as the bargaining unit of the company's employees; if, however, the provincial legislation applied, it was the provincially-regulated union that was properly certifiable.

The result was a 6-3 split decision. Rothstein J., writing for the majority, said that the freight forwarding company fell within provincial jurisdiction. In reaching this conclusion, he emphasized *the manner* in which the freight forwarding service was provided. The company fell within provincial jurisdiction, because it merely consolidated and de-consolidated freight, and did not actually physically transport the freight across provincial borders. In contrast, Binnie J., writing for the dissent, said that the freight forwarding company fell within federal jurisdiction. Unlike the majority, he emphasized, citing a previous decision of the Supreme Court,²³⁰ *the nature* of the service provided by the freight forwarding

²³⁰ *Alberta Government Telephones v. Can.* [1989] 2 S.C.R. 225.

company. The company fell within federal jurisdiction, because it facilitated the shipment of goods across provincial borders.

The majority and minority adopted different interpretative approaches. Departing from recent precedent, Rothstein J. emphasized “historical context.” He said, citing Confederation-era documents, that “the preference for diversity of regulatory authority over works and undertakings should be respected, absent a justifiable reason that exceptional federal jurisdiction should apply.”²³¹ Binnie J., in contrast, emphasized economic efficiency. He said, citing *Canadian Western Bank*, that “Canadian courts have never accepted the sort of ‘originalism’ implicit in my colleague’s historical description of the thinking in 1867. ... This is not to say that the passage of time alters the division of powers. It is to say that the arrangement of legislative and executive powers entrenched in the *Constitution Act, 1867* must now be applied in light of the business realities of 2009 and not frozen in 1867.”²³² On these facts, federal jurisdiction was to be preferred, because checkerboard provincial regulation was antithetical to the coherent and efficient operation of an integrated national transportation service.

The decision in *Consolidated Fastfrate* may hint at interesting things

²³¹ *Consolidated Fastfrate*, note 151, above, para. 39; see also paras. 32-39.

²³² *Id.*, para. 89.

to come. The Supreme Court was faced with a choice between federal and provincial legislation. Faced with that choice, the Supreme Court seemed unable to agree, not only about the result, but also about the interpretative methodology to apply in reaching that result. (And interestingly, Binnie and LeBel JJ., who co-authored the decision in *Canadian Western Bank*, appear to have parted company.) This suggests that, although there is a measure of agreement on the Supreme Court that caution should be exercised before imposing absolute limits on jurisdiction, the justices may have difficulty agreeing about what order of government to favour in those cases where they are faced with a choice between *an exercise* of federal and provincial legislative power. If this is true, it would not be particularly surprising to see disagreements also arise about whether in fact there are still absolute limits on jurisdiction, and (more likely) where those limits lie.

C. Federal Leadership or Equal Partners?

Recall the earlier distinction drawn in the academic literature between the narrow sense of co-operative federalism (which envisages a hierarchical relationship between the federal government and the provincial governments) and collaborative federalism (which envisages a non-hierarchical relationship between the federal government and the provincial governments). Which, if either, does the Supreme Court intend to facilitate?

The answer is that it is difficult to tell. The Supreme Court speaks merely of co-operative federalism, without indicating whether it has in mind a certain amount of federal-provincial hierarchy. The paramouncy decisions provide the most insight into the Supreme Court's thinking, but these decisions send mixed messages.

Two aspects of these decisions seem to reflect a desire to facilitate a hierarchical model of co-operative federalism. Consider the definition of conflict. As noted, the Supreme Court broadened the definition of conflict in two ways: the impossibility of dual compliance test now includes governmental decision-makers, not just citizens; and there will be a conflict both where there is an impossibility of dual compliance or a frustration of federal purpose. This broader definition of conflict affords the federal government a powerful bargaining chip in intergovernmental negotiations about jurisdiction. As Katherine Swinton notes, "[t]he [Supreme] Court's attitudes towards ... the definition of conflict ... affect both the agenda and the tenor of intergovernmental relations."²³³ Consider also the new focus of a paramouncy analysis. By embracing the frustration of federal purpose test, the agenda of the federal government, not just citizen compliance, is

²³³ Swinton, note 19, above, 138. See also Lederman, note 51, above, 315 (noting that the answer to the question 'who has the power to do what?' will influence federal-provincial negotiations).

now central to any paramountcy analysis.²³⁴ This seems to indicate that the Supreme Court is particularly concerned to facilitate the achievement of *federal* goals. It is unclear whether the Supreme Court has these two considerations in mind. However, if it does, this would seem to indicate, at best, that the Supreme Court is content to facilitate a hierarchical, federally-dominant form of intergovernmental dialogue about particular exercises of jurisdiction, and at worst, that “co-operative federalism” is merely an *ex post facto* rationalization for an approach that seeks to privilege federal legislative power.

Two other aspects of these decisions, however, may reflect a desire to facilitate a non-hierarchical, collaborative model of co-operative federalism. First, the Supreme Court indicated clearly in *Rothmans* that it will be reluctant to “impute to Parliament ... an intention to ‘occup[y] the field’ in the absence of very clear statutory language to that effect.”²³⁵ Second, in *Canadian Western Bank*, the Supreme Court reiterated (and then applied) the “fundamental rule of constitutional interpretation that, ‘[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between

²³⁴ Elliot, note 193, above, 650.

²³⁵ *Rothmans*, note 102, above, para. 21 (citation omitted).

the two statutes.”²³⁶ In effect, both of these ‘rules’ require Parliament to speak clearly if it intends to pre-empt provincial legislation. This may serve a deliberative function, ensuring that Parliament proceeds cautiously and deliberatively, by at least turning its mind to provincial regulatory interests in a given field of jurisdiction. But it also may serve a dialogue-stimulating function. In considering provincial interests, Parliament may be encouraged to consult with the provinces, in order to work out a solution that is acceptable to both orders of government. Failing that, the provinces may be put on notice, giving them the opportunity to pressure the federal government, politically, to negotiate a solution that is acceptable to both orders of government.²³⁷ It is unclear whether the Supreme Court has these considerations in mind in articulating these ‘rules’, but if it does, this would seem to speak to a court that is anxious, where possible, to facilitate a non-hierarchical, collaborative intergovernmental dialogue about particular exercises of jurisdiction.

D. The Political Safeguards of *Canadian* Federalism?

Notice a fundamental difference in the ideas expressed in the

²³⁶ *Canadian Western Bank*, note 8, above, para. 75 (citation omitted).

²³⁷ See D. Coenen, “A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue” (2000-01) 42 *Wm. & Mary L. Rev.* 1579, 1604-1618 (recounting the features of “clear statement rules” from the U.S. perspective); and R.M. Hills, Jr., “Against Pre-emption: How Federalism Can Improve the National Political Process” (2007) 82 *N.Y.U. Law Rev.* 1 (pointing out the deliberative effects of clear statement rules from the U.S. angle).

previous two paragraphs. In one paragraph, the focus is the definition of conflict; this reflects an underlying assumption that judicially-defined and enforceable limits on federal power are critically important in a federal system. On this view, a court that adopts a broad definition of conflict is placing the provinces at the mercy of a federal government that can displace provincial regulation at its whim. In the other paragraph, little emphasis is placed on judicially-defined and enforced limits on federal power; the limits on federal power are assumed to lie in the political process. This touches upon a fundamental assumption that seems to underlie the theory of judicial review described in this article: this is the idea that the political branches are up to the task of setting the balance of power, and capable of protecting their own interests in doing so.

Is this view defensible? The idea of the political safeguards of federalism has figured prominently in American academic and judicial writing.²³⁸ However, the idea has received little sustained attention in Canada.²³⁹ The assumption seems to be that the idea has little purchase in Canada, because there are no (or insufficient) political safeguards in the

²³⁸ See the sources cited in note 41. See also Note, “The Lessons of *Lopez*: The Political Dynamics of Federalism’s Political Safeguards” (2005) 119 Harv. L. Rev. 609; and S. Calabresi, “A Government of Limited and Enumerated Powers” (1995-96) 94 Mich. L. Rev. 752.

²³⁹ For exceptions, see Swinton, note 10, above, 41-50; Baier, note 7, above, 146-52; and J. Leclair, “Jane Austen and the Council of the Federalism” (2006) 15 Const. Forum 51.

Canadian federal system.²⁴⁰ It is beyond the scope of this article to consider the accuracy of this view here; I leave that for future work. But if it is true that there are political safeguards operating in the Canadian federal system, this would seem to have important implications for each of the three questions raised above. If there are political safeguards at work, there is a strong argument that intergovernmental dialogue ought to play an important (perhaps even decisive) role in constitutional adjudication. Moreover, the need for the courts to intervene is significantly reduced, and the whole question of what limits the Supreme Court will and ought to place on federal and/or provincial legislative power becomes much less of a concern. Finally, the idea would shed a whole new light on the Supreme Court's current approach to the paramountcy doctrine. The Supreme Court may not be abandoning the provinces to the whim of the federal government, as it might seem, but may indeed be working from the assumption that the provinces have the tools at their disposal to protect their own interests.

CONCLUSION

In *Canadian Western Bank*, the Supreme Court provided rare and

²⁴⁰ See S. Choudhry, "Popular Revolution or Popular Constitutionalism", in R. Bauman and T. Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006), 497 (noting that the application of the idea of political safeguards in Canada is "unclear", in light of certain structural differences, but suggesting that Weiler's argument "that 'the better technique for managing conflict is continual negotiation and political compromise' deserves closer consideration"); and *Ontario Hydro*, note 183, above, para. 72 (referring to the "very real and effective political forces that undergird federalism", without further elaboration).

rich insight into its theory of judicial review in division of powers cases. Under this theory, the Supreme Court encourages the political branches to take the lead in defining the federal-provincial division of powers, by working out mutually agreeable allocations of jurisdiction in each area of regulatory concern. The Supreme Court primarily limits itself to facilitating intergovernmental dialogue about the division of powers and to resolving the intergovernmental conflicts that result where the political branches fail to agree.

This theory of judicial review is reflected in the McLachlin Court's division of powers decisions. It is reflected overtly in those situations where the Supreme Court is asked to consider the constitutionality of a legislative measure evidencing some measure of intergovernmental agreement about jurisdiction. But it is also reflected, albeit less overtly, in the overall approach to the division of powers. Under this approach, the Supreme Court acts with considerable restraint in imposing absolute limits on federal and provincial jurisdiction, by accommodating substantial overlap in jurisdiction, and primarily limits itself to managing overlapping legislation to avoid conflicts in operation.

This theory of judicial review raises a number of interesting questions, some of which I outlined in the final section of this article. The Supreme Court has indeed given constitutional law scholars good reason to

care again about the division of powers.²⁴¹

²⁴¹ See MacKay, note 3, above (asking whether constitutional law scholars do, and should, care again about federalism).

SECOND ARTICLE:
THE POLITICAL SAFEGUARDS OF CANADIAN FEDERALISM

There is a vast body of literature by legal scholars in the United States that explores whether or not there are “political safeguards of federalism” – aspects of the political process that protect the jurisdiction (or “interests”) of the states from federal encroachments.¹ Legal scholars in Canada, however, have largely neglected this question.² Some Canadian legal scholars (as well as courts) have suggested that there are aspects of the political process that protect provincial jurisdiction from federal encroachments,³ but the majority of Canadian legal scholars seem skeptical that these political safeguards of *Canadian* federalism exist – or if they do, that they are especially robust. The federal government, the view seems to be, typically has and will come out on top in disputes with the provinces over jurisdiction outside of the courts.⁴ Yet, neither of these views has been

¹ The term is drawn from H. Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government” (1954) 54 *Colum. L. Rev.* 543. For additional references, see Part I(A), below.

² S. Choudhry, “Popular Revolution or Popular Constitutionalism?”, in R. Bauman and T. Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge: Cambridge University Press, 2006), 497 (urging a closer look).

³ For references, see Part I(A), below.

⁴ See, e.g., A. Lajoie, “The Federal Spending Power and Fiscal Imbalance in Canada”, in S. Choudhry et al., eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006), 145 (“Canada is both a pro and a constant winner at [the] game [of centralization]”); K. Swinton, *The Supreme Court and*

defended in the legal scholarship in any detailed, systematic manner. As a result, if there are political safeguards of Canadian federalism, we lack a detailed account of what they are, and how, where and why they work. And if Canada lacks political safeguards of federalism that are very robust, or even altogether, we lack a detailed account of why any candidates fall short.

These questions warrant a careful exploration for several reasons. First, the political branches in Canada play an important – indeed primary – role in setting the division of powers, including by resolving many of their own division of powers disputes, outside of the courts.⁵ There is a large body of literature by Canadian political scientists that explores the role that the political branches play in doing so,⁶ but the bulk of the legal scholarship focuses on the role of the courts,⁷ often casting the courts as the exclusive (or at least decisive) ‘umpires’ or ‘arbiters’ of the division of powers.⁸ In

Canadian Federalism (Toronto: Carswell, 1990), 48-52 (suggesting that, absent judicial oversight, there is a real risk of “federal expansion”); and J. Leclair, “Forging a True Federal Spirit: Refuting the Myth of Quebec’s ‘Radical Difference’”, in A. Pratte, ed., *Reconquering Canada* (Vancouver: Douglas & McIntyre, 2008), 29 (suggesting “the centralization of powers by the federal government” is the “one recurrent theme in the Quebec, and indeed the Canadian, political universe”). See further Part I(A), below.

⁵ See, e.g., *Reference re Employment Insurance Act (Can.), ss. 22 and 23* [2005] 2 S.C.R. 669, para. 10 (“The task of maintaining the balance between federal and provincial powers falls primarily to governments”); and G. Baier, “The Courts, The Constitution and Dispute Resolution”, in H. Bakvis and G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3d ed. (Oxford: Oxford University Press, 2012), ch. 5.

⁶ For references, see Parts I(A) and III, below.

⁷ For exceptions, see Part I(A), below.

⁸ For references, see note 76, below.

doing so, it often ignores, or makes unsubstantiated assumptions about, the role of the political branches.⁹ An exploration of whether there are political safeguards of Canadian federalism would further our understanding of how the division of powers develops today, bringing the role that the political branches play in sustaining Canada's federal system out of the shadows. It would also set the stage for normative legal scholarship that is better equipped to assess the role of the courts in Canada's federal system.¹⁰

Second, the answer to these questions may have implications for the approach that the Supreme Court of Canada has adopted in division of powers cases in recent years. Under this approach, the Court has embraced a fairly deferential standard of review, tolerating – even celebrating – a significant degree of de facto overlap in jurisdiction, and largely leaving it to the political branches to set the division of powers.¹¹ The Court has not

⁹ One example of this is the tendency to bemoan the fate of Canada's federal system after looking only at judicial decisions, as if judicial decisions tell us all that we really need to know about the actual federal-provincial balance of power: see, e.g., Lajoie, note 4, above; and H. Brun and G. Tremblay, *Droit constitutionnel*, 4th ed. (Cowansville, PQ.: Yvon Blais, 2002), 437. The implication seems to be that the political process does not also play a role in setting and sustaining the balance of power, imposing its own de facto jurisdictional constraints. For criticism of this tendency, see J.F. Gaudreault-DesBiens, "The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy", in Choudhry et al., note 4, above, 187-88.

¹⁰ N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994) (emphasizing the need to assess institutional choice in comparative perspective); and C.R. Sunstein and A. Vermeule, "Interpretation and Institutions" (2003) 101 Mich. L. Rev. 885 (similar point).

¹¹ For a detailed discussion, see W.K. Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 S.C.L.R. (2d) 625. (This article is included as part of this dissertation: see "First Article".)

completely left the division of powers to the political branches, as recent decisions finding both federal and provincial initiatives unconstitutional on division of powers grounds make abundantly clear.¹² However, it seems unlikely that the Court will attempt to impose significant limits on federal or provincial jurisdiction, since this would entail a dramatic shift in approach, and expose a large number of overlapping federal-provincial initiatives to challenge. Various legal scholars have expressed concerns about the Court's approach, with the most common concern being that it inadequately safeguards provincial autonomy.¹³ The capacity of the provinces to protect their own jurisdiction, without judicial intervention, has implications for debates about this approach to judicial review. In addition, if the courts do continue to play a secondary role in the division of powers context, it will be especially important to understand how the provinces fare

See also B. Ryder, "The End of Umpire?: Federalism and Judicial Restraint" (2006) 34 S.C.L.R. (2d) 345; E. Brouillet, "The Federal Principle, the Balance of Power and the 2005 Decisions of the Supreme Court of Canada" (2006) 34 S.C.L.R. (2d) 307; E. Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 S.C.L.R. (2d) 601; and J.F. Gaudreault-DesBiens, "The 'Principle of Federalism' and the Legacy of the Patriation and Quebec Veto References" (2011) 54 S.C.L.R. (2d) 77.

¹² *Que. v. Lacombe* [2010] 2 S.C.R. 453 (enforcing limits on the provincial regulation of aeronautics); and *Que. v. Cdn. Owners and Pilots Assn.* [2010] 2 S.C.R. 536 (same); *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 (enforcing limits on the federal regulation of assisted human reproduction); and *Reference re Securities Act* [2011] 3 S.C.R. 837 (enforcing limits on the federal regulation of securities).

¹³ See, e.g., Brouillet (2006), note 11, above, 325-32; Ryder, note 11, above, 369; B. Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Division of Powers" (2011) 54 S.C.L.R. (2d) 565, 594-600; R. Elliot, "Safeguarding Provincial Autonomy from the Supreme Court's New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?" (2007) 38 S.C.L.R. (2d) 629.

in jurisdictional disputes with the federal government outside the courts.¹⁴

Third, and related to the second point, the answer to these questions may have implications for the Court's facilitative approach to judicial review of the division of powers. Division of powers disputes are increasingly settled in the political branches, in direct and indirect negotiations between federal and provincial decision-makers.¹⁵ In a number of recent decisions, the Supreme Court has acknowledged, and signaled its desire to "facilitate", this type of "cooperative federalism" – in part, it seems, by deferring to cooperative intergovernmental efforts, where they occur.¹⁶ Legal scholars have acknowledged the Court's references to cooperative federalism,¹⁷ but have not yet engaged in any serious way with the normative implications of this facilitative approach. An assessment of whether or not there are political safeguards of Canadian federalism has implications for the Court's facilitative approach, speaking to concerns that it may work to the disadvantage of provincial jurisdiction and autonomy.

Finally, there is a burgeoning body of literature, particularly in the

¹⁴ See T. Hueglin, "The Principle of Subsidiarity" in I. Peach, ed., *Constructing Tomorrow's Federalism* (Winnipeg: University of Manitoba Press, 2007), 212 (suggesting federalism scholars need to focus more on the implications of shared jurisdiction); and N. Karazivan and J.F. Gaudreault-DesBiens, "On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation" (2010) 49 Can. Bus. L.J. 1, 35 (same).

¹⁵ See Baier, note 5, above, ch. 5.

¹⁶ See further, Wright, note 11, above, Parts I and II.

¹⁷ See, e.g., Brouillet, note 11, above, 616-17 (providing a list of references).

United States,¹⁸ but increasingly in Canada,¹⁹ that debates whether, and when, non-judicial actors are equipped to engage in constitutional interpretation. There is also a burgeoning body of literature, in Canada and elsewhere, that explores process-based,²⁰ dialogic²¹ and pluralistic approaches²² to constitutional decision-making. These bodies of literature vary in focus and approach, but one key point of commonality is that they all look beyond the courts to (at least) the political branches as sources of constitutional decision-making. A discussion of whether there are political safeguards of Canadian federalism resonates with these bodies of literature.

The primary aim of this article is to explore the political safeguards

¹⁸ T.W. Morrison, “Constitutional Avoidance in the Executive Branch” (2006) 106 Colum. L. Rev. 1189, 1190-1191 fn. 2 (listing the main resources); I. Bar-Siman-Tov, “Lawmakers as Lawbreakers” (2010) 52 Wm. & Mary L. Rev. 805, 809 fn. 11 (same).

¹⁹ See, e.g., T. Kahana, “Legalism, Anxiety and Legislative Constitutionalism” (2005-06) 31 Queen’s L.J. 537 (criticizing “legislative constitutionalism” in the *Charter* context); and G. Huscroft, “Constitutionalism from the Top Down” (2007) 45 Osgoode Hall L.J. 91, 99-103 (defending a form of ‘coordinate construction’ in the *Charter* context).

²⁰ See, e.g., L. Sossin, “The McLachlin Court and the Promise of Procedural Justice”, in A. Dodek and D.A. Wright, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), 55 (discussing the Supreme Court of Canada’s turn to process in a variety of different contexts); C. Sheppard, “Inclusion, Voice and Process-Based Constitutionalism” (2013) 50 Osgoode Hall L.J. 547 (same); and I. Bar-Siman-Tov, “Semiprocedural Judicial Review” (2012) 6 *Legisprudence* 271, 271-2 (providing references to resources discussing a similar turn in other international and national courts).

²¹ For an excellent summary (circa 2006/07) of these theories, albeit with a focus on Canada and the U.S., see C. Bateup, “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2005-06) 71 *Brook. L. Rev.* 1109; and C. Bateup, “Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective” (2007) 21 *Temp. Int. & Comp. L.J.* 1.

²² See, for a good example, R. Macdonald and R. Wolfe, “Canada’s Third National Policy: The Epiphenomenal or the Real Constitution?” (2009) 59 *U.T.L.J.* 469.

of Canadian federalism. It argues that there are political safeguards that the provinces can and do tap to limit or prevent perceived federal encroachments on provincial jurisdiction, and it seeks to identify these political safeguards, and how, where and why they work. In doing so, it draws on the political science literature about Canadian federalism, as well as the “political safeguards of federalism” literature from the United States.²³ It does not argue that these political safeguards adequately protect federalism in Canada, and thus that judicial review is unnecessary. It argues, more modestly, that these political safeguards play an important role in Canada’s federal system, in concert with judicial review, and that an appreciation of these political safeguards is essential to understanding how provincial jurisdiction is safeguarded today in Canada’s federal system.

The article argues that these political safeguards arise (in large part) from the intergovernmental apparatus that has been established in Canada to manage federal-provincial relations, not the sorts of ‘intragovernmental safeguards’ that some scholars have emphasized in the United States, like the Senate.²⁴ It describes the capacity, opportunities, and leverage that these ‘intergovernmental safeguards’ provide the provinces to block, and limit,

²³ I draw on the United States literature only with an eye to what it might reveal about Canadian federalism, and conscious of the differences between the two federal systems.

²⁴ I say in large part, because this does not capture the opportunities that are available to the provinces to safeguard provincial jurisdiction when the provinces play a role in administering and enforcing federal policy. As noted below, in note 370, these safeguards warrant further consideration, which, due to space limitations, I defer to future work.

perceived federal encroachments, and it provides two case studies of situations where they were utilized. It does not argue that these intergovernmental safeguards prevent all perceived federal encroachments; on the contrary, it acknowledges that, in disputes with the federal government over jurisdiction outside of the courts, the provinces sometimes ‘win’ and sometimes ‘lose’, and it highlights various reasons that they fall short as safeguards of federalism. It argues, rather, that, in some cases, these intergovernmental safeguards provide the provinces the ability to check federal overreach and influence federal policy, by frustrating federal initiatives altogether in some situations, and influencing their design and implementation in others. This complicates the zero-sum, winner-takes-all rhetoric that is often evident in the legal scholarship;²⁵ it also undermines the claim that the federal government typically has the ability to come out on top in disputes with the provinces over jurisdiction outside of the courts.

The article is organized in three parts. Part I lays the groundwork for a discussion of the political safeguards, by addressing various preliminary questions. Part II discusses the intragovernmental safeguards. Part III, which is the core of the paper, discusses the intergovernmental safeguards.

Two basic points frame my discussion in the article. First, an

²⁵ For scholarship in the United States that challenges similar zero-sum, winner-takes-all claims, and highlights the overlapping, negotiated, interactive role that federal and state actors often play, see, e.g., R.A. Schapiro, *Polyphonic Federalism* (Chicago: University of Chicago Press, 2009); and E. Ryan, “Negotiating Federalism” (2011) 52 B.C. L. Rev. 1.

assumption: I assume that federalism is a fundamental aspect of Canada's constitutional system, and thus that it warrants protection;²⁶ I discuss *how* federalism is protected in Canada, *not whether* it warrants protection. Second, a limitation: I focus on the efficacy of the political safeguards as safeguards *of federalism*, and avoid broader questions about the merits of the processes identified and the policy outcomes that result from them.

I. FRAMING THE DISCUSSION

In this part, I frame my discussion of the political safeguards of Canadian federalism. I begin with a brief review of the literature, and then address several theoretical questions that have implications for the assessment of the political safeguards in Parts II and III of the article.

A. The State of Play: The Debate about Political Safeguards

The argument that there are aspects of the political system that are capable of limiting or preventing federal overreach figures prominently in federalism debates in the United States. The argument can be traced to the founders.²⁷ However, it was given new life, and a name, in a 1954 article by

²⁶ The federalism literature in Canada suggests a variety of different reasons to protect federalism. For example, in English-Canada, the literature tends to emphasize the part that federalism can play in facilitating efficient and effective public policy, while in French-Canada, the literature tends to emphasize the part that federalism can play in protecting linguistic and cultural diversity: see R. Simeon, "Criteria for Choice in Federal Systems" (1982-83) 8 Queen's L.J. 131; F. Rocher, "The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism" in A.-G. Gagnon, ed., *Contemporary Canadian Federalism: Foundations, Traditions, Institutions* (Toronto: University of Toronto Press, 2009), ch. 3.

²⁷ See, e.g., The Federalist No. 28 (Clinton Rossiter, ed., 1961), 181 (by Alexander

Herbert Wechsler called “The Political Safeguards of Federalism.”²⁸ In that article, Wechsler pointed to two “political safeguards” that, he said, played a “role of great importance” in the United States.²⁹ The first was the simple fact that the states pre-dated the federal government “as governmental entities” and “sources of ... law”.³⁰ This served as a political safeguard of federalism, Wechsler argued, because it established a “tradition” of “governance of matters by the states”, and placed a “burden of persuasion on those favoring national intervention”.³¹ The second was the role that the states played in the “composition and selection” of the federal government, including the Senate, the House of Representatives, and the Presidency.³² This served as a political safeguard of federalism, Wechsler argued, because it gave the states powerful political leverage over both branches of Congress and the President. Taken together, these two “political safeguards of federalism” were, Wechsler insisted, “intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states”.³³

Hamilton); *The Federalist* No. 45 (Clinton Rossiter, ed., 1961), 291 (by James Madison).

²⁸ Wechsler, note 1, above.

²⁹ *Id.*, 543.

³⁰ *Id.*, 546.

³¹ *Id.*, 544-545.

³² *Id.*, 547-558.

³³ *Id.*, 558.

Since 1954, Wechsler's argument has been a topic of ongoing debate in the United States, in the courts and the academy. The argument was updated and expanded in the early 1980s by several scholars,³⁴ and explicitly adopted by a slim 5-4 majority of the United States Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority* (1985).³⁵ This prompted a barrage of criticism, from those who expressed doubts about whether the political safeguards identified were sufficient under modern political conditions to limit or prevent federal overreach.³⁶ These doubts were echoed in the 1990s by a differently-constituted United States Supreme Court, which, in a variety of decisions, implicitly rejected the political safeguards argument and reclaimed its role as federal umpire.³⁷

Advocates of the political safeguards of federalism argument responded by shifting focus, pointing to other features of the United States

³⁴ See, in particular, J.H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980), 161-259. See also D.B. LaPierre, "The Political Safeguards of Federalism Redux" (1982) 60 Wash. U.L.Q. 779.

³⁵ (1985) 469 U.S. 528, 552-53 per Blackmun J. (invoking the political safeguards argument in support of a decision finding that the Commerce Clause gives Congress the power to extend the federal *Fair Labor Standards Act* to state and local governments).

³⁶ W.W. Van Alstyne, "The Second Death of Federalism" (1985) 83 Mich. L. Rev. 1709; E. Garrett, "Enhancing the Political Safeguards of Federalism?" (1997) 45 U. Kan. L. Rev. 1113; J.C. Yoo, "The Judicial Safeguards of Federalism" (1997) 70 S. Cal. L. Rev. 1322; S.B. Prakash & J.C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories" (2001) 79 Tex. L. Rev. 1459; L.A. Baker & E.A. Young, "Federalism and the Double Standard of Judicial Review" (2001) 51 Duke L.J. 75; and L.A. Baker, "Putting the Safeguards Back into the Political Safeguards of Federalism" (2001) Vill. L. Rev. 951.

³⁷ For discussion, see Yoo (1997), previous note.

political system that, they argue, give the states the ability to limit or prevent federal overreach. Some, for example, have emphasized the party system. On this view, the leverage of the states flows from the organization of political parties, which have “link[ed] the fortunes of officeholders at [the federal and state] levels”, fostering “a mutual dependency that [has] induced federal lawmakers to defer to the desires of state officials and parties”.³⁸ Others have pointed to the “procedural safeguards of federalism”. On this view, the states’ ability to resist federal overreach flows from the lawmaking procedures prescribed by the United States Constitution, which were designed to protect the states by making federal law fairly difficult to make, and assigning lawmaking solely to actors subject to the political safeguards of federalism.³⁹ Still others have pointed to the role of the intergovernmental apparatus. On this view, the intergovernmental apparatus that the states have established for the purposes of lobbying the federal government provides the states with the opportunity and, in some cases, the leverage to limit or prevent federal overreach.⁴⁰ And others have pointed to

³⁸ L. Kramer, “Understanding Federalism” (1994) 47 Vand. L. Rev. 1485, 1522-1523; L. Kramer, “Putting the Politics Back into the Political Safeguards of Federalism” (2000) 100 Colum. L. Rev. 215, 278. For responses, see Baker & Young, note 36, above, 115-117; P. Frymer & A. Yoon, “Political Parties, Representation and Federal Safeguards” (2002) 96 Nw. U. L. Rev. 977; M.A. Hamilton, “Why Federalism Must Be Enforced: A Response to Professor Kramer” (2001) 46 Vill. L. Rev. 1069; and Baker (2001), note 36, above.

³⁹ Bradford R. Clark, “The Procedural Safeguards of Federalism” (2007-2008) 83 Notre Dame L. Rev. 1681 (describing and defending his earlier argument to this effect).

⁴⁰ See, in particular, J.D. Nugent, *Safeguarding Federalism: How States Protect their*

the “populist safeguards of federalism”. On this view, the public can act as a federalism safeguard, by directly or indirectly opposing federal overreach.⁴¹ The emphasis may differ, but the conviction animating the views of all of these scholars is that there are political safeguards of federalism that, alone or in combination, are capable of limiting or preventing federal overreach.

Unlike in the United States, there has been very little discussion among legal scholars in Canada about whether there are political safeguards of federalism that are capable of limiting or preventing federal overreach. To some extent, this is probably a symptom of the general state of the legal scholarship about Canadian federalism. Federalism has not been a major preoccupation of legal scholars in Canada in recent decades, especially outside Quebec.⁴² But, of the legal scholars that do still write about federalism, most tend to assume, with little or no discussion, that judicial review does (descriptively)⁴³ and should (normatively)⁴⁴ play an essential role in Canada’s federal system, and focus on assessing the role that the

Interests in National Policymaking (Norman, OK.: University of Oklahoma Press, 2009).

⁴¹ R.A. Mikos, “The Populist Safeguards of Federalism” (2007) 68 Ohio St. L.J. 1669 (making this argument); and C.D. Kam and R.A. Mikos, “Do Citizens Care about Federalism?: An Experimental Test” (2007) 4 J. Empirical Legal Stud. 589 (same).

⁴² Wright, note 11, above, 625-26 (making this observation and providing references).

⁴³ P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), 223 (“commentators have all agreed that federalism matters”).

⁴⁴ Making this point, see Swinton, note 4, above, 21; and Ryder, note 11, above, 347.

courts do and should play. Little attention is often paid to how federalism works outside the courts, in the political arena – the assumption being, it would seem, that this is an issue that is better left to political scientists.

There are a few legal scholars – chief among them Paul Weiler and Patrick Monahan – that have challenged the idea that judicial review *should* play an essential role in Canada’s federal system, and argued that division of powers disputes should be left to political processes.⁴⁵ Monahan has also challenged the idea that judicial review *does* play an essential role in Canada’s federal system.⁴⁶ Yet, in making these arguments, little attention was paid to whether there are political safeguards of Canadian federalism – although Weiler did suggest, without elaboration, that there are “political constraints” in Canada that restrain federal “self-aggrandizement”.⁴⁷

There are also legal scholars that have acknowledged the role that the political branches play in Canada’s federal system, in setting the balance of powers and resolving federal-provincial disputes.⁴⁸ Of these, some have

⁴⁵ P. Weiler, *In The Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974), ch. 6 (arguing that division of powers disputes should be resolved through “continual negotiation and political compromise”); and P. Monahan, “At Doctrine’s Twilight: The Structure of Canadian Federalism” (1984) 23 U.T.L.J. 47 (arguing that division of powers disputes should be left to “political processes”).

⁴⁶ Monahan, note 43, above, ch. 10 (noting the “limited impact” of judicial decisions).

⁴⁷ P. Weiler, “The Supreme Court of Canada and Canadian Federalism”, in J. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973), 61.

⁴⁸ See, e.g., William Lederman, “Some Forms and Limitations of Cooperative Federalism” (1967) 45 Can. Bar Rev. 409; Monahan, (1987), note 43, above, ch. 10; Swinton, note 4, above, chs. 1-2; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007+),

also suggested that there may be political safeguards of Canadian federalism that restrain federal overreach – although the term ‘political safeguards’ is rarely used.⁴⁹ However, the majority of legal scholars seem skeptical that these political safeguards exist – or if they do, that they are especially robust.⁵⁰ And neither of these views has been defended in any systematic way; in most cases, they are expressed only in passing, or even only by implication, and the informal intergovernmental safeguards that I

secs. 5.5(c), 5.8; S. Choudhry, “Beyond the Flight from Constitutional Legalism” (2003) 12 *Const. Forum* 77; Gaudreault-DesBiens, note 9, above, 187-88; Leclair, note 4, above, ch. 2; and D. Schneiderman, “Making Waves: The Supreme Court of Canada Confronts Stephen Harper’s Brand of Federalism”, in A. Anand, ed., *What’s Next for Canada?: Securities Regulation After the Reference* (Toronto: Irwin, 2012), ch. 5.

⁴⁹ See, e.g., Weiler, note 47, above, 61 (suggesting, without elaboration, there are “political constraints” in Canada that restrain federal “self-aggrandizement”); Ryder, note 11, above, 375 (suggesting, without elaboration, “[f]ederal governments in Canada pay a heavy political price for running roughshod over provincial interests, even though they have a growing legal capacity to do so”); and Leclair, note 4, above, 32, 64-7 (noting factors that have acted “as obstacles to the unbridled centralization of federal powers”). From the courts, see, in particular, *Ontario Hydro v. Ont.* [1993] 3 S.C.R. 327, para. 72 per LaForest J. (noting, in a discussion of the federal declaratory and disallowance powers, there are “very real and effective political forces that undergird federalism” in Canada); see also Schneiderman, previous note, 87 (finding in the Supreme Court of Canada’s recent division of powers decisions implicit support for the idea that in Canada there are “political safeguards of federalism ... sufficient to police jurisdictional lines of authority”).

⁵⁰ One of the most detailed defences of this view is Swinton, note 4, above, 47-52; for an earlier, and slightly more optimistic, assessment, see K. Swinton, “Federalism and Provincial Government Immunity” (1979) 29 *U.T.L.J.* 1, 22-26. See also Lajoie, note 4, above, 145 (“Canada is both a pro and a constant winner at [the] game [of centralization]”).

This view is also implicit in arguments claiming that, absent judicially-enforced limits on federal jurisdiction, provincial jurisdiction can be restricted at will by the federal government, the clear implication being that there are no political safeguards that do or can supplement or substitute them: see, e.g., E. Brouillet, *La négation de la nation. L’identité culturelle québécoise et le fédéralisme canadien* (Quebec: Septentrion, 2005), 384; and Brun and Tremblay, note 9, above, 437 – both translated in Leclair, note 4, above, 29-30.

emphasize here are often ignored altogether, or discussed briefly at best.⁵¹

Political scientists have devoted more attention to discussions of whether or not there are political safeguards of Canadian federalism than legal scholars – although again, the term ‘political safeguards’ is rarely used. This is perhaps unsurprising, since political scientists have, on the whole, been much more skeptical about the need for, and the impact of, judicial review than their legal counterparts.⁵² There is a large body of political science literature that discusses Canada’s lack of formal intragovernmental safeguards.⁵³ There is also a large body of political science literature that discusses Canada’s intergovernmental apparatus.⁵⁴ However, the role that this intergovernmental apparatus may play in safeguarding provincial jurisdiction has not been addressed in any detail. English-Canadian political scientists have tended to neglect the role that it plays in doing so, or to treat it dismissively as mere ‘turf protection’, and to

⁵¹ The most detailed explorations in the legal scholarship – both numbering less than 5 pages – seem to be Swinton, note 4, above, 47-52; and Leclair, note 4, above, 64-7.

⁵² G. Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: U.B.C. Press, 2006), 2 (noting an “excess of scepticism [among Canadian political scientists] about the impact of judicial review”); and A. Cairns, “The Judicial Committee and its Critics” (1971) 4 *Can. J. Pol. Sc.* 319 (challenging the notion that the Privy Council “precipitated, sustained, and caused” Canada’s decentralized path).

⁵³ See the discussion in Part II, below.

⁵⁴ The gold standard remains R. Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1971; 2006). See also the sources listed in Part III, below.

focus on other issues, like accountability and policy outcomes.⁵⁵ French-Canadian political scientists have placed more weight on safeguarding provincial jurisdiction,⁵⁶ but have tended to neglect or underestimate the capacity of the intergovernmental safeguards to play this role.⁵⁷ This article draws on the political science literature, but it also builds upon it, providing a more detailed, and positive, account of the intergovernmental safeguards.

B. Defining Federalism

What is federalism? What is being politically safeguarded? The political safeguards literature in the United States regularly suggests that the target of the political safeguards is “state interests” (or some variation of the term). However, it rarely clarifies in any detail what this term means.⁵⁸ In this article, I focus on the political safeguards that are available in Canada to safeguard: 1) the jurisdiction; 2) of the provinces; 3) as institutions; 4) against federal encroachments. I elaborate on these four points below.

⁵⁵ This is evident, e.g., in the literature advocating “citizen-centered federalism”: see, e.g., R. Ambrose et al., *Managing the Federation: A Citizen-Centered Approach* (Ottawa: Crossing Boundaries National Council, 2006). For good overviews of the English-Canadian political science literature, see R. Simeon, *Political Science and Federalism* (Kingston: Institute of Intergovernmental Relations, 2002); and Rocher, note 26, above.

⁵⁶ See, for further discussion, Rocher, note 26, above.

⁵⁷ Many politicians, public figures, and academics in Quebec have been arguing for decades for *formal* legal and constitutional recognition of Quebec’s position as the heart and home of Canada’s French-speaking community, so it is hardly surprising that *informal* safeguards like the intergovernmental safeguards are either neglected or underestimated.

⁵⁸ See Nugent, note 40, above, 20, 24 (making this point).

Consider first my focus on *jurisdiction*. In my view, the “interest” that is properly the primary focus of a discussion of the political safeguards of federalism is jurisdiction. Although the precise meaning of the term is hotly contested, most recent federalism scholarship seems to agree that federalism refers, *at a minimum*, to a polity in which there are (at least) two orders of government, each with constitutionally grounded claims to *some* degree of jurisdiction.⁵⁹ It follows from this, in my view, that the primary focus of an assessment of the political safeguards of federalism, as safeguards of federalism, should be their jurisdiction-protecting capacity.⁶⁰

But what is jurisdiction? I take the term to refer, at a minimum, to the power or authority to make policy in relation to a particular issue. However, this definition takes us only so far, because it conceals deep disagreements about the type of jurisdiction that is entailed by Canadian federalism. These disagreements revolve, at base, around how much jurisdictional autonomy that the provinces should enjoy in the Canadian federal system. On one view, the so-called classical paradigm, Canadian

⁵⁹ See, e.g., D. Halberstam, “Comparative Federalism and the Role of the Judiciary”, in K. Whittington et al., eds., *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 142; Hogg, note 48, above, sec. 5.1; N. Bolleyer, *Intergovernmental Cooperation: Rational Choices in Federal Systems and Beyond* (Oxford: Oxford University Press, 2009), 12; and C. Saunders, “Can Federalism Have Jurisprudential Weight?”, in T.J. Courchene et al., eds., *The Federal Idea: Essays in Honour of Ronald L. Watts* (Montreal: McGill-Queen’s University Press, 2011), 112.

⁶⁰ I do not deny that the political safeguards may be utilized to pursue and protect other interests: see, e.g., Nugent, note 40, above, 36-46 (arguing that political safeguards of federalism may protect “legalistic”, “administrative” and “fiscal” state interests).

federalism entails a strong form of autonomy.⁶¹ On this view, the provinces are likened to sovereign states, with the exclusive authority to regulate all subjects (or ‘matters’) that fall within their jurisdiction, and the ‘right’ to exclude the federal government from doing so. This view does not tolerate overlap in federal and provincial jurisdiction, unless the text of the Constitution provides otherwise; rather, it supports confining federal and provincial jurisdiction to “watertight compartments”.⁶² On another view, the so-called modern paradigm, Canadian federalism entails a weaker form of autonomy.⁶³ On this view, the provinces retain an area of exclusive jurisdiction, but exclusive is interpreted in a narrower manner to mean the ability to pursue policies “that deal predominantly” with subjects that are allocated to the provinces.⁶⁴ Like the classical paradigm, this view accords the provinces a realm of exclusive jurisdiction, but unlike the classical paradigm, it tolerates significantly more de facto overlap in jurisdiction, by allowing the federal government to pursue policies that have ‘incidental’ spill-over effects on subjects that are otherwise allocated to the provinces.

This article adopts the modern paradigm. The central concern of this

⁶¹ B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism” (1990-91) 36 McGill L.J. 308, 322-24 (discussing this “classical paradigm”).

⁶² *A.-G. Can. v. A.-G. Ont.* [1937] A.C. 325, 354 per Lord Atkin (P.C., Can.).

⁶³ Ryder, note 61, above, 324-26 (discussing this “modern paradigm”).

⁶⁴ Ryder, note 13, above, 579.

article is Canada's federal system as it operates in practice. The modern paradigm, unlike the classical paradigm, better accords with the reality of modern governance in Canada's federalism system, which is characterized by significant de facto jurisdictional overlap and interdependence.⁶⁵ In addition, the modern paradigm has also been embraced in a long line of Supreme Court of Canada decisions.⁶⁶ It would be inappropriate to judge the political safeguards using a different, and stricter, standard of protection than the courts – their standard comparator – do and are likely to provide.

I recognize that the meaning that is attributed to federalism has key implications for the view that is likely to be taken about the efficacy of the political safeguards as federalism safeguards. Those that favour the classical paradigm may look less favorably on the political safeguards, by overlooking or downplaying those situations in which the political safeguards are wielded to limit (but not rebuff) federal encroachments. However, in my view, the modern paradigm captures the nuances and complexities of our federalism more accurately than the classical paradigm.

Consider next my emphasis on *provincial* jurisdiction. In a federal system, the federal government may encroach on the jurisdiction of the

⁶⁵ See, e.g., P. Monahan et al., *A New Division of Powers for Canada* (Toronto: York University Centre for Public Law and Public Policy, 1992), 4 (“both levels of government are active across the whole range of policy fields”); and R. Simeon and A. Nugent, “Parliamentary Canada and Intergovernmental Canada”, in Bakvis and Skogstad, note 5, above, 64 (noting the prevalence of “overlapping and shared responsibilities” in Canada).

⁶⁶ See Wright, note 11, above; see also the other sources listed in notes 11, 13, above.

provincial governments, the provincial governments may encroach on the jurisdiction of the federal government, and a provincial government may encroach on the jurisdiction of another provincial government. I focus on federal encroachments on provincial jurisdiction, because that is the type of encroachment that seems to most occupy, and concern, legal scholars in Canada. In doing so, I should not be taken as suggesting that the other two types of jurisdictional encroachments are not also of concern in Canada. On the contrary, as I see it, a theory of federalism that relied exclusively on political safeguards to prevent encroachments would need to account for whether, and if so, how, the theory addresses the possibility of both provincial-federal encroachment and provincial-provincial encroachment.⁶⁷

Consider next my emphasis on the allocation of jurisdiction to provincial *institutions*. Federal and provincial jurisdiction in Canada is allocated in sections 91 and 92 of the *Constitution Act, 1867*. These two provisions confer legislative authority on the federal Parliament and the provincial legislatures.⁶⁸ This serves to highlight an important point: that

⁶⁷ See, e.g., Weiler, note 45, above, ch. 6 (who argues against judicial review of the division of powers in the Canadian context, but concedes two functions to courts: a) determining whether federal and provincial laws conflict; and b) determining whether provincial laws inappropriately discriminate against extra-provincial persons or products).

⁶⁸ To be fair, s. 91, which outlines the “Legislative Authority of [the] Parliament of Canada”, refers to “the Queen”, acting “by and with the Advice and Consent of the Senate and the House of Commons”; in practice, this confers legislative authority on the federal Parliament. Section 92, which outlines the “Subjects of exclusive Provincial Legislation”, refers to the provincial “Legislature” and makes no mention of the Queen.

discussions of the political safeguards of federalism must focus on their ability to protect the jurisdiction of federal and provincial institutions, not private interests that happen to be concentrated in particular provinces.⁶⁹ This is important because, as I will show below, various potential political safeguards of federalism probably protect private province-based interests rather than the jurisdiction of the provincial governments as institutions.

Consider finally the use of the term *encroachments*. Federal encroachments on provincial jurisdiction may come in several different forms. First, federal encroachments may take the form of federal initiatives that exceed federal jurisdiction, intruding in a constitutionally impermissible way on a matter that falls within provincial jurisdiction. Second, federal encroachments may take the form of federal initiatives that fall within federal jurisdiction, but legally displace or limit the operation of valid provincial initiatives, by rendering them inoperative under the federal paramountcy doctrine. Finally, federal encroachments may take the form of federal initiatives that fall within federal jurisdiction, but that somehow displace, limit or alter the operation of provincial initiatives in practice, not

⁶⁹ This point has been emphasized in the literature in the United States: see, e.g., E. Young, “Two Cheers for Process Federalism” (2001) 46 *Vill. L. Rev.* 1349, 1357-58 (arguing that the focus should be “upon protection of the institutional interests of state governments rather than the representation of private interests that happen to be geographically concentrated within particular states”); and Kramer (2000), note 38, above 222-26 (drawing a similar distinction between institutional interests and individual interests).

legally.⁷⁰ These forms of federal encroachment are not all created equal; the first involves federal initiatives that encroach directly on provincial jurisdiction in an unconstitutional way, while the second and third involve otherwise valid federal initiatives that encroach on provincial jurisdiction, by displacing, or limiting, valid provincial initiatives, either legally or in practice. However, the political safeguards can be, and are, utilized to prevent or limit all three forms of federal encroachment, and so a complete account of the role of the political safeguards – and, by extension, the story of how jurisdiction is safeguarded in Canada today – must include an account of the role that they play in limiting all three forms of federal encroachment. In addition, given the prevalence of de facto overlap, an understanding of how the political safeguards prevent or limit the second and third forms of federal encroachment seems particularly salient.

C. Assessing the Political Safeguards

How should we assess the performance of the political safeguards of Canadian federalism? This section addresses four issues that arise in attempting to answer this question, issues that, explicitly or implicitly, animate debates about the political safeguards in the United States.

⁷⁰ For example, alterations to otherwise valid federal criminal law statutes that create new criminal offences, or impose stricter sentences, may have an impact on existing provincial initiatives, and thus jurisdiction, since the provinces often provide the police, court, detention, and probation personnel and facilities: Swinton, note 4, above, 43.

a. Substance or Process?

Consider first *how* the political safeguards are supposed to protect provincial jurisdiction: are they supposed to safeguard provincial jurisdiction directly, by policing fixed substantive limits on federal jurisdiction, or indirectly, by ensuring that the political process affords the provinces the ability to limit inroads on provincial jurisdiction? The conventional view, in Canada and the United States, is that there are fixed substantive limits on jurisdiction, and that, in assessing the performance of a federalism safeguard, we should focus on measuring its ability to define and enforce these limits.⁷¹ The political safeguards literature in the United States adopts a different approach. Like the conventional view, it contemplates the protection of a zone of state jurisdiction, but unlike the conventional view, it eschews or at least downplays fixed substantive limits in favour of flexible process-based limits. It does not necessarily eschew fixed limits altogether: some seem to reject any notion of fixed substantive limits,⁷²

⁷¹ See Kramer (2000), note 38, above, 292 (arguing that “many theories of federalism make the mistake of assuming an underlying [substantive allocation]”, with the “judicial review question ... cast as an inquiry into whether courts or politics is ‘better’ at preserving this predetermined allocation”). The notion of fixed substantive limits is not necessarily inconsistent with the notion of ‘living constitutionalism’, which contemplates flexible constitutional limits that respond to new or changed circumstances. However, the flexibility contemplated by living constitutionalism seems to be more limited, or ‘rooted’.

⁷² This seems to be Larry Kramer’s view: see Kramer (2000), note 38, above, 289, 292 (criticizing “the mistake of assuming an underlying ideal, permanent division of authority between the national government and the states”); and Kramer (1994), note 38, above, 1499 (arguing that “just because it’s no longer possible to maintain a fixed domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a fluid one”).

while others seem to contemplate lingering fixed substantive limits, which will be policed by the political safeguards⁷³ or by the courts.⁷⁴ But, on the whole, it seems to assume, either explicitly or implicitly, that we should assess the performance of federalism safeguards primarily by measuring their ability to police flexible process-based limits on jurisdiction.⁷⁵

This article accepts that there are fixed substantive limits on federal jurisdiction, but it also accepts, in accordance with the modern paradigm, that these limits allow for significant de facto overlap in jurisdiction. It takes seriously the role that the political safeguards may play in policing these fixed substantive limits on federal jurisdiction, but it also takes seriously the flexible process-based limits on federal jurisdiction that these political safeguards may impose in these areas of de facto overlap.

b. Courts or Politics?

Consider second *who* is supposed to define these federal encroachments: the courts, the political branches, or both? The conventional view, in the United States and Canada, is of course that the courts properly

⁷³ This seems to be Jesse Choper's view: see "The Scope of National Power Vis-à-vis the States: The Dispensability of Judicial Review" (1977) 86 Yale L.J. 1552, 1599-1600 (acknowledging Congress "may transgress the constitutional principle of federalism").

⁷⁴ This seems to be Herbert Wechsler's view: see note 1, above; and note 78, below.

⁷⁵ See Schapiro, note 25, above, 85 (noting that process-based theories have "sought to advance the values of federalism by focusing on the process by which governmental decisions are made, rather than on the substantive reach of federal regulations").

have the final (and, many argue, exclusive) say in defining what counts as a federal encroachment.⁷⁶ The general thrust of the political safeguards literature in the United States is in favour of granting the final say to the political branches⁷⁷ - although the literature does not necessarily contemplate that the courts will and should play absolutely no role at all.⁷⁸

This article accepts that judicial decisions provide *one* standard that can be used in defining what counts as a federal encroachment. However, it accepts that the political branches also play an important – indeed primary - role in determining how jurisdiction is allocated in Canada, and it attempts to draw attention to those situations where the provinces utilize the political safeguards to limit or entirely block federal initiatives that *they* perceive –

⁷⁶ From Canada, see, e.g., P. Russell, “Constitutional Reform of the Canadian Judiciary” (1969) 7 Alta. L.R. 103, 123 (“both in the popular imagination and the view of most Canadian statesmen, the primary role of the ... [Court] is to act as the final arbiter of the Constitution or the ‘umpire of the federal system’”); and R. Schertzer, *Judging the nation: The Supreme Court of Canada, federalism and managing diversity* (Ph.D. diss., The London School of Economics, 2012), 68 (suggesting, of Canada, that “the role of the judiciary as the enforcer of the constitutional order is generally accepted”). For a leading account and defense of this view in the United States, see L. Alexander and F. Schauer, “On Extrajudicial Constitutional Interpretation” (1997) 110 Harv. L. Rev. 1359.

⁷⁷ See Choper, note 34, above, 175 (federalism issues should be non-justiciable).

⁷⁸ Herbert Wechsler, for example, seems to contemplate that the courts will continue to play some sort of a role: see note 1, above, 559 (noting “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress”, but insisting that it cannot “decline to measure enactments by the Constitution when it ... [faces] ... the question in ... ordinary litigation”). See E. Young, “The Rehnquist Court’s Two Federalisms” (2004) 83 Texas L. Rev. 1, 71 (advancing this reading of Wechsler). See also A. Rapaczynski, “From Sovereignty to Process: The Jurisprudence of Federalism After *Garcia*” (1985) Sup. Ct. Rev. 341 (advocating a process-based role for the courts that reinforces the efficacy of the political safeguards); and Young, note 69, above (same).

with or without judicial support – to encroach on provincial jurisdiction.⁷⁹

This standard may arouse controversy. As noted, legal scholars in Canada usually look to the courts to define what counts as a federal encroachment in the division of powers context.⁸⁰ The problem with adopting an exclusively court-based standard in discussing the political safeguards of federalism is the risk that the role that the political safeguards actually play in protecting provincial jurisdiction will be obscured.⁸¹ A court-based standard would focus on whether the political safeguards are used by the provinces to restrain federal initiatives that the courts have said (or likely would say) count as federal encroachments. However, the provinces may also utilize the political safeguards to limit or restrain federal initiatives where the courts have not been asked to settle the allocation of jurisdiction or have decided to play a limited role, or where both orders of government share jurisdiction.⁸² In addition, the provinces may also use the political safeguards to challenge federal initiatives that have actually been

⁷⁹ This adds an additional wrinkle to the forms of encroachment discussed earlier: see Part I(B). Since there may be a disagreement about whether the federal government has the jurisdiction to pursue an initiative – a disagreement that may survive a decision from the courts – there may also be a disagreement about whether the issue is the scope of federal jurisdiction (the first form of encroachment) or the impact of an otherwise valid exercise of federal jurisdiction on provincial jurisdiction (the second and third forms of encroachment).

⁸⁰ See the text accompanying note 76, above; see also Part I(A), above.

⁸¹ Advocates of extra-judicial constitutional interpretation have been critical of the use of a court-based standard for a variety of reasons: see, for a good discussion, M. Tushnet, “Interpretation in Legislatures and Courts”, Bauman & Kahana, note 2, above, 356-60.

⁸² For an example, see the next section, discussing the federal spending power.

held by the courts to be constitutionally valid.⁸³ The term federal encroachment may seem loaded, absent or despite a decision from the courts, but the manner in which I use the term captures the various ways in which the political safeguards are actually utilized.⁸⁴ And if, as expected, judicial intervention and de facto overlap continue to be the exception rather than the rule, understanding these nuances may have particular salience.

I should not, in adopting this standard, be taken as suggesting that I think the political branches should, as a normative matter, have the final authority to interpret the division of powers. There are strong reasons to allocate final authority to interpret the Constitution to the courts,⁸⁵ perhaps especially in the division of powers context, where there are concerns about avoiding a question-begging situation where one order of government gets to define the scope of its own jurisdiction.⁸⁶ In addition, I should not be

⁸³ See Swinton, note 4, above, 18 (“the result of a legal ‘win’ for one government [in a division of powers dispute] is not the same as a political win”, and a court decision may not “finally resolve a dispute between levels of government”); and P. Russell, “The Supreme Court and Federal-Provincial Relations” (1985) 11 Can. Pub. Pol. 161, 62 (similar point).

⁸⁴ I do not deny that the provinces may resist federal initiatives for a variety of reasons, some of which may have little to do with protecting constitutionally-guaranteed allocations of jurisdiction: see Part III(E), where I discuss this issue, and its implications, further.

⁸⁵ In previous work, I have argued that the final (but not exclusive) authority to interpret the *Charter* should be allocated to the courts: P.W. Hogg, A.A. Bushell Thornton, and W.K. Wright, “*Charter* Dialogue Revisited” (2007) 45 Osgoode Hall L.J. 1, 30-38.

⁸⁶ See the debate between Jeffrey Goldsworthy, who argues that federalism judicial review is necessary to avoid this sort of a “question-begging” situation (“Structural Judicial Review and the Objection from Democracy” (2010) 60 U.T.L.J. 137); and Adrienne Stone, who disputes this “more formidable” argument for federalism judicial review (“Judicial Review Without Rights” (2008) Oxford J. Legal Stud. 1, 27-30; and “Structural Judicial

taken as suggesting that I believe that all of the federal initiatives that the provinces challenge do encroach improperly on provincial jurisdiction. I am highly skeptical that it is possible to make these sorts of assessments in the abstract, and in any event, any answer I might provide would almost certainly be fraught with controversy. My point is, more modestly, that, in attempting to understand and assess how the provinces use the political safeguards to protect provincial jurisdiction, it is best to adopt a standard that captures the political safeguards as they actually function in practice.

c. The “Shadow Cast by the Courts”

Consider third how to assess the impact that judicial review may have on the efficacy of the political safeguards. The courts play a role in the division of powers context in Canada in two situations. The first is ordinary judicial review, the second the reference procedure.⁸⁷ The role that the courts play in these two contexts complicates the task of assessing the strength of the political safeguards of federalism, because they may both over-inflate political safeguards (supposed ‘wins’ for a political safeguard

Review and the Judicial Role in Constitutional Law” (2010) 60 U.T.L.J. 109).

⁸⁷ Judicial references provide both orders of government a mechanism to refer a contentious initiative to the courts for a ruling on its constitutionality, even though a concrete dispute surrounding its application may not exist, and “without the delay that comes with litigation through normal channels”: Swinton, note 4, above, 11.

From 1867 to 1966, 68 of the 197 (or 35%) constitutional cases that reached the highest available court (the Privy Council until 1949, the Supreme Court of Canada from 1949) were references; from 1967 to 1986, 23 of 155 (or 15%) were references: B. Strayer, *The Canadian Constitution and the Courts*, 3d ed. (Toronto: Butterworths, 1988), ch. 9.

may be due to fear of a successful court challenge) and under-inflate political safeguards (political actors may decide to punt difficult or divisive constitutional issues to the courts, perhaps reducing the need for, as well as the efficacy of, the political safeguards).⁸⁸ Mark Tushnet has aptly called this “shadow cast by the courts” the problem of “judicial overhang”.⁸⁹

Federalism scholars have adopted a variety of views about how judicial review and judicial references impact the practice of federalism. Some (often legal scholars) have taken the view that the courts matter a lot to the practice of federalism.⁹⁰ Others (often, but not solely, political scientists) have taken the view that the courts matter very little.⁹¹ Still others have taken a middle ground view, and accept that the courts are an “important actor in the federal system, but only one of many in the cast”.⁹²

This article adopts the third (middle ground) view. I accept that the courts matter, and thus that it is important to be sensitive to the impact that the courts may have on the efficacy of the political safeguards in particular

⁸⁸ And, since the United States Supreme Court has rejected a reference function, the lessons that can be drawn from the U.S. literature and experience are further complicated.

⁸⁹ See M. Tushnet, “Evaluating Congressional Constitutional Interpretation” (2001) 50 Duke L.J. 1395, 1400-01; and, for an update of his argument, Tushnet, note 81, above, 357.

⁹⁰ Monahan, note 43, above, 222 (noting, albeit in 1987, that “[l]egal scholars have long regarded judicial review as a central feature of Canadian federalism”).

⁹¹ *Id.*, 239 (arguing “the outcomes of constitutional cases are much less determinative of public policy than is often supposed by lawyers and legal scholars”); and Baier, note 52, above, 2 (noting political scientists’ “skepticism about the impact of judicial review”).

⁹² Swinton, note 4, above, 18.

contexts. A judicial decision may impact the choice of regulatory instrument, by taking certain regulatory instruments off the table for one of the two orders of government. It may impact the allocation of bargaining power, if the ‘losing’ order of government attempts to work around the decision by negotiating a solution with the ‘winning’ order of government. And, it may facilitate the resolution of federal-provincial disputes, if the losing order of government is inclined to abandon the initiative altogether.⁹³

However, I am also inclined to think that the courts are ‘only one of many in the cast’, and thus that the problem of judicial overhang may not be as serious as might be imagined. For one thing, with only three recent exceptions, the courts in Canada have adopted a highly deferential approach to judicial review of the division of powers for the past 30 years.⁹⁴ Deferential courts may cast a limited, or at least a reduced, shadow,⁹⁵ although intermittent holdings that initiatives exceed jurisdictional limits may impact the scope of the shadow that is cast – preserving and perhaps also increasing it.⁹⁶ In addition, there are specific areas in which the courts play a limited role, either because the courts have not been asked to

⁹³ K. Swinton, “Federalism Under Fire” (1992) 55 *Law and Contemp. Probs.* 121, 139.

⁹⁴ See the text accompanying notes 11 to 14, 65 to 66, above.

⁹⁵ See J. Pickerill, *Constitutional Deliberation in Congress* (Durham: Duke University Press, 2004) (making this argument about federalism issues in the U.S. context).

⁹⁶ See Schneiderman, note 48, above, 86-88.

intervene or have decided not to do so. The federal spending power is an example. The federal government's ability to attach conditions to offers of federal funds in areas of provincial jurisdiction is contested, but both orders of government seem happy to leave this "as a grey area of jurisdiction",⁹⁷ and where it has been raised, the Supreme Court of Canada has been fairly cautious about pronouncing on its validity,⁹⁸ at least conclusively.⁹⁹

Moreover, as Patrick Monahan has persuasively argued, even when a court does enter the fray, and finds that legislation enacted by one order of government is *ultra vires* on federalism grounds, it does not necessarily have the final word.¹⁰⁰ This is because "the other level of government may choose to enact the legislation in substantially the same form"; "the results of the litigation may be reversed by intergovernmental agreement"; or "the 'losing' level of government may simply reassert regulation over the activity in question" by substituting "an alternative policy instrument".¹⁰¹

⁹⁷ Swinton, note 4, above, 17; and Choudhry (2003), note 48, above, 81. See also *Confédération des syndicats nationaux v. Can.* [2008] 3 S.C.R. 511, para. 20 (federal government discouraging the Court from addressing a federal spending power argument).

⁹⁸ See, e.g., *Confédération des syndicats*, previous note, para. 49 (refraining from addressing the validity of conditional spending under the federal spending power).

⁹⁹ There is an Alberta Court of Appeal that finds conditional spending under the federal spending power constitutional; there are also a number of Supreme Court decisions that suggest that it is inclined to reach the same conclusion; but a conclusive decision from the Court is still lacking. See Hogg, note 48, above, sec. 6.8(a) (providing references).

¹⁰⁰ Monahan, note 43, above, ch. 10.

¹⁰¹ *Id.*, 224. See also *id.*, 228-239 (discussing two case studies). This may be unfolding in the aftermath of the *Securities Reference*, which held that the federal government's

Finally, even when a court does enter the fray and holds that an initiative is *intra vires* on federalism grounds, it does not necessarily have the final word. As Katherine Swinton notes, “the result of a legal ‘win’ for one government is not the same as a political ‘win’”.¹⁰² In some cases, the order of government that ‘loses’ inside the courts carries on, by utilizing the political safeguards of federalism to try – at times successfully – to limit or block an initiative that was held to be constitutional by the courts.¹⁰³

This article explores these dynamics, with reference to the political safeguards of federalism. In doing so, it assumes that the courts, while important in some cases at some times, are ‘only one of many in the cast’.

d. The Need for Safeguards of Federalism

Consider finally the need for safeguards of federalism. How much do we need safeguards of federalism, and why do we need them? Legal scholars in Canada have not addressed these questions in any systematic way, but most seem to assume that we do need them – and some seem to imagine that we need them a great deal.¹⁰⁴ The answers to these questions

proposed national *Securities Act* was unconstitutional: see note 12, above. The federal government has reached an agreement with Ontario and British Columbia to establish a ‘co-operative securities regulator’, and invited the other provinces to join: see “Feds, Ontario and B.C. agree on co-operative securities regulator”, *Toronto Star* (September 19, 2013).

¹⁰² Swinton, note 4, above, 18; and Swinton, note 93, above, 139.

¹⁰³ See, e.g., the discussion of environmental assessments in Part III(D)(b), below.

¹⁰⁴ See, e.g., Swinton, note 4, above, 51 (suggesting that “Each level of government has an

may have important implications for how we assess the political safeguards.

Take the first question, about how much we need safeguards of federalism. If, as some seem to imagine, we need safeguards of federalism a great deal, because the federal government has been and will be a serial encroacher on provincial jurisdiction, then we might have high expectations for these safeguards. But, if we think that the federal government usually takes a restrained approach to its jurisdiction, then we might have reduced expectations for these safeguards, since less might ultimately turn on them.

Or take the second question, about why we need safeguards of federalism at all. There would seem to be (at least) three possible reasons for federal encroachments. One is lack of knowledge; if the federal government is unaware that a federal initiative does or will encroach on provincial jurisdiction, legally or in practice, it may pursue it, unaware of any jurisdictional concerns. Initiatives do not apply themselves, and it may be difficult for a government to anticipate how an initiative will be applied. Another possible reason is reasonable disagreement; the federal government

interest in not only maintaining, but expanding its jurisdiction”); Ryder, note 61, above, 351 (referring to the “imperial tendencies of federal jurisdiction”); J. Facal, “Conflicting National Identities and Federalism”, in Gagnon, note 26, above, 223 (referring to the “imperious exercise of federal spending powers”); and Leclair, note 4, above, 29 (suggesting, with references, that the “one recurrent theme in Quebec, and ... [Canada]” is the “centralization of powers by the federal government”). Similar claims are found in the Canadian political science literature: see, e.g., A. Cairns, “The Governments and Societies of Canadian Federalism” (1977) 10 Can. J. Pol. Sc. 695; K. Norrie et al., *Federalism and Economic Union in Canada* (Toronto: University of Toronto Press, 1986), 129; and G. Stevenson, ‘The Division of Powers’, in R.D. Olling and M.W. Westmacott, eds., *Perspectives on Canadian Federalism* (Scarborough, ON: Prentice Hall, 1988), 41.

may have formed an honest but mistaken belief that a federal initiative does not encroach on provincial jurisdiction, due to a good faith disagreement about the scope or limits of federal jurisdiction.¹⁰⁵ Finally, a federal encroachment may be intentional – the result of a calculation that the benefits of pursuing a federal initiative that encroaches on provincial jurisdiction outweigh the costs.¹⁰⁶ If we imagine that lack of knowledge is the most likely reason for federal encroachments, we might think that political safeguards only need to serve a signaling function, by somehow alerting federal actors to any jurisdictional concerns. But, if we imagine that intentional cost-benefit analyses or reasonable disagreement likely (also) play a role, we might think that more is required; that the political safeguards must be equipped to restrain federal initiatives that encroach, by somehow giving the provinces the ability to block (or at least limit) them.

I am inclined to think that the federal government in Canada has taken a fairly restrained approach to jurisdictional issues in recent

¹⁰⁵ Reasonable disagreement about the meaning and application of constitutional standards is of course central to Jeremy Waldron’s ‘core case’ against judicial review: see J. Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale L.J. 1346. Waldron’s argument, which focuses on individual rights, was extended to structural issues, including the division of powers, by Adrienne Stone: see, for references, note 86, above.

¹⁰⁶ See J. Hiebert, “Parliamentary Engagement with the *Charter*” (2012) 58 S.C.L.R. (2d) 87, 97-98 (suggesting, with reference to the *Charter*, that governments in Canada may “knowingly” pursue initiatives “with a high degree of risk for litigation and invalidation”, and that, in deciding to do so, governments explicitly engage in a cost-benefit analysis).

decades,¹⁰⁷ but that federal encroachments do occur, likely for all three of the reasons described in the prior paragraph, alone and in combination.¹⁰⁸ However, it is beyond the scope of this article to attempt a detailed defence of these claims. I thus assume that we need safeguards of federalism in Canada, and that federal encroachments occur for all three of these reasons.

II. THE (LACKING) INTRAGOVERNMENTAL SAFEGUARDS

The next two parts discuss the political safeguards of Canadian federalism. Political scientists in Canada often draw a distinction between

¹⁰⁷ To be sure, the federal government has at times pursued initiatives, like the national securities regulator, that push the limits of federal jurisdiction. But, tellingly, the national securities regulator was pursued after significant outside pressure calling for the federal government to act; the federal government was very slow to act; the federal government secured favorable opinion letters from several leading constitutional lawyers; the federal government attempted to accommodate provincial concerns (for example, by including an opt-in mechanism); and, in defending the law in court, the federal government took a fairly restrained approach, and did not invoke all of the possible heads of legislative power. See *Securities Reference*, note 12, above; as well as the articles in Anand, note 48, above.

In addition, as with the national securities regulator, in recent decades, federal legislation that arguably touches on one or more areas of provincial jurisdiction has often included provisions that attempt to give the provinces at least some control over whether, and how, the legislation applies within their boundaries. For example, federal legislation has increasingly included equivalency provisions, which allow the provinces to secure provincial exemptions from federal legislation if they already have equivalent legislation in place: see, e.g., *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 10.

Finally, the federal government has taken a restrained approach to the spending, disallowance and declaratory powers in recent decades – powers that, if used, could pose a serious threat to provincial jurisdiction, especially since the courts have proven reluctant to restrain their use: on the spending power, see notes 97 to 99, above, and note 197, below; on the disallowance and declaratory powers, see Hogg, note 48, above, sec. 5.3.

This all may speak to the strength of the political safeguards of federalism in Canada, but also to the federal government's restraint in relation to provincial jurisdiction.

¹⁰⁸ For example, federal actors may have formed the honest but mistaken view that an initiative is constitutional, but, in adopting this view, they may have engaged in 'motivated reasoning', unconsciously downplaying constitutional concerns because they favour the initiative itself. On 'motivated reasoning', see D.M. Kahan, "Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law" (2011) 125 Harv. L. Rev. 1.

intrastate (or intragovernmental) federalism and interstate (or intergovernmental) federalism.¹⁰⁹ Intragovernmental federalism refers to the safeguards that are available *inside* the federal government to safeguard federalism and settle federalism disputes, intergovernmental federalism to the safeguards that are available *outside* the federal government to safeguard federalism and settle federalism disputes. This part considers whether Canada has intragovernmental safeguards of federalism. It argues, in keeping with the political science literature, that Canada now lacks (if indeed it ever had) a robust system of intragovernmental safeguards.¹¹⁰

My discussion in the next two parts is informed by several assumptions. First, I assume that the federal government is a “they” rather than (or at least as well as) an “it”. The Canadian federalism scholarship regularly refers to the federal government as an “it”, giving the impression of a “personified rational actor” that acts of its own volition.¹¹¹ Indeed, I often do so in this article, for ease of reference. I accept that the federal government has institutional features that have an important impact on

¹⁰⁹ D.V. Smiley and R.L. Watts, *Intrastate Federalism in Canada* (Toronto: University of Toronto Press, 1985), 4 (defining intrastate and interstate federalism). I use the terms intragovernmental federalism and intergovernmental federalism, because this avoids any confusion with the United States, which of course has states rather than provinces.

¹¹⁰ See, e.g., R.L. Watts, “Executive Federalism: A Comparative Analysis” (Kingston: Institute of Intergovernmental Relations, Research Paper No. 26, 1989), 17 (“Of all the contemporary federations, Canada does the least institutionally to provide an adequate regional expression of views in national affairs through ... its central institutions”).

¹¹¹ See Bar-Siman-Tov, note 18, above, 851 (noting this trend in the U.S.).

political decision-making, but I assume that elected and unelected officials – the “they” – also have interests that drive political decision-making.¹¹² Second, I accept that, in Canada’s parliamentary system, federal party leaders¹¹³ – the Prime Minister, but also, to a lesser extent, his/her cabinet ministers and senior political advisors – play the biggest part in determining the government’s policy agenda.¹¹⁴ Finally, I assume that there are a number of motivations for political decision-making. This is in keeping with recent scholarship, which does not emphasize only personal motivations (like a concern for re-election or ideology) or public-regarding motivations (like a concern for good public policy) for political decision-making, but a mix of different – and possibly conflicting – motivations.¹¹⁵

A. The Senate

The framers of the *Constitution Act, 1867* were well acquainted with

¹¹² R.L. Watts, *Comparing Federal Systems*, 3d ed. (Montreal: McGill-Queen’s University Press, 2008), 20-21 (noting the role of social *and* institutional forces).

¹¹³ This does not include the leaders of the federal opposition parties because, in our parliamentary system, they usually have a limited ability to set and define federal policy.

¹¹⁴ Making this point, see D. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); and D. Savoie, *Power: Where is It?* (Montreal: McGill-Queen’s University Press, 2010).

¹¹⁵ See, e.g., J.A. Brander, “Economic Policy Formation in a Federal State”, in R. Simeon, ed., *Intergovernmental Relations* (Toronto: University of Toronto Press, 1985), 40; and R. Simeon and I. Robinson, *State, Society and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 14-16. This also seems to be the mainstream view in the United States: see, e.g., E. Garrett and A. Vermeule, “Institutional Design of a Thayerian Congress” (2001) 50 *Duke L.J.* 1277, 1287-89 (listing references).

the federal system in the United States, which was the only useful federal precedent available to them in 1867.¹¹⁶ As in the United States, the framers agreed that the Senate should play a role in protecting provincial or regional interests in the new federation.¹¹⁷ However, as in the United States, there was serious disagreement about the form that the Senate should take. And, as in the United States, there is fairly widespread agreement that the Senate has proven to be largely ineffective as a political safeguard of federalism.¹¹⁸

Why? First, senators are appointed by the Governor General, acting, by convention, on the advice of the Prime Minister.¹¹⁹ In theory, appointed senators may be freer than elected senators to vote against federal initiatives that they regard to push or exceed federal jurisdiction, because their appointed status would seem to afford them independence from the

¹¹⁶ See P.W. Hogg & W.K. Wright, “Canadian Federalism, the Privy Council and the Supreme Court” (2005) 38 U.B.C. L. Rev. 273, 333 (making this point).

¹¹⁷ The rest of this paragraph draws from: Smiley and Watts, note 109, above, 117-120.

¹¹⁸ On the Senate in Canada, see, e.g., Smiley and Watts, note 109, above, 119; and R.A. MacKay, *The Unreformed Senate of Canada* (Toronto: McClelland, 1962), 110. On the Senate in the United States, see, e.g., Kramer (2000), note 38, above, 223-225.

The Senate in Canada has a standing committee, the Standing Committee on Legal and Constitutional Affairs, which has a mandate that includes “federal-provincial relations”. I am not aware of any research that analyzes the role that this standing committee may play in flagging division of powers concerns. Research suggests that *Parliament* plays very little role in scrutinizing federal initiatives for their compliance with the *Charter*: see, e.g., J. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers’ Intent* (Vancouver: U.B.C. Press, 2005), ch. 7; and J. Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002). I would be very surprised if division of powers issues received more scrutiny.

¹¹⁹ *Constitution Act, 1867*, s. 24; Privy Council minute, P.C. 3374 (October 25, 1935).

electorate and government.¹²⁰ However, there is widespread skepticism that this occurs in practice, either at all or in any significant way, because senate appointments are usually awarded to the party faithful, who are unlikely to vote to block federal initiatives, at least where their party is in power.¹²¹

Second, even if senators were not hindered by party loyalty, it remains doubtful that they would play a role in blocking or limiting federal overreach, despite having the legal power to do so. Because they are appointed rather than elected, there is always a public outcry when senators do vote to block federal initiatives, and they do so rarely.¹²² This further hinders the Senate's ability to play a role in restraining federal overreach.¹²³

Third, even if there were senators that were prepared to vote to block federal initiatives, it is not clear that, as federal appointees and members of a federal institution, these senators would be inclined to vote to protect the jurisdiction of provincial institutions, as opposed to provincially-

¹²⁰ P.G. Thomas, "Parliament and Legislatures: Central to Canadian Democracy?", in J. Courtney and D. Smith, eds., *The Oxford Handbook of Canadian Politics* (Oxford: Oxford University Press, 2010), 166-167 (suggesting senators may play this role).

¹²¹ See, e.g., Simeon, note 54, above, 29; Swinton, note 4, above, 48; and R. Pelletier, "Intergovernmental Cooperation Mechanisms: Factors for Change?", Commission on the Future of Health Care in Canada, Discussion Paper No. 29 (Ottawa, October 2002), 4.

¹²² Hogg, note 48, above, 9.4(c), fn. 38 (providing a list of resources and figures).

¹²³ If the Harper government is successful in its push for an indirectly-elected, term-limited Senate, this might change. However, the next two problems would remain.

based interests.¹²⁴ Indeed, senators may actually be inclined to support, not oppose, federal initiatives that push or exceed federal jurisdiction, if they think that these initiatives benefit particular provincially-based interests.¹²⁵

Finally, senators are appointed to represent regions, not provinces, with each region allocated 24 senators.¹²⁶ Two of these regions consist of the largest provinces: Ontario and Quebec. However, the other two regions consist of several smaller provinces, with the three Maritime provinces constituting one region and the four Western provinces another region. Even if senators were inclined to protect the jurisdiction of provincial institutions, there is no guarantee that they would agree as to when it was appropriate to do so. And it is easy to imagine situations in which the regional composition of the Senate would work to the disadvantage of the smaller provinces, by diluting the votes of senators from those provinces.¹²⁷

¹²⁴ This is a point that has been emphasized about the United States Senate: see, e.g., Kramer (2000), note 38, above, 222-23; and Baker and Young, note 36, above, 113-14.

¹²⁵ On one view, the framers did not intend the Senate to be an institution that would protect provincial institutions: Monahan (1987), note 43, above, 180. However, on another view, the framers did intend the Senate to play this role: see *Senate Reference* [1980] 1 S.C.R. 54 (which has been read to adopt this view, by Monahan, this note, 182-86).

¹²⁶ On Newfoundland's entry into Confederation in 1949, it was given six senators; the Yukon, Northwest Territories, and Nunavut, have also each been given one senator.

¹²⁷ This problem also exists, albeit in a different form, with the Senate (and Congress) in the United States. As Larry Kramer explains, "Preferences in Congress are aggregated on a nationwide basis: However sensitive federal legislators may be to state or local interests, if interests in an area represented by a majority of these legislators concur, interests in the rest of the country will be subordinated": see (2000) note 38, above, 222-24.

B. The Federal Cabinet

The historical record also suggests that the framers expected the federal cabinet to play an important role in protecting the provinces.¹²⁸ The basic idea was to give the federal cabinet a federal character, by ensuring that all cabinets had at least one cabinet minister from each of the provinces, with the more populous provinces to be granted more than one. These federal cabinet ministers would, it was expected, serve as a conduit for provincial officials with federal grievances, and attempt to protect provincial and regional interests. Although there is some evidence that the federal cabinet did play this role in Canada's early years, there is general agreement that its role in this regard has been seriously weakened.¹²⁹ Moreover, there is good reason to doubt that the federal cabinet ever played a major role in protecting provincial jurisdiction from federal overreach.

First, cabinet ministers are unlikely to oppose federal initiatives that are important to the Prime Minister, or that have been announced publicly, even if they have jurisdictional concerns. There is strong party loyalty in the

¹²⁸ See, e.g., J. Smith, *Federalism* (Vancouver: U.B.C. Press, 2005), 50-53.

¹²⁹ See, e.g., Smiley and Watts, note 109, above, ch. 5; H. Bakvis, *Regional Ministers: Power and Influence in the Canadian Cabinet* (Toronto: University of Toronto Press, 1991); Pelletier, note 121, above, 5; G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 4th ed. (Montreal: McGill-Queen's University Press, 2004), 230; and J.P. Meekison et al., "The Institutions of Executive Federalism", in J.P. Meekison et al., eds., *Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen's University Press, 2004), 12-13. For a more sanguine account of its role as 'regional representative', see H. Bakvis and A.B. Tanguay, "Federalism, Political Parties, and the Burden of National Unity", in Bakvis and Skogstad, note 5, above, 99-106.

federal Parliament (and provincial legislatures) in Canada, which is rooted in the conventions of responsible government, party discipline and party socialization.¹³⁰ Cabinet ministers may feel free to voice province- or region-specific concerns about new initiatives before they have been announced, especially if they do not seem overly important to the Prime Minister, but they are highly unlikely to do so if either of these conditions does not hold. As with the Senate, cabinet ministers are appointed by the Governor General, acting, by convention, on the advice of the Prime Minister. Cabinet posts are highly desirable, because, among other things, cabinet ministers “draw additional salaries, tend to have longer – and safer – political careers, and have the greatest facility to influence public policy”.¹³¹ Those that hope to obtain a cabinet post must “demonstrate their loyalty to the party well in advance”.¹³² And, once they obtain a cabinet post, cabinet ministers are usually reticent to oppose federal initiatives that have the support of the Prime Minister, or that have been announced publicly, either because they have become socialized into toeing the party line, or because

¹³⁰ D. Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons* (Vancouver: U.B.C. Press, 1997); J. Malloy, “The Executive and Parliament in Canada” (2004) 10 J. Leg. Stud. 206; J.-F. Goudbout and B. Hoyland, “Legislative Voting in the Canadian Parliament” (2011) Can. J. Pol. Sc. 367; and Savoie (1999), (2010), note 114, above.

¹³¹ D. Docherty, *Legislatures* (Vancouver: U.B.C. Press, 2005), 49-50.

¹³² *Id.*, 49-50, 57, 71.

party discipline and cabinet solidarity would likely cost them their posts.¹³³

Second, there is an important distinction between the jurisdiction of provincial institutions and provincially-based interests.¹³⁴ It is less than clear, as with the Senate, that federal cabinet ministers will be inclined to protect the jurisdiction of provincial institutions, rather than provincially-based private interests, even in a ‘federalized’ federal cabinet. Cabinet ministers are also elected MPs, and their desire for re-election will provide them with a powerful incentive to support federal initiatives that respond to the problems that matter to their constituents, even if they have concerns that those initiatives intrude improperly on provincial jurisdiction.¹³⁵

Finally, there is no guarantee that all provinces will be adequately represented in the federal cabinet, due to the vagaries of Canada’s electoral system.¹³⁶ In federal elections, the single-member, simple-plurality electoral system often results in a significant discrepancy between votes cast and seats received, and political parties with regionally-concentrated support are often strongly rewarded while those with support that is distributed across the country are penalized. As a result, it is not uncommon for governing

¹³³ Simeon, note 54, above, 27-29; and Swinton, note 4, above, 47-48.

¹³⁴ As noted, this point has been emphasized in the United States: see note 124, above.

¹³⁵ Simeon, note 54, above, 28-29, makes this point about the cabinet.

¹³⁶ See Simeon & Nugent, note 65, above, 61-2.

parties to have limited seats in one or more provinces, with the consequence that those provinces may be un- or under-represented in the federal cabinet.¹³⁷ Further exacerbating this problem, research suggests, perhaps unsurprisingly, that the federal government may pay closer attention to provinces where the pay-off in seats was, or is expected to be, highest.¹³⁸

C. Political Parties

There is little evidence that the framers expected political parties to play any (significant) role in safeguarding federalism in Canada. However, the argument that political parties can play a crucial role in safeguarding federalism has been prominent in the American and comparative federalism literature,¹³⁹ and this argument has been picked up and applied to Canada in the political science literature. The general consensus in the political science literature is that, as with the Senate and the federal cabinet, political parties do not play a major role as political safeguards of federalism in Canada.¹⁴⁰

¹³⁷ Prime Ministers at times go to great lengths to ensure that there is at least one cabinet minister from each province (with the exception of Prince Edward Island). For example, Prime Ministers occasionally appoint federal senators to the cabinet.

¹³⁸ See, e.g., V. Dickson, “Seat-vote curves, loyalty effects and the provincial distribution of Canadian government spending” (2009) 139 *Public Choice* 317.

¹³⁹ For this argument from U.S. political scientists, see, in particular, W. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), esp. ch. 2; from U.S. legal scholars, see, in particular, Kramer (1994), note 38, above, and Kramer (2000), note 38, above; and from the comparative federalism literature, see, in particular, M. Filippov, P.C. Ordeshook, and O. Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge: Cambridge University Press, 2004).

¹⁴⁰ See, e.g., D.V. Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill

The federalism literature provides two accounts of how political parties can operate as a political safeguard of federalism.¹⁴¹ On one account, political parties will do so if they are decentralized, in the sense that federal politicians depend on provincial parties to get (re)elected. On this account, the risk of federal overreach is alleviated, because provincial politicians will demand respect for the jurisdiction of provincial institutions in return for their efforts on behalf of federal politicians, and federal politicians will refrain from antagonizing provincial officials and provincial parties by encroaching on the jurisdiction of provincial institutions. On another account, political parties will operate as political safeguards if they are integrated, in the sense that federal and provincial politicians are mutually dependent on the party apparatus of the other order of government to get (re)elected. On this account, the risk of federal and provincial overreach is alleviated, because the mutual dependency of federal and provincial politicians will induce federal politicians to defer to, and refrain from antagonizing, provincial officials and provincial parties, and vice versa.

There is widespread agreement that political parties in Canada are not (or at least are no longer) either ‘decentralized’ or ‘integrated’.¹⁴² Not

Ryerson, 1987), 101-124; and Bakvis and Tanguay, note 129, above, 110 (but see *id.*, 108).

¹⁴¹ For a discussion of these two accounts, see J. Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009), 113-116.

¹⁴² See Bednar, previous note, 141; R. Dyck, “Relations Between Federal and Provincial

all political parties exist federally and provincially in all parts of the country, and even where they do, their electoral success federally and provincially can vary considerably. For example, the federal Conservative Party does not have a provincial counterpart that contests elections in Quebec, and the federal Conservative Party has had considerably more electoral success in British Columbia than its provincial counterpart. In addition, where political parties do exist at both the federal and provincial levels, the federal and provincial parties tend to be quite bifurcated.¹⁴³ For example, there are often autonomous nominating processes for national and provincial office and for national and provincial party leadership;¹⁴⁴ there are often different party organizations for contesting national and provincial elections;¹⁴⁵ political parties often have different ideologies and platforms at the federal and provincial levels, and sometimes openly criticize and

Parties”, in A.B. Tanguay and A.-G. Gagnon, eds., *Canadian Parties in Transition*, 2d ed. (Scarborough, ON.: Nelson, 1996), 162-163; D.K. Stewart and R.K. Carty, “Many Political Worlds?: Provincial Parties and Party Systems”, in C. Dunn, ed., *Provinces: Canadian Provincial Politics*, 2d ed. (Toronto: University of Toronto Press, 2008); and R.K. Carty and W. Cross, “Political Parties and the Practice of Brokerage Politics”, in Courtney and Smith, note 120, above, 197-198.

¹⁴³ The one exception is the New Democratic Party. The provincial and federal NDP is “tightly integrated”: Stewart and Carty, note 142, above, 107. However, the NDP has yet to achieve a majority at the federal level, and thus its status does not impact my conclusion.

¹⁴⁴ See Smiley, note 140, above, 106-108; and more recently, K. Detterbeck, “Party Careers in Federal Systems” (2011) 21 Reg. & Fed. Studies 245, 259-263; and D. Doherty, “The Canadian Political Career Structure” (2011) 21 Reg. & Fed. Studies 185, 187.

¹⁴⁵ Smiley, note 140, above, 112; Dyck, note 142, above; Stewart and Carty, note 142, above, 107-108; Detterbeck, note 144, above, 259-263; and Doherty, note 144, above, 187.

campaign against each other;¹⁴⁶ and federal and provincial political parties often draw their financial support from different sources.¹⁴⁷ Finally, there is little evidence of ‘progressive ambition’. Although there are exceptions, most politicians work only federally or provincially,¹⁴⁸ and even when politicians do seek to move to the other order of government, a switch in party is possible.¹⁴⁹ These are all indications that political parties in Canada lack either the decentralization or integration necessary to encourage federal politicians to defer to the interests of provincial politicians and parties.

In any event, political parties are, at best, imperfect federalism safeguards. The efficacy of political parties as a federalism safeguard turns, at least in part, on the willingness of provincial officials to use their influence within their party apparatus to oppose federal overreach. But, as I argue below, there are good reasons to doubt that provincial politicians will be universally predisposed to oppose federal overreach; and in fact, in some

¹⁴⁶ Smiley, note 140, above, 108, 115; Stewart and Carty, note 142, above, 98-104. For example, Danny Williams, the (now former) Progressive Conservative premier of Newfoundland and Labrador, engaged in a public campaign urging voters in Atlantic Canada to vote ‘ABC’ (Anything But Conservative) in the federal election of 2008.

¹⁴⁷ Smiley, note 140, above, 115; and Doherty, note 144, above, 187.

¹⁴⁸ Smiley, note 140, above, 112; D. Barrie and R. Gibbins, “Parliamentary Careers in the Canadian Federal State” (1989) 22 Can. J. Pol. Sc. 137; Carty and Cross, note 142, above, 197-98; Fillipov et al., note 139, above, 209-10; and Doherty, note 144, above, 187.

¹⁴⁹ Doherty, note 144, above, 197-201.

cases, they may welcome it, for political or programmatic reasons.¹⁵⁰ In addition, the mutual dependence that lies at the heart of the integration version of the argument is a double-edged sword; in some cases, it may induce provincial politicians to sacrifice provincial jurisdiction for the good of the federal party.¹⁵¹ Finally, the extent to which political parties are decentralized or integrated is subject to fluctuations over time. Accordingly, even if political parties in Canada were either decentralized or integrated, the protection that this would provide to jurisdiction might be variable.

III. THE INTERGOVERNMENTAL SAFEGUARDS

The previous part set out the reasons to doubt that there are intragovernmental safeguards of federalism in Canada that play any significant role in protecting provincial jurisdiction from federal overreach. If we were to stop here, we might be inclined to conclude, as many legal scholars seem to do, that the courts are the only real safeguard available in Canada to protect provincial jurisdiction.¹⁵² However, this would be premature. Canada may lack a robust system of intragovernmental safeguards, but it does have intergovernmental safeguards of federalism. These intergovernmental safeguards arise or flow from the vast

¹⁵⁰ See Part III(E), below.

¹⁵¹ Bednar, note 141, above, 118 (noting political parties “may be too forgiving”).

¹⁵² See Part I(A), above.

intergovernmental apparatus that exists in Canada to manage federal-provincial relations. This intergovernmental apparatus provides a forum for coordinating or harmonizing federal and provincial policies, adapting the division of powers to changing circumstances, and resolving federal and provincial disputes.¹⁵³ But it also provides the provinces with the institutional capacity, the opportunities, and, in some cases, the leverage, to limit or prevent federal overreach, by influencing the design and implementation of, or even frustrating, federal initiatives. To be sure, these intergovernmental safeguards of federalism do not provide the provinces with a sure-fire veto over federal policy-making, but they do provide them an important means to influence federal policy and check federal overreach.

This part explores Canada's intergovernmental safeguards of federalism.¹⁵⁴ It discusses the institutional capacity (Part III(A)),

¹⁵³ D.M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal: McGill-Queen's University Press, 2002), 58-59; J. Poirier, "Intergovernmental Agreements in Canada", in Meekison et al., note 129, above, 448-53; and Watts (2008), note 112, above, 117.

¹⁵⁴ I draw heavily on Richard Simeon's seminal 1972 study, entitled "Federal-Provincial Diplomacy": see note 54, above. Simeon likened relations between the federal government and the provincial governments to international diplomacy. The framework Simeon developed in that study – which focused on the capacity of governments to pursue their goals and interests through intergovernmental negotiation, and identified the factors that determine both the conduct of such negotiations and their ultimate outcomes – is still highly germane to discussions of intergovernmental relations in Canada. However, Simeon's study is 40 years old, and there is now a significant body of literature that augments and qualifies Simeon's framework and insights. I tap this literature as well. In addition, unlike Simeon, I focus on one 'interest': the protection of provincial jurisdiction. See also Simeon and Robinson, note 115, above; Meekison et al., note 129, above; H. Bakvis et al., *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009); and Simeon and Nugent, note 65, above, 89-111.

opportunities (Part III(B)), and sources of leverage (Part III(C)) that are available in the intergovernmental context to challenge federal overreach. It then discusses two examples of the intergovernmental safeguards in action (Part III(D)), and their weaknesses as federalism safeguards (Part III(E)).

A. The Intergovernmental Apparatus and Provincial Capacity

This section provides a brief sketch of the intergovernmental apparatus that exists provincially in Canada. In doing so, it highlights the institutional capacity that this intergovernmental apparatus provides the provincial governments to monitor and challenge federal overreach.

The *Constitution Act, 1867* made no formal provision for an intergovernmental apparatus to manage federal-provincial relations.¹⁵⁵ The framers appear to have assumed that this sort of intergovernmental apparatus would be unnecessary in the new federation: the federal and provincial governments would occupy “exclusive” areas of jurisdiction,¹⁵⁶ and, as noted in the prior part, provincial concerns about federal decision-making would be accommodated within the federal government, by the Senate and the federal cabinet. The usefulness of, even need for, some sort of intergovernmental apparatus became clear soon after Confederation; the

¹⁵⁵ See D. Cameron and R. Simeon, “Intergovernmental Relations in Canada” (2002) 32 *Publius* 49 (providing a good overview of the rise of the intergovernmental apparatus).

¹⁵⁶ The *Constitution Act, 1867* regularly uses the word “exclusive” in ss. 91 and 92.

provincial premiers held the first provincial premiers' conference in 1887, and the 'first ministers' (the Prime Minister and the provincial premiers) held their first conference in 1906. However, the bulk of the modern intergovernmental apparatus did not take shape until the 1960s and 1970s, in the years that saw the rise of the modern social welfare state. The significant growth in government that occurred during this period seriously strained the old assumptions about exclusive jurisdiction, by increasing the overlap and interdependence of federal and provincial policy-making and finances, and it became increasingly clear that the intragovernmental safeguards were far too weak to accommodate provincial concerns. The intergovernmental apparatus was established in response. Since that time, it has come to play a vitally important role in the Canadian federal system.

The pattern of intergovernmental relations in Canada varies over time, and by policy area.¹⁵⁷ At certain times, and in certain policy areas, the pattern of intergovernmental relations is primarily competitive and adversarial, characterized by conflict, turf-protection and blame-shifting. However, at other times, and in other policy areas, the pattern of intergovernmental relations is more cooperative, characterized by attempts to develop mutually acceptable initiatives and to solve jurisdictional

¹⁵⁷ Making this point, see H. Bakvis and G. Skogstad, "Introduction", in Bakvis and Skogstad, note 5, above, 4-11; and Simeon and Nugent, note 65, above, 65 ("Intergovernmental relations ... are a complex mixture of collaboration and competition").

disputes and issues through intergovernmental negotiation and compromise.

The executive branches of the federal and provincial governments dominate intergovernmental relations in Canada, with very little input or influence from the federal Parliament or the provincial legislatures. Ultimate responsibility for intergovernmental relations normally rests, federally, with the Prime Minister, and provincially, with the premiers. This pattern of “executive federalism” reflects the concentration of executive and (in practice) legislative power in Canada’s parliamentary system, as well as the importance of intergovernmental relations to Canadian federalism.¹⁵⁸

The Prime Minister and the provincial premiers normally assume ultimate responsibility for intergovernmental relations in Canada, but of course they do not handle this task alone; they are assisted by the cabinet ministers charged with overseeing specific departments and agencies, and dedicated and department-specific intergovernmental affairs units or agencies. The federal and all provincial governments established dedicated intergovernmental affairs agencies in the 1960s and 1970s. The provinces established intergovernmental affairs agencies in order to enhance internal cohesion, with an eye to obtaining “greater control over the burgeoning interactions between governments”, and “to assist in fending off federal

¹⁵⁸ Smiley (1987), note 140, above, 83 (and ch. 4 generally); Savoie (1999), note 114, above; Savoie (2010), note 114, above; and G.J. Inwood et al., *Intergovernmental Policy Capacity in Canada* (Montreal: McGill-Queen’s University Press, 2011), 65, 71.

intrusions into provincial jurisdiction”.¹⁵⁹ The various provincial dedicated intergovernmental affairs agencies take a variety of different forms, from full-scale ministries with their own ‘Minister of Intergovernmental Affairs’ (as in Alberta) to specialized units within the central agency or office that serves the provincial premier (as in Prince Edward Island).¹⁶⁰ They have a variety of different “structure[s], functions, financial resources, and staff levels”.¹⁶¹ And there are differences of opinion about the role that they play in ‘fending off federal intrusions’, with some suggesting that intergovernmental officials are more likely to engage in ‘turf protection’ than other civil servants, others suggesting there is no appreciable difference, and still others suggesting that the differences are *interprovincial*, not *intraprovincial*.¹⁶² However, “one common feature

¹⁵⁹ T.B. Woolstencroft, “Organizing Intergovernmental Relations”, Institute of Intergovernmental Relations, Queen’s University, Discussion Paper No. 12 (1982), 13-14.

¹⁶⁰ B.G. Pollard, *Managing the Interface* (Kingston: Institute of Intergovernmental Affairs, 1986); G.J. Inwood et al., “Intergovernmental Officials in Canada”, in J.P. Meekison et al., note 129, above, ch. 9; C.M. Johns et al., “Intergovernmental Innovation and the Administrative State in Canada” (2006) 19 *Governance* 627; C.M. Johns et al., “Formal and informal dimensions of intergovernmental administrative relations in Canada” (2007) 50 *Can. Public Admin.* 21; and Inwood et al., note 158, above, 45-7.

¹⁶¹ Johns et al. (2006), previous note, 635.

¹⁶² Compare D. Smiley, “An Outsider’s Observations of Federal-Provincial Relations among Consenting Adults”, in R. Simeon, ed., *Confrontation and Collaboration* (Toronto: Institute of Public Administration of Canada, 1979), 113-14 (suggesting intergovernmental officials are agents of institutional aggrandizement); with Woolstencroft, note 159, above, 75-78 (suggesting that turf protection is important, but that “some agencies accentuate these concerns more than others”); and P. Fafard et al., “The Presence (or Lack Thereof) of a Federal Culture in Canada: The Views of Canadians” (2010) 20(1) *Reg. & Fed. Studies* 19, 35 (suggesting that, with the exception of Quebec, where there is a general concern for jurisdiction, intergovernmental officials are no more likely to engage in turf protection).

seems to be the establishment of intergovernmental agencies that are proximate to executive power, with first ministers often acting as their own intergovernmental relations minister”.¹⁶³ In addition, all of the dedicated provincial intergovernmental affairs agencies work to monitor, coordinate (internally, with other departments, and externally, with other governments, federal and provincial) and provide advice on issues affecting both orders of government.¹⁶⁴ These dedicated intergovernmental affairs agencies enhance the institutional capacity of the provinces that are so inclined to challenge federal initiatives that overreach, by enhancing their ability to identify these initiatives and to coordinate an intra- and interprovincial response.

These dedicated provincial intergovernmental affairs agencies have been supplemented in many cases by department-specific intergovernmental affairs units.¹⁶⁵ Like the dedicated intergovernmental affairs agencies, the roles and structures of these department-specific units vary. However, on a basic level, all of these department-specific units assist the relevant minister, by focusing on intergovernmental relations in the policy areas that fall within the mandate of their specific line department, and supporting their respective provincial governments in the different intergovernmental

¹⁶³ Inwood et al., note 158, above, 47.

¹⁶⁴ Johns et al. (2007), note 160, above, 29-30.

¹⁶⁵ For an accounting, see Johns et al. (2007), note 160, above, 24-26.

mechanisms that have developed in these policy areas. These department-specific units provide the provinces yet another level of institutional capacity to monitor, identify and coordinate a response to federal overreach.

B. Opportunities to Challenge Federal Encroachment

There are a variety of different opportunities available to the provinces in the intergovernmental context to attempt to limit or outright oppose federal initiatives that overreach, at all stages of the federal policy-making process. This section describes these various opportunities.

a. Formal Negotiations

The most obvious opportunity that is available to the provinces to attempt to limit and oppose federal initiatives that overreach arises in the context of direct federal-provincial negotiations.¹⁶⁶ Elected and unelected federal and provincial officials engage in negotiations in a dizzying array of forums and regulatory contexts.¹⁶⁷ The ultimate goal is often a formal or intergovernmental agreement, which may serve, among other things, to “sort out responsibilities”, “to co-ordinate policy initiatives”, to channel

¹⁶⁶ On ‘federalism negotiations’ in the U.S., see Ryan, note 25, above.

¹⁶⁷ See Inwoods et al., note 158, above, 48 (noting “there was an average of 104 federal-provincial-territorial conferences of first ministers, ministers and deputy ministers ... per year from 1998-99 to 2005-06”; that in 2009 there were 67; and that “this does not include the countless meetings held at lower levels ... , which it is estimated would, if included, raise the number of intergovernmental relations meetings into the thousands”). See also Simeon, note 54, above; Bakvis et al., note 154, above; and Bakvis and Skogstad, note 5, above – discussing intergovernmental relations generally, and in specific contexts.

“federal funds in areas of provincial jurisdiction”, or to “delegate functions”, thereby “modifying the *exercise* of constitutional competences”.¹⁶⁸ However, federal-provincial negotiations also provide the provinces with the opportunity to attempt to limit and oppose federal initiatives that overreach, by voicing concerns, rallying supporters and working to secure favored (or more favorable) jurisdictional outcomes.¹⁶⁹

There are a variety of different forums in which elected and unelected federal and provincial officials engage in direct negotiations. The most visible forums for direct federal-provincial negotiations are First Ministers’ Conferences and Meetings (FMCs/FMMs).¹⁷⁰ FMCs are formal meetings of the Prime Minister and provincial premiers, while FMMs are more informal. There is no formal requirement for regular FMCs and

¹⁶⁸ Poirier, note 153, above, 448-53 (discussing the functions served by “IGAs”).

¹⁶⁹ It may seem doubtful that direct federal-provincial negotiations are a fruitful forum for the protection of provincial jurisdiction, because provincial officials may feel compelled to cooperate and compromise, discouraging them from fighting for provincial jurisdiction at all, or encouraging them to split the difference, by tolerating some level of federal encroachment. This may occur in some cases. However, federal-provincial negotiations are certainly not always models of cooperation and compromise, and in any event, cooperation and compromise do not necessarily result in less provincial jurisdiction. Research suggests that ‘turf protection’ has long been, and remains, a significant concern for provincial officials in federal-provincial negotiations: see Simeon, note 54, above; and Johns et al. (2006), note 160, above, 643. In some cases, provincial officials involved in otherwise cooperative federal-provincial negotiations may attempt to limit the extent of a federal encroachment, but in other cases, they may make respect for provincial jurisdiction a precondition, and walk away from the negotiating table if this condition is not satisfied. The extent to which the provinces emphasize jurisdiction will reflect their goals entering the negotiations, as well as their goals and bargaining power during them.

¹⁷⁰ See, for further discussion of FMCs and FMMs, M. Papillon and R. Simeon, “The Weakest Link? First Ministers’ Conferences”, in Meekison et al., note 129, above, ch. 5.

FMMs; they are called at the pleasure of the Prime Minister, who chairs the sessions, with the result that they can be held intermittently, depending on the whim of the particular Prime Minister. There are no clear formal guidelines about what matters will be considered; they have considered a number of issues or only one issue, ranging from constitutional reform to health care policy and its funding. And there are few formal decision-making rules or procedures, and no continuing institutional support or staff. However, FMCs and FMMs have been described as one of the “peak institutions” of Canadian federalism, which play a major role in driving intergovernmental relations in Canada.¹⁷¹ They also provide an important chance for the provinces to attempt to limit or oppose federal initiatives that overreach, especially because the Prime Minister will usually have the ability in practice to deliver on a promise to halt proposed or existing federal initiatives, or alter those initiatives to address provincial concerns.¹⁷²

The next most visible (but also vitally important) forums for direct federal-provincial negotiations are ministerial councils. Ministerial councils bring together the federal and provincial ministers responsible for policy in particular areas. There are more than twenty ministerial councils, “in such

¹⁷¹ *Id.*, 114. It has been suggested that FMCs and FMMs are declining “in both frequency and, perhaps, significance”, and are being replaced in significance by ministerial councils and meetings of senior officials: Inwood et al., note 158, above, 41.

¹⁷² H. Telford, “The Spending Power Revisited” (2008) IRPP Policy Matters 9, 40 (“federal-provincial conferences frequently have been opportunities for the provinces to gang up on the federal government”); see also Meekison et al., note 129, above, 15-16.

areas as health, finance, social services, agriculture, trade and environment”.¹⁷³ Ministerial councils differ, but recently there has been a growth in more institutionalized ministerial councils, which have full-time secretariats, regularly-scheduled meetings, and an elaborate substructure of committees consisting of deputy ministers, assistant deputy ministers, and senior officials.¹⁷⁴ Ministerial councils meet much more regularly than FMCs and FMMs – some sort of meeting is held “almost weekly” – and are where much of the “real work” of intergovernmental relations is now accomplished.¹⁷⁵ Ministerial councils provide another important chance for the provinces to attempt to limit or oppose federal initiatives that overreach.

The least visible forums for direct federal-provincial negotiations are meetings of unelected federal and provincial officials. There are a multitude of meetings that occur between the federal and provincial deputy ministers and senior officials responsible for particular policy areas. These meetings often precede and lay the groundwork for FMM/FMCs and ministerial councils, or deal with matters of implementation, and are “the most frequent intergovernmental events”.¹⁷⁶ Unelected federal officials may

¹⁷³ Inwood et al., note 158, above, 42.

¹⁷⁴ Johns et al. (2006), note 160, above, 636-637.

¹⁷⁵ Bakvis et al., note 154, above, 112-114.

¹⁷⁶ *Id.*, 114.

often have less ability to influence federal policy than elected federal officials. However, these meetings provide the provinces another important chance to signal their opposition to federal initiatives that overreach.

b. Lobbying

In addition to formal federal-provincial negotiations, the provinces can and do also directly lobby federal officials, in order to influence federal decision-making, either by encouraging the federal government to proceed in a manner that respects provincial jurisdiction, or by securing a role in the federal policy-making process, so that they can try to ensure that it does so as decisions are made. There are no detailed accounts of these sorts of intergovernmental lobbying in Canada.¹⁷⁷ However, the intergovernmental relations literature refers to situations in which provincial representatives appeared before parliamentary committees to challenge federal initiatives that their government perceived to overreach.¹⁷⁸ It has also begun to take note of the “myriad of informal networks and relationships which link [federal and provincial] officials”, including “unstructured, sporadic personal meetings, contacts, telephone and conference calls, emails, lunches

¹⁷⁷ On intergovernmental lobbying in the U.S., see, e.g., Nugent, note 40, above, ch. 4.

¹⁷⁸ See, e.g., K. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: U.B.C. Press, 1996), 94, 138 (referring to three examples).

and the like”.¹⁷⁹ These forms of contact provide the provinces another opportunity to attempt to limit and oppose federal initiatives that overreach.

c. Public Criticism

There are also indirect opportunities available to the provinces to attempt to limit or oppose federal initiatives that overreach. The most obvious is public criticism. Unlike federal-provincial negotiations or lobbying, public criticism attempts to influence federal decision-making indirectly, not directly, through complaints and appeals to the public.¹⁸⁰

Public criticism of federal initiatives by the provinces is a staple of intergovernmental politics in Canada,¹⁸¹ and may take a variety of forms. It may take the form, for example, of a formal press release, an informal press leak, a position paper, a speech, or a press conference, or some combination of these, from or by a senior official, a cabinet minister, or even the premier. It may form part of a short-term or long-term strategy to influence a proposed or existing federal initiative, a federal election or upcoming or

¹⁷⁹ Johns et al. (2007), note 160, above, 34.

¹⁸⁰ On “public exhortation” in the U.S., see Nugent, note 40, above, 74-75.

¹⁸¹ See, e.g., Inwood et al., note 158, above, 65 (noting that the provincial “premiers were not shy about moving onto the national stage to air their grievances and make demands”); and K. McRoberts, “Unilateralism, Bilateralism, and Multilateralism”, in R. Simeon, ed., *Intergovernmental Relations* (Toronto: University of Toronto Press, 1985), ch. 3 (describing situations in which the provinces engaged in these sorts of public criticisms).

ongoing negotiations.¹⁸² It may be the product of a single province, or, if they agree, a number of provinces, acting together in an ad hoc manner, or through an interprovincial body like the Council of the Federation, a provincial ministerial council, or a regional provincial body such as the Western Premiers' Conference.¹⁸³ Finally, it may focus, in whole or in part, on claims that the federal initiative encroaches on provincial jurisdiction, or make little or nothing of jurisdiction and target the substance of the initiative, by, for example, criticizing its impact on existing provincial policies or the likelihood that it will achieve its objectives.¹⁸⁴ Public criticism of these sorts is yet another opportunity that is available to the provinces to attempt to limit or oppose federal initiatives that overreach.

d. Provincial Preemption

A less obvious indirect opportunity that is available to the provinces to attempt to limit or oppose federal initiatives that overreach is provincial 'preemption'. The provinces may attempt to stave off proposed or potential federal overreach by 'occupying the field', working together to establish

¹⁸² See, e.g., Bakvis et al., note 154, above, 107 (talking about how leaks to the press before or during federal-provincial negotiations can be part of a 'calculated strategy').

¹⁸³ See, e.g., T. Courchene, "Intergovernmental Transfers and Canadian Values" (2010) Policy Options 32, 37 ("the [Council] is also a lobby group for the provinces").

¹⁸⁴ For example, Quebec complained loudly about the federal government's proposed national securities regulator, arguing that it was both unnecessary, because the present system works well, *and* that it "threaten[ed] Quebec's legislative competence": see, e.g., "Quebec to fight Ottawa over single regulator", *Globe and Mail* (July 8, 2009).

and implement regional or pan-Canadian provincial policies that ‘preempt’ federal intervention.¹⁸⁵ Provincial preemption of this sort may stave off federal intervention by thwarting public pressure for a uniform federal law; making a uniform federal law unnecessary, or more difficult to justify; or cultivating a ‘positive feedback loop’, a portion of the public that supports or invests in complying with, and will thus defend, provincial regulation.¹⁸⁶

There are several interprovincial bodies in Canada that attempt to facilitate the establishment and implementation of regional or pan-Canadian provincial policies. The most important is the Council of the Federation. The Council of the Federation is an interprovincial body, established in 2003, which consists of all the provincial premiers. Unlike its predecessor, the Annual Premiers’ Conference, the Council of the Federation meets at least twice a year, and is supported by a permanent secretariat and various subcommittees. The Council of the Federation is supplemented by a variety of other interprovincial bodies, including the Western Premiers’ Conference, which is a regional body consisting of the premiers of the four western provinces and three territories; the Council of Atlantic Premiers, which is a regional body consisting of the premiers of the four Atlantic

¹⁸⁵ For a discussion of the role that “coordinate governance” plays in staving off federal intervention in the United States, see Nugent, note 40, above, 67-70, and ch. 3. ‘Provincial preemption’ is a variation on Nugent’s term “preempting federal preemption”.

¹⁸⁶ I expand upon this discussion of provincial preemption in Part III(C)(f), below.

provinces; and ministerial committees consisting of the provincial ministers responsible for particular policy areas, like education. These interprovincial bodies all work, not only to plan and coordinate strategies with respect to the federal government, but also at times, despite frequent differences of interest and opinion, to forge common interprovincial policies, at a regional or pan-Canadian level. Significant doubts have been expressed about how successful these interprovincial bodies have been in this regard.¹⁸⁷ I address some of the barriers to interprovincial policy-making in the next section. However, to the extent that common policies are forged,¹⁸⁸ there is a possibility for provincial preemption that provides the provinces with yet another opportunity to attempt to limit and oppose federal overreach.¹⁸⁹

¹⁸⁷ See, e.g., Bakvis et al., note 154, above, 108-118 (discussing the Council of the Federation, ministerial councils, and regional bodies); Meekison et al., note 129, above, chs. 6-7 (discussing the Annual Premiers' Conference and Western Premiers' Conference).

¹⁸⁸ One example of (at least partial) success is the 'passport system' for securities regulation agreed to by all provinces, except Ontario, in 2004, and implemented in 2008. The passport system is a 'mutual recognition system' that aims to provide a "single window of access to Canada's capital markets", by allowing market participants to satisfy the regulatory requirements of one province: see "A Provincial/Territorial Memorandum of Understanding Regarding Securities Regulation" (2004), sec. 5.1. The passport system was raised repeatedly in criticisms of the federal government's proposed national securities regulator: see, e.g., Karazivan & Gaudreault-DesBiens, note 14, above, 3, 18. The proposal was declared unconstitutional by the Supreme Court, a decision that almost certainly was influenced – albeit not explicitly – by the passport system's existence: see note 12, above.

¹⁸⁹ Another body that plays a role in forging common provincial policies is the Uniform Law Conference of Canada. The ULCC has a Civil Section that "assembles government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonization": see <http://www.ulcc.ca/en/about/> (date accessed: January 29, 2012). The Civil Section drafts "uniform statutes", which it recommends for adoption by (usually only) the provinces.

e. The Policy-Making Process

The opportunities that are available to the provinces to attempt to limit and oppose federal overreach in the intergovernmental context are not limited to one stage of the federal policy-making process. To be sure, provincial preemption seems more likely to play a role in restraining federal initiatives at the planning (pre-legislative) or enactment (legislative) stages of the federal policy-making process. If there are already regional or pan-Canadian provincial policies addressing an issue, the federal government may simply decide at the planning stage that a federal law is unnecessary or too difficult to justify, or it may reach a similar conclusion after going public with an initiative and abandon or alter it at the legislative stage. However, the provinces may utilize federal-provincial negotiations, informal lobbying, and public criticism to influence federal decision-making at all stages of the federal policy-making process. The anticipation of provincial opposition in any of these contexts may dissuade the federal government from pursuing an initiative; actual opposition in any of these contexts may cause it to abandon or alter an initiative; and opposition to an initiative post-enactment may cause it to reconsider and alter or abandon it.

C. Provincial Leverage

The previous two sections described the institutional capacity and the opportunities that the intergovernmental apparatus provides the

provinces to monitor, and to attempt to limit or prevent, federal initiatives that overreach. I turn now to describing the primary sources of leverage that are available to the provinces in the intergovernmental context.¹⁹⁰ Leverage is important because it determines the chances of success, assuming that it is deployed effectively. The more leverage that is available to the provinces, the better the chances that they will be successful in limiting or derailing a federal initiative that they perceive to encroach on provincial jurisdiction.¹⁹¹

a. The Conventional View of Provincial Leverage

The conventional view in the legal scholarship in Canada seems to be that, outside the courts,¹⁹² the federal government typically has the upper hand in disputes with the provinces over jurisdiction.¹⁹³ Legal scholars usually mention one or two sources of leverage that are thought to give the federal government the upper hand. The first is the federal paramountcy

¹⁹⁰ By leverage, I mean some factor (either an objective fact or subjective belief) that helps the provinces, directly or indirectly, to limit or prevent federal overreach. The distinction between objective fact and subjective belief is important. If the relevant federal decision-maker believes that the provinces have leverage for some reason, even though, objectively, they do not, the provinces may still benefit: Simeon, note 54, above, 201-2.

¹⁹¹ See Ryan, note 25, above, 79 (making this point about leverage in the U.S. context).

¹⁹² There are, of course, also claims that the courts have a pro-federal government bias, and thus that the provinces are systematically disadvantaged *inside* the courts as well: see P.W. Hogg, "Is the Supreme Court Biased in Constitutional Cases?" (1979) 57 Can. Bar Rev. 721 (considering and dismissing these claims of bias in division of powers cases).

¹⁹³ See note 50, above, for references.

doctrine.¹⁹⁴ The paramountcy doctrine is said to provide the federal government with a powerful source of leverage because, in the many situations where there is de jure or de facto shared jurisdiction, it provides the federal government with the “legal trump card”.¹⁹⁵ The second source of leverage that is usually mentioned is the federal spending power. The federal spending power is said to provide the federal government with a powerful source of leverage because it allows the federal government to provide direct grants of federal funds to individuals and institutions in areas of provincial jurisdiction, sidestepping the provinces altogether, and to provide conditional grants to the provinces that cajole or (some argue) coerce them into pursuing policies that fall within provincial jurisdiction.¹⁹⁶

The conventional view has some truth to it. Taken together, federal paramountcy and the federal spending power can provide the federal government with powerful sources of leverage that can be exploited in disputes with the provinces over jurisdiction.¹⁹⁷ However, the conventional

¹⁹⁴ This rule provides that federal law prevails, to the extent that it conflicts with provincial laws: see *Rothmans, Benson & Hedges v. Sask.* [2005] 1 S.C.R. 188, para. 11.

¹⁹⁵ Ryder, note 13, above, 595; see also Swinton, note 93, above, 138.

¹⁹⁶ See, e.g., Gaudreault-DesBiens, note 9, above, 190; and A. Lajoie, “Federalism in Canada: Provinces and Minorities – Same Fight”, in Gagnon, note 26, above, ch. 5 (referring to the federal spending power as an “instrument of centralization”).

¹⁹⁷ That said, the federal government in Canada has engaged in conditional spending significantly less than in other federations, including the United States: for statistics, see Watts, note 112, above, 106 (noting that only 27% of provincial transfers under the federal spending power have any conditions attached at all, unless the ‘semi-conditional’ Canadian Health and Social Transfers are included, in which case the number increases to 64.9%; the

view is, at best, incomplete, and at worst, misleading. Why? Because there are also significant sources of leverage that the provinces can exploit, outside the courts, to limit or prevent overreach. These sources of provincial leverage have been largely overlooked in the legal scholarship, perhaps because they are informal and politically contingent, rather than formal and legally rooted. However, these sources of provincial leverage are not any less real than these federal resources, and in some cases, they are just as, or even more powerful. Without claiming to be exhaustive, this section describes the primary sources of leverage that are available to the provinces.

One caveat: it is difficult (and perhaps impossible) to predict how these sources of leverage will stack up in the general run of cases, and so I do not attempt to do so. I argue simply that the provinces do have important sources of leverage, and that these will be sufficient in some situations to allow the provinces to limit or derail federal initiatives that they perceive to

comparable figure in the United States is 100%). This fact alone seems quite revealing.

Scholars have identified a shift to a different form of conditional spending in recent years, which does not require the provinces to satisfy particular substantive outcomes, but establishes broad national standards and performance measurements and imposes reporting obligations, to the federal government or (more often) the public. It has been argued that this form of conditional spending still provides the federal government with the power to influence provincial decision-making: see G. Boismenu and P. Graefe, "The New Federal Tool Belt" (2004) 30 *Can. Public Policy* 71. But, due to various weaknesses in the reporting process, there are good reasons to doubt the extent of the federal government's influence: see, for discussion, P. Kershaw, "Weather-vane federalism" (2006) 49 *Can. Public Admin.* 196; L. Anderson and T. Findlay, "Does public reporting measure up?" (2010) 53 *Can. Public Admin.* 417; and the various articles in P. Graefe et al., eds., *Overpromising and Underperforming: Understanding and Evaluating New Intergovernmental Accountability Regimes* (Toronto: University of Toronto Press, 2013). See also M. Dorf and C. Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 *Colum. L. Rev.* 267 (advocating this sort of federal role in the U.S. context).

overreach. I discuss two such situations in detail below, in Part (III)(D).

b. Provincial Capacity

One source of leverage that is available to the provinces in some cases to limit or prevent federal overreach is provincial capacity.¹⁹⁸ This is distinct from the institutional capacity, discussed earlier, that the intergovernmental apparatus itself provides the provinces to oppose federal overreach. The provinces may have expertise that the federal government (thinks it) needs to pursue an initiative, due to their knowledge of local circumstances, or the history of provincial regulation and the cultivation of policy capacity in a particular area.¹⁹⁹ In addition, or alternatively, the provinces may have physical resources that the federal government needs to pursue an initiative, including information, ‘boots on the ground’,

¹⁹⁸ The leverage that “state capacity” provides has been emphasized in the U.S.: see Ryan, note 25, above, 79-80, 90-1 (“The more the implicated realm of governance depends on state capacity, the more power state negotiators wield at the table”); see also Kramer (1994), note 38, above, 1544; R.M. Hills, Jr., “The Political Economy of Cooperative Federalism” (1997-98) 96 Mich. L. Rev. 813; Nugent, note 40, above, 173-75; and J. Bulman-Pozen and H. Gerken, “Uncooperative Federalism” (2009) 118 Yale L.J. 1256, 1266-67. This idea has received much less attention in Canada, with a few exceptions, in the political science literature: see McRoberts, note 181, above, 114 (“there are a great many areas in which Ottawa has demonstrated an interest over the years where the provincial governments have an important capability, if not the primary capability. Consequently, it is only through collaboration with the provinces that Ottawa can hope to have any effect”); Simeon, note 54, above, 213-17; S. Dion, *Straight Talk: On Canadian Unity* (Montreal: McGill-Queen’s University Press, 1999), 118 (“There are few policies that the [federal] Government can accomplish without the active cooperation of the provinces. ... The federal government simply does not have the capacity to act alone ... in [relation to] the vast majority of social policies”); and the sources in the next two notes.

¹⁹⁹ Bakvis et al., note 154, above, 61 (“capacity to generate, analyze, and manage ideas is a crucial part of a government’s overall policy capacity – and a strong policy capacity is one of the more important resources available ... during intergovernmental negotiations”).

infrastructure, and equipment. Where this is the case, these different forms of provincial capacity can provide the provinces with a powerful source of leverage that can be tapped in working to limit or oppose federal initiatives that overreach.²⁰⁰ In order to get their way, the provinces can threaten to refuse – and, if necessary, actually refuse – to make them available to the federal government, or at least make it harder for it to access them. Either way, the more that a particular federal initiative depends on one or more of these forms of provincial capacity, the more leverage the provinces wield.

c. The Threat of Retaliation

Another source of leverage that is available to the provinces in some cases to limit or halt federal overreach is the threat of retaliation. New federal initiatives are usually contested by at least one of the provinces, in the political realm and, sometimes, in the courts, particularly if they have an impact in any way on provincial jurisdiction.²⁰¹ I highlighted the prevalence

²⁰⁰ For example, when the federal government proposed the Canada Millennium Scholarships, federally-funded scholarships and bursaries to post-secondary students, the federal government “was in a weak bargaining position”, because the provinces “had all the necessary data and delivery infrastructure”: H. Bakvis, “The Knowledge Economy and Secondary Education”, in Bakvis and Skogstad, note 5, above, 216. See also Simeon, note 54, above, 203 (noting the role capacity played in the 1960s when the federal government made concessions to the provinces with the federal manpower program); Harrison, note 178, above, 106 (noting the role capacity played in the 1980s when the federal government delegated enforcement of federal environmental policies to the provinces); and *B.C. v. Lafarge* [2007] 2 S.C.R. 86, para. 38 (suggesting “the federal ability to implement transportation infrastructure without provincial cooperation is seriously circumscribed”).

²⁰¹ Hogg and Wright, note 116, above, 346-47. But see Part III(E), noting exceptions.

of public criticism of federal initiatives by the provinces above.²⁰² If simple criticism falls short, the provinces can raise the stakes, by threatening to retaliate – and, if necessary, actually doing so. The federal and provincial governments “do not develop individual policies in isolation”.²⁰³ They are typically involved in pursuing any number of different initiatives at the same time, many of which bring them into contact with decision-makers from the other order of government. If the federal government refuses to meet the provinces’ demands in one area, the provinces can threaten to retaliate in other areas.²⁰⁴ This may give the provinces leverage if the federal government is worried about the effect that provincial backlash may have on federal initiatives in these other areas, perhaps because the federal government attaches a higher priority to them. In addition, if the federal initiative involves free-standing provincial institutions, like universities, colleges, municipalities, and provincial administrative agencies, the provinces can threaten to retaliate against these institutions, for example, by decreasing their budgets. If the federal government refuses to halt the initiative on its own accord, these sorts of threats may do so indirectly, by discouraging these provincial institutions from working with the federal government. Although a blunt instrument, this is a strategy that Quebec has

²⁰² See Part III(B)(c), above.

²⁰³ Harrison, note 178, above, 28.

²⁰⁴ Bolleyer, note 59, above, 166; and Harrison, note 178, above, 28.

employed to halt federal initiatives that were perceived to overreach.²⁰⁵

d. The Pressures Toward Coordination

Another source of provincial leverage, which overlaps with the two sources of leverage identified earlier, arises from what might be called the pressures toward coordination. There are often significant pressures toward coordination in Canada's federal system, pressures that may push the federal and provincial governments to coordinate the allocation and exercise of jurisdiction in particular situations. These pressures toward coordination may exist where the scope of federal and provincial jurisdiction is fairly clear, and neither side has sufficient jurisdiction to address a particular problem.²⁰⁶ The political branches may work together in these situations to 'pool' jurisdiction, thereby avoiding a division of powers impediment. These pressures toward coordination may also exist where there are no jurisdictional impediments, but it is not possible or desirable to exercise jurisdiction unilaterally, for political or programmatic reasons.²⁰⁷ These

²⁰⁵ McRoberts, note 181, above, 104, 114 (describing how Quebec was able to thwart a program of direct federal grants to municipalities by threatening to penalize them).

²⁰⁶ See, e.g., *Fédération des producteurs de volailles du Québec v. Pelland* [2005] 1 S.C.R. 292 (discussing a chicken marketing scheme that utilized techniques like administrative interdelegation to pool jurisdiction, to sidestep limits on federal jurisdiction over intraprovincial trade and provincial jurisdiction over interprovincial trade).

²⁰⁷ For example, coordination may be necessary if an initiative calls for the intergovernmental coordination of policy expertise or physical resources; to limit the inefficient, unnecessary duplication of federal and provincial initiatives; and to harmonize initiatives, to ensure that overlapping initiatives do not work at cross-purposes.

pressures toward coordination may also exist where the scope of jurisdiction remains unclear, or contested, and the possible costs and risks of looking to the courts to clarify the scope of jurisdiction exceed the possible benefits.²⁰⁸ Finally, these pressures toward coordination may exist where the scope of jurisdiction is fairly clear, but remains contested, and the possible benefits to both orders of government of working out an alternative allocation of jurisdiction that is more favorable to the order of government that lacks the contested authority exceed the possible costs of doing so.²⁰⁹

These pressures toward coordination, where they exist, may not be equal. Where they are stronger for the federal government than they are for the provinces, the result may be a subtle form of provincial leverage. If, in response to these pressures toward coordination, the federal government attempts to consult with the provinces before pursuing a new initiative, with an eye to coordinating it with new or anticipated provincial initiatives, the provinces might be able to use the imbalance to push for changes that address their jurisdictional concerns. If the federal government proves reluctant to address these concerns, a threat by the provinces to walk away from the table and to ‘go it alone’ – and, if necessary, an actual decision to

²⁰⁸ The spending power is an example. The federal and provincial governments appear reticent to seek a judicial determination on the validity of conditional federal spending. The federal government appears to fear an adverse result, because it would call into question a number of major federal policies, and the provinces appear to fear a favorable judicial determination, because it would help legitimize it: Choudhry (2003), note 48, above, 81.

²⁰⁹ See, for an example, the discussion of EAs in Part III(D)(b), below.

do so – might then do the trick, especially if there is some sense, on the part of federal decision-makers, that the result might be provincial policies that would undermine federal efforts. And if the federal government still proves reluctant to address these concerns, the provinces might then use their resources to limit the initiative’s impact, as and where this is possible.²¹⁰

e. Public Opposition

Another source of leverage that is available to the provinces in some cases is public opposition. This may seem an unlikely source of leverage. There is a growing body of research that suggests that, while many Canadians support federalism in the abstract,²¹¹ voters lack the ability to identify which order of government actually is and (under the division of powers) should be regulating an issue;²¹² that voters may be unable to agree

²¹⁰ For example, in 2012, the Quebec government threatened to pursue various strategies to soften the impact of various criminal law reforms enacted by the federal government, using its jurisdiction over the administration of justice: “Omnibus Crime Bill: Quebec Says it Will Work to Soften New Legislation”, *Huffington Post* (March 16, 2012).

²¹¹ See, e.g., J. Kincaid and R.L. Cole, “Citizen Attitudes Towards Issues of Federalism in Canada, Mexico, and the United States” (2011) 41 *Publius* 53, 68-70.

²¹² F. Cutler, “Government Responsibility and Electoral Accountability in Federations” (2004) 34 *Publius* 19; C. Anderson, “Economic Voting, Multilevel Governance and Information in Canada” (2008) 41 *Can. J. Pol. Sc.* 329; F. Cutler, “Whodunnit?: Canadian Voters, Intergovernmentalism and Responsibility” (2008) 41 *Can. J. Pol. Sc.* 627; Fafard et al., note 162, above; S. Soroka and C. Wlezien, “Public Opinion and Public Policy”, in Courtney and Smith, note 129, above, ch. 15; Kincaid and Cole, previous note, above; and C. Wlezien and S. Soroka, “Federalism and Public Responsiveness to Policy” (2011) 41 *Publius* 31. See also J.O. McGinnis & I. Somin, “Federalism vs. States’ Rights” (2004) 99 *Nw. U. L. Rev.* 103 (discussing the U.S.). Compare F. Cutler and M. Mendelsohn, “Unnatural Loyalties or Naïve Collaborationists?”, in G. Kernerman and P. Resnick, eds., *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship* (Vancouver: U.B.C. Press, 2005) (finding that Canadians have fairly realistic views of

amongst themselves about the limits of federal jurisdiction,²¹³ and that voters may be willing to tolerate federal overreach, if they identify with a government for partisan or other reasons,²¹⁴ or if a federal initiative satisfies their particular policy preferences.²¹⁵ Taken together, this research suggests that voters lack the knowledge, the coordination and the inclination to restrain federal overreach. This, in turn, would seem to cast doubt upon any claim that public opposition is a possible source of provincial leverage.

However, there may be political risk in federal overreach in at least some cases. There is a long line of literature that contends that voters specifically and social forces generally can and do actually influence the division of powers in federal systems.²¹⁶ This literature lacks a systematic

federal and provincial responsibility in various areas); and S.K. Schneider et al., “Public Opinion Toward Intergovernmental Policy Responsibilities” (2011) 41 *Publius* 1, 22 (suggesting, of the U.S., that “the American public has a fairly crystallized idea about what it wants local, state and national governments to do in public policymaking”).

²¹³ Indeed, research suggests that significant segments of the Canadian public prefer a model of federalism in which both orders of government *share* jurisdiction: see, e.g., Cutler and Mendelsohn, previous note, 86; and Fafard et al., note 162, above, 29-30.

²¹⁴ Wlezien and Soroka, note 212, above, 34; and Bednar, note 141, above, 111.

²¹⁵ Fafard et al., note 162, above; and S. Choudhry, “Redistribution in the Canadian Federation”, in Choudhry et al., note 2, above, 52-53. See also N. Devins, “The Judicial Safeguards of Federalism” (2004) 99 *Nw. U. L. Rev.* 131 (discussing the U.S.).

²¹⁶ The idea that voters or ‘the people’ have an influence on the division of powers can be traced back to the Federalist Papers in the United States: see, e.g., The Federalist No. 17 (J.E. Cooke, ed., 1961) (by A. Hamilton); The Federalist No. 45 (J.E. Cooke, ed., 1961) (by J. Madison); and The Federalist No. 46 (J.E. Cooke, ed., 1961) (by J. Madison); see also W.H. Riker, *Federalism: Origin, Operation, and Significance* (Boston: Little, Brown, 1964), 103-11. On “social forces” and society more generally, see, e.g., W.A. Livingston, “A note on the nature of federalism” (1952) 67 *Pol. Sc. Q.* 81; C.J. Friedrich, *Trends of federalism in theory and practice* (New York: Praeger, 1968), 53; D.J. Elazar, *Exploring*

account of the influence of voters, but Canadian political scientists, employing the case study method, have highlighted ways in which they may play a role.²¹⁷ There is also a growing body of empirical research – most about the United States, but some about Canada – that has begun to explore the different ways that voters may influence the division of powers.²¹⁸ It may be too soon to draw any definitive conclusions from this research, but it does point to (at least) two situations where the public may play a role in limiting or preventing federal overreach in Canada’s federal system.

The first situation involves interest groups.²¹⁹ Interest groups may be well engaged with the political system, at least on the policy issues that matter to them; they may be well equipped to coordinate common positions on specific policy issues, particularly if they are well resourced and organized; and, at least in some cases, they may have strong incentives to oppose federal initiatives.²²⁰ This may make them a powerful resource for

Federalism (Tuscaloosa: University of Alabama Press, 1987), 192. Compare Cairns, note 104, above (criticizing Livingston’s ‘sociological’ approach, with a focus on Canada).

²¹⁷ See, e.g., Simeon, note 54, above, 204-13; Simeon and Robinson, note 115, above (discussing social influences on federalism); and notes 224, 226, and 244-45, below.

²¹⁸ See, e.g., Mikos, note 41, above (discussing U.S.); Mikos and Kam, note 41, above (same); and Kincaid and Cole, note 211, above (discussing the U.S., Canada, and Mexico).

²¹⁹ For a general overview of the role that interest and “advocacy groups” play in Canada, see L. Young and J. Everitt, *Advocacy Groups* (Vancouver: U.B.C. Press, 2005).

²²⁰ This is a basic claim of rational choice theories of interest groups: M. Olson, *The Logic of Collective Action* (N.Y.: Schocken, 1965) (discussing greater incentives for groups to mobilize around selective versus collective benefits and narrow versus diffuse interests).

provinces that are intent on challenging federal overreach, counteracting the knowledge, coordination, and inclination problems identified earlier.

Why might interest groups be interested in opposing federal initiatives that overreach? They might be inclined to do so for Constitution-oriented reasons, or, perhaps more likely, they might be inclined to do so for policy-oriented reasons, using constitutional arguments strategically, if at all, for either self-interested or programmatic reasons.²²¹ For example, they (or their members) may have invested resources in complying with a provincial regulatory scheme, and prefer to avoid the additional outlay of resources that may be required to comply with an additional (or alternative) federal regulatory scheme;²²² they may fear that federal initiatives on one issue will lay the groundwork for federal initiatives on related issues, issues on which they prefer provincial regulation;²²³ or they may oppose any sort

²²¹ See J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) (identifying cases where corporate and business-friendly interests in Canada used constitutional division of powers arguments strategically to escape laws they disliked); and Weiler, note 45, above, 181 (same). See also J.M. Pickerill, *Constitutional Deliberation in Congress* (Durham, N.C.: Duke University Press, 2004), 66 (arguing, with reference to the U.S., that “the opponents of a policy might use a relevant constitutional issue as an argument against [it]”, and that “[e]stablished interest groups often have the means, expertise and incentives to identify relevant constitutional issues, fashion persuasive legal arguments, and mobilize public opinion”); and J.R. Macey, “Federal Deference to Local Regulators and the Economic Theory of Regulation” (1990) 76 Va. L. Rev. 265, 282 (making a similar point, also with reference to the U.S.).

²²² See Macey, previous note, 276-281 (noting the role that these “asset-specific investments” can play in engaging public support, thereby sustaining legal and constitutional arrangements); and D. Levinson, “Parchment and Politics: The Positive Puzzle of Constitutional Commitment” (2011) 124 Harv. Law Rev. 658, 686-87 (same).

²²³ Mikos, note 41, above, 1673.

of federal intervention, because they believe that, generally, they have more influence at the provincial level than the federal level.²²⁴ Either way, this may cause them to rally their resources to oppose federal initiatives.

This sort of interest group opposition may provide the provinces with a source of leverage in two different ways. First, if interest groups oppose a particular federal initiative that the provinces perceive to overreach, the provinces may be able to exploit the opposition of these interest groups, even if they have no direct relationship with them. Second, if the provinces have reason to believe that particular interest groups may be inclined to oppose a particular federal initiative, the provinces may seek to rally these groups to oppose the initiative, directly, by trying to influence federal decision-making, or indirectly, by defending the provincial position.

The role that interest groups may play in opposing federal initiatives

²²⁴ Cairns, note 104, above, 712-16 (suggesting that “there is contemporary evidence that pressure groups attempt to influence the workings of the federal division of power by having the government closest to the centre of their organizational strength, and to which they have the easiest access, handle the concerns affecting them”); and P.C. Fafard, “Groups, Governments and the Environment”, in P.C. Fafard and K. Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Montreal: McGill-Queen’s University Press, 2000), 85, 95-96 (providing evidence that the provinces and business-oriented interest groups in Canada became allies in protecting, if not expanding, the role of the provinces with respect to environmental regulation, and in opposing a federal role). See also, for a discussion of why regulated firms (and the interest groups representing these firms) may prefer provincial or ‘local’ jurisdiction, P.C. Fafard, “Green Harmonization”, in H. Lazar, ed., *Canada: The State of the Federation 1997* (Montreal: McGill-Queen’s University Press, 1998), 212; and Harrison, note 178, above, 23. And for a more general discussion of how federations encourage a “territorial differentiation of interest groups”, see E. Montpetit, “Westminster Parliamentarism, Policy Networks, and the Behavior of Political Actors”, in A. Lecours, ed., *New Institutionalism* (Toronto: University of Toronto Press, 2005), 231.

that the provinces regard to overreach has not been subjected to detailed scrutiny in Canada,²²⁵ but there is evidence that interest groups do play this sort of role in some situations.²²⁶ Unsurprisingly, this research suggests that the roles that interest groups play varies considerably,²²⁷ with varying levels of impact.²²⁸ However, it also suggests that, in some situations, interest groups can play a very important role in limiting or derailing federal initiatives that the provinces perceive to encroach on provincial jurisdiction.²²⁹ There is little evidence that the interest groups studied were

²²⁵ Fafard (2000), previous note, 82 (making this point).

²²⁶ I discuss one situation in which interest groups may have played this sort of role in Part III(D)(b), below, relying on evidence gathered by Patrick Fafard: see previous note. Christopher Armstrong has also documented a number of situations in Ontario from 1867 to 1942 where different interest groups representing private business interests allied themselves with different levels of government; in some of these situations, the province and these provincially-allied interests were successful in limiting or derailing a proposed federal initiative: *The Politics of Federalism: Ontario's Relations with the Federal Government* (Toronto: University of Toronto Press, 1981). Similarly, in his study of transportation policy in the 1970s, Richard Schultz demonstrated how different governments publicly engaged a constituency of interests to bolster the legitimacy and strength of their position vis-à-vis the other order of government: "Interest Groups and Intergovernmental Negotiations", in D.P. Shugarman and R. Whitaker, eds., *Federalism and Political Community* (Peterborough, ON.: Broadview Press, 1977). See also Cairns, note 104, above, 712-16 (discussing relationship between provinces and interest groups); G. Skogstad, "Canadian Federalism, International Trade and Regional Market Integration in an Era of Complex Sovereignty", in Bakvis and Skogstad, note 5, above, 239 (same).

²²⁷ For instance, in some situations, interest groups may work fairly independently of the provinces, while in other situations they may work with the provinces more directly; where they work together directly, rather than indirectly, the lines of influence can run "in both directions", with the provinces attempting to mobilize interest groups to oppose federal initiatives in some situations, and vice versa; and the nature of the relationships that exist may be quite shallow, the product of short-term political expedience, or fairly intense, creating, in effect, "strategic allies" for some purposes: Fafard (2000), note 224, above, 95.

²²⁸ *Id.*, 95-96.

²²⁹ See the sources cited in note 226, above.

driven by any sort of principled commitment to the division of powers.²³⁰ If these groups made division of powers arguments, they usually seemed to do so for strategic reasons, to advance their specific policy goals. But, either way, the “sentiment” is not any “the less centrifugal in its effects”.²³¹

The second situation involves ordinary voters. Ordinary voters may generally lack the knowledge, coordination and inclination to play a role in opposing federal overreach of their own accord, but in some situations the provinces may be able to counteract these barriers. The provinces may do so by attempting to mobilize or exploit existing public opposition to a federal initiative; or by attempting to convince federal decision-makers that the public is on their side, and threatening to mobilize or exploit public opposition if their demands are not met. In doing so, the provinces may utilize division of powers arguments, or they may focus on attacking the initiative’s substantive merits. Either way, as with interest groups, where the provinces do so, the ‘sentiment is not any the less centrifugal in its effects’.

There are several good reasons to believe that public opposition is a source of leverage that can be utilized by the provinces in some cases to limit or oppose federal initiatives that overreach. First, even though ordinary voters may generally lack the knowledge necessary to play a role

²³⁰ Fafard (2000), note 224, above, 95.

²³¹ Wechsler, note 1, above, 552.

in opposing federal initiatives that overreach, the provinces may be well placed in many cases to counteract this problem, by engaging in a public campaign that informs voters about their opposition to a federal initiative. As noted, public criticism of federal initiatives by the provinces is a staple of intergovernmental politics in Canada,²³² and is facilitated by its vast intergovernmental apparatus. Public criticism of federal initiatives by the provinces may²³³ be sufficient in some cases to grab (or at least threaten to grab) the attention of enough voters to counteract the voter knowledge problems that may otherwise undermine the provinces' ability to utilize public opposition as a source of leverage to restrain federal overreach.²³⁴

Second, even though ordinary voters may generally lack the coordination and inclination necessary to play a role in opposing federal initiatives that overreach, the provinces may also be well placed to counteract these problems, by exploiting, directly or indirectly, the higher

²³² See Part III(B)(c), above; Smiley (1987), note 140, above, 170 (“On innumerable occasions, provincial governments have run their election campaigns in asking for voters for a strong mandate to deal with Ottawa”); and Bakvis et al., note 154, above, xiv.

²³³ It is possible that voters will remain confused about the nature and reach of a proposed or existing federal initiative, because assigning responsibility in a particular area is complex. This may have an impact on provincial efforts to mobilize some voters against a federal initiative, but it is also possible that the differences in support and trust discussed in the next few paragraphs will cause voters to give the benefit of doubt to the provinces.

²³⁴ See, e.g., Smith (2005), note 128, above, 118-119 (noting that “voters might well be aware of which government is on which side [if] one or both governments wants to make it clear”); and McRoberts, note 181, above (discussing various examples). See also Kam and Mikos, note 41, above, 601-3 (discussing, with reference to the U.S., how “elite debate can make federalism a more salient and persuasive consideration in the minds of citizens”).

levels of trust and support that voters in Canada seem to accord (at least some of) their provincial governments. The idea that voters in Canada trust and support their provincial governments more than the federal government sits uncomfortably with a conventional claim about Canadian federalism: that voters in Quebec generally identify with and support their provincial government, because it speaks for the French-speaking minority in Canada, while voters in the ‘Rest of Canada’ are typically inclined to identify with and support the federal government, because it speaks for the English-speaking majority. However, while the relationship of Quebec voters with their provincial government is undoubtedly colored and strengthened by national loyalties and grievances that have no (or at least less) purchase outside Quebec,²³⁵ recent research challenges the accuracy of this claim.

This research, which draws on polls conducted between 2002 and 2009, suggests that Quebecers are not alone in supporting their provincial government more than the federal government. On the contrary, this research suggests that Canadians *in the other provinces* are also more²³⁶ (and in some cases significantly more) inclined to trust and support their provincial government than the federal government.²³⁷ It also suggests that,

²³⁵ I discuss Quebec in more detail below, in Part III(C)(g).

²³⁶ The claim here is not zero-sum. Voters that express more trust in their provincial government also often express some level of trust in the federal government as well.

²³⁷ Kincaid and Cole, note 211, above, 58-67 (finding, based on polls from 2002, 2003,

of Canada, the United States, and Mexico, “Canadians stand out as least supportive of their federal government”.²³⁸ Trust in and support for governments are complex concepts that are difficult to explain. These differences in federal-provincial trust and support may be grounded, at least in part, in voters’ regional (or, in Quebec, national) loyalties,²³⁹ a history of regional (or national) grievances, and a federal system that does little to calm these grievances (and likely exacerbates them).²⁴⁰ The provinces, or

2004, 2007 and 2009, Canadians are more likely to indicate, sometimes by wide margins, that their province is not “treated with the respect it deserves in the federal system of government”, and that the federal government is the order of government giving them the least for their money, that is least trusted, and that has too much power); as well as R.L. Cole et al., “Public opinion on federalism in the United States and Canada in 2002: The aftermath of terrorism” (2002) 32 *Publius* 123 (2002 results); J. Kincaid et al., “Public Opinion on Federalism in Canada, Mexico, and the United States in 2003” (2003) 33 *Publius* 145 (2003 results); and R.L. Cole et al., “Public opinion on federalism and federal political culture in Canada, Mexico and the United States” (2004) 34 *Publius* 201 (2004 results). See also M. Mendelsohn and J.S. Matthews, “The New Ontario: The Shifting Attitudes of Ontarians toward the Federation” (Toronto: Mowat Centre, 2010) (focusing on the different (but changing) results from Ontario, but finding similar results from other provinces on issues of respect, influence, fiscal fairness and identity); and R. Sears, “The Next Federal-Provincial Battles” (May 2010) *Policy Options* 23, 24 (“Canada is the only nation in the world where more than 70 percent of the people believe they are a disempowered, discriminated minority, abused by the national government and its allies”).

²³⁸ Kincaid et al. (2003), previous note, 149.

²³⁹ J. Bickerton & A.-G. Gagnon, “Regions and Regionalism”, in J. Bickerton and A.-G. Gagnon, *Canadian Politics*, 5th ed. (Toronto: University of Toronto Press, 2009), 84 (suggesting regionalism is “strong and pervasive” in Canada); and D.J. Savoie, “Power at the Apex”, in Bickerton and Gagnon, this note, 119 (making a similar observation).

²⁴⁰ For example, it has been argued that regional (and national) loyalties may be exacerbated in Canada by: a) the single member, simple plurality electoral system, which often, due to the regionally-fragmented nature of Canada’s political parties, results (or appears to result) in one or more regions having control of the federal government; and b) the weaknesses of Canada’s intragovernmental safeguards of federalism, which hinders the federal government’s ability to (at least claim) to represent the un(der)represented regions: A. Cairns, “The Electoral System and the Party System in Canada” (1968) 1 *Can. J. Pol. Sc.* 55; Smiley, note 140, above, 156-73; and R. Gibbins, “Early Warning, No Response: Alan Cairns and Electoral Reform”, in Kernerman and Resnick, note 212, above.

small groups of them, correspond to these different regions, and the provinces have become the natural advocates of, and have often actively fostered, these regional (or national) loyalties and grievances.²⁴¹ In addition, or alternatively, these differences may also be grounded, at least in part, in more short-term partisan allegiances, where voters identify more with the party in power provincially.²⁴² Regardless of the explanation, this research seems to confirm political scientist Donald Smiley’s observation that “the provinces have considerable hold on the allegiance of their residents.”²⁴³

These differences in trust and support can play an important role in helping the provinces to overcome the voter coordination and inclination problems that may otherwise hamper them from utilizing public opposition as a source of leverage. They may make credible (or unnecessary) a threat by the provinces to the federal government to mobilize or exploit public opposition to a federal initiative, by improving the likelihood that voters will rally or coordinate around and support a province’s criticisms.²⁴⁴ And

²⁴¹ Mendelsohn and Matthews, note 237, above, 1 (noting the provincial “premiers [outside Ontario] were often ready to fan the flames of regional grievance by highlighting [their provinces’] mistreatment – both real and exaggerated – by the federal government”).

²⁴² J. Bulman-Pozen, “Partisan Federalism” (2014) 127 Harv. L. Rev., forthcoming (suggesting, with reference to the U.S., that “individuals may identify with the states not because they represent something essentially different from the nation, but rather because they serve as forums for articulating competing visions for the national will”).

²⁴³ Smiley, note 140, above, 190.

²⁴⁴ Simeon, note 54, above, 204-13 (discussing the role that perceptions of “political support” for a provincial government may play in negotiations); and Bakvis et al., note 154, above, 52-3 (suggesting “public opinion” may be a “resource”). See also Bednar, note

they may enhance a province's ability to mobilize or exploit this sort of public opposition to a federal initiative.²⁴⁵ To be sure, the strength of these differences in trust and support seems to vary by province,²⁴⁶ and over time and by issue.²⁴⁷ Moreover, they may be counterbalanced by other considerations that voters (or provincial leaders) value more.²⁴⁸ However, the provinces do appear to command trust and support more than the federal government in many cases, and these differences, where they exist, do appear to provide the provinces with an advantage,²⁴⁹ especially where they

141, above, 187-88 (suggesting that a “federal culture” “coordinates the punishment capacity of the people, establishing the credibility of their threat to punish a government”).

²⁴⁵ See, e.g., Simeon and Robinson, note 115, above, 173, 296 (noting relationship in Western Canada during a particular period between “regional conflict”, alignment with provincial governments, and provincial “political resources and political authority”); and G. Stevenson, “The Political Economy of Regionalism and Federalism”, in Bakvis & Skogstad, note 5, above, 32 (noting that “[i]t is not hard for [oil- and gas-producing provinces] to mobilize their own populations, whose standard of living may be affected, against external threats to their resources”). See also Mikos, note 41, above, 1701 (noting, with reference to the U.S., that “a growing body of empirical research supports the notion that trust in state governments dampens support for the federalization of state policy domains”); and Mikos and Kam, note 41, above (providing empirical proof for this claim).

²⁴⁶ See Kincaid and Cole, note 211, above, 59 (finding that a majority of Ontarians believe their province is treated with respect in the federation, although noting a precipitous drop between 2002 and 2009). See also Cole et al. (2002), note 237, above (finding Ontario to be the biggest outlier, but also finding variations in Atlantic Canada and Manitoba-Saskatchewan); and Kincaid et al. (2003), note 237, above (finding similar variations).

²⁴⁷ Mendelsohn and Matthews, note 237, above (documenting shifts in Ontario).

²⁴⁸ See, e.g., Simeon and Robinson, note 115, above, 173 (arguing Atlantic Canada's limited resource wealth made it less likely than Western Canada to claim “jurisdictional room”, because it relied on the federal government to support provincial programs financially); and N. Wiseman, “Social Democracy in a Neo-Conservative Age”, in H. Telford and H. Lazar, eds., *Canadian Political Culture(s) in Transition* (Kingston: Institute of Intergovernmental Relations, 2002), 217-32 (discussing Manitoba and Saskatchewan).

²⁴⁹ The idea that trust and support may play a role in restraining federal overreach in federal

are or can be “linked to broadly shared perceptions of regional injustice”.²⁵⁰

This suggestion may strike some as implausible. Voters in Canada often express little patience for federal-provincial conflict and seem to “have an instinct toward [federal-provincial] collaboration”.²⁵¹ In addition, as noted, voters often exhibit little knowledge of, and commitment to, the division of powers.²⁵² Most Canadians, it seems, would prefer their federal and provincial governments to eschew jurisdictional disputes, and to collaborate and cooperate. However, when push comes to shove, “public opinion does seem to coalesce around provincial grievances”.²⁵³ It may be true (at least outside Quebec) that provinces that focus too much on constitutional niceties like the division of powers will enjoy little success getting voters to ‘coalesce’ around their ‘grievances’. Research in the United States suggests otherwise: that “elite debate can make federalism a

systems is not new. Alexander Hamilton and James Madison argued, with reference to the United States, that ‘the people’ would support their state governments more than the federal government, and that this would serve to restrain federal overreach: see note 27, above. See also Riker (1964), note 216, above, 111 (“the popular sentiment of loyalty to (different levels of) government [is the] fundamental feature [maintaining] the federal bargain”); and T.E. Pettys, “Competing for the People’s Affection” (2003) 56 Vand. L. Rev. 329 (suggesting, with reference to the U.S., that citizens may grant states more regulatory responsibility when states earn their “trust, confidence, allegiance, and loyalty”).

²⁵⁰ Bickerton and Gagnon, note 239, above, 74, 80.

²⁵¹ Cutler and Mendelsohn, note 212, above, 86.

²⁵² See the text accompanying notes 212-15, above.

²⁵³ Cutler and Mendelsohn, note 212, above, 86.

more salient and persuasive consideration in the minds of citizens”.²⁵⁴ Future research may also reveal the same to be true in Canada. However, if not, the provinces can still target the merits of federal initiatives. And where they do so, trust and support are advantages that the provinces may be able to use in *some* cases in getting voters to coalesce around their grievances.

However, even if a province is unable to exploit general differences in trust and support in attempting to counteract the problems of voter coordination and inclination, it is still possible that the provinces will enjoy greater public support in relation to a particular issue.²⁵⁵ This, too, may make credible a threat by the provinces to mobilize public opposition – or, if necessary, enhance the provinces’ ability to mobilize or exploit it.

Finally, even if public criticism by the provinces does or may go unnoticed in some cases, or the provinces lack public support, generally or on an individual issue, public opposition may still play a role in influencing federal decision-making. The opposition of only one province may be sufficient in some cases, especially if the support of the electorate in that province is key to a government’s electoral prospects.²⁵⁶ In addition, it may

²⁵⁴ Kam and Mikos, note 41, above, 601-3.

²⁵⁵ Simeon, note 54, above, 204 (noting public support on “individual issues” makes it “likely the federal government will feel ... it must make concessions to the premiers”).

²⁵⁶ J.T. Levy, *Federalism, Liberalism and the Separation of Loyalties* (2007) 101 Am. Pol. Sc. Rev. 459, 469 (“it perhaps need not be the case that all provinces in a successful federation can successfully command loyalty against the center ... [A] few such provinces, or even one, might serve as an anchor for the whole system”).

be difficult for federal decision-makers to determine where the support of the public lies, and it may form the view, mistakenly, that public support does (or likely would) lie with the provinces.²⁵⁷ Or alternatively, federal decision-makers may prefer to err on the side of caution, especially if an election is looming and a government's electoral prospects are unclear.

The federalism literature has only just begun to shed light on how voters influence the division of powers.²⁵⁸ Public opposition may not be a sure fire source of leverage in all situations, but it does seem to be one of the sources of leverage that the provinces can exploit in *some* situations.²⁵⁹

f. Interprovincial Cooperation

Another source of leverage that is available to the provinces in some cases to assist them in limiting or preventing federal encroachments is

²⁵⁷ See Simeon, note 54, above, 204-5 (noting the role that subjective beliefs about political support play in federal decision-making). See also Macey, note 221, above, 284-85 (noting that “in a world of imperfect information, lawmakers will not always be certain of whether the political costs to them of passing a particular statute outweigh the benefits”).

²⁵⁸ For example, even though polls reveal lower levels of trust and support for the federal government, there are also polls that indicate that citizens identify with “both the national community and their provincial community, even in Quebec”: Simeon and Robinson, note 115, above, 297-98. These polls seem contradictory. It may be that citizens draw a distinction between their national and provincial *governments* and *communities*. It may also be, as Simeon and Robinson have suggested, that they reveal a “desire for less tension and conflict, for a more consensual style that would be more sensitive to regionalism and provincialism”: *id.*, 300. Neither explanation necessarily indicates more support for the federal *government*, but more research is needed to sort out these issues.

²⁵⁹ See Bednar, note 141, above, 142-43 (suggesting that, since the end of appeals to the Privy Council, the “sole recourse” of the provinces in Canada has been “to appeal to popular constraints by raising public suspicion of Ottawa’s greed for power”, and that this is “a tactic Quebec seems to have mastered, but played well in other provinces as well”).

interprovincial cooperation. Interprovincial cooperation may provide leverage in two situations.²⁶⁰ The first situation is where the provinces join forces to oppose existing or proposed federal initiatives. In this situation, interprovincial cooperation *directly* targets federal encroachments. This form of interprovincial cooperation may benefit the provinces in various ways. It may serve to focus the opposition of the provinces, by reducing a possible 11 different positions down to as few as two. It may neutralize the federal government's ability to pursue a divide and conquer strategy, which allows the federal government to isolate and discredit provinces that oppose a federal initiative by pointing to the fact that some provinces support (or do not oppose) the initiative. It may increase the opportunity cost of pursuing a federal initiative, by enhancing the standing of provincial opposition to the initiative, placing an added burden on the federal government to respond, and possibly distracting it from pursuing other (perhaps higher priority) initiatives. Finally, it may enhance the credibility of provincial criticism of the merits or constitutionality of a federal initiative, or, if it comes to that, a threat by the provinces to actually rally voters to oppose the initiative.

The second situation in which interprovincial cooperation may function as a source of leverage is where the provinces work together to harmonize provincial policies without the direct involvement of the federal

²⁶⁰ See Bolleyer, note 59, above, 9, 137 (noting the two ways that interprovincial cooperation may “strengthen [the provinces’] position towards the federal government”).

government, attempting to engage in what I have called ‘provincial preemption’.²⁶¹ In this situation, intergovernmental cooperation *indirectly* targets federal encroachments. It may do so by averting public or interest group pressure for a uniform federal law, by deterring them from lobbying the federal government to intervene, thereby keeping the issue off its agenda.²⁶² It may stave off federal intervention by undermining the argument for a uniform federal level, making federal intervention either unnecessary or at least more difficult to justify.²⁶³ Finally, it may cultivate a ‘positive feedback loop’, a portion of the public that supports, or invests in complying with, provincial regulation in an area, and will thus defend it.²⁶⁴

Again, this may strike some as implausible. The provinces are not always inclined to join forces in opposing federal encroachments. The provinces may be relatively united in opposing a federal initiative in some cases. But in some cases, the provinces may passively tolerate the initiative; in other cases, they may actively support the initiative; and in still other cases, different provinces may have different preferences.²⁶⁵ Provincial

²⁶¹ See Part III(B)(d), above.

²⁶² Nugent, note 40, above, 70.

²⁶³ See, e.g., Bolleyer, note 59, above, 77; and Meekison, note 129, above, 145-46 (citing a passage from the Tremblay Report (released in 1956) that makes this point).

²⁶⁴ Macey, note 221, above, 276-81 (discussing the role that ‘positive feedback loops’ play in sustaining laws and Constitutions); and Levinson, note 222, above, 686-87 (same).

²⁶⁵ For further discussion of this point, and the reasons for it, see Part III(E), below.

leaders have a variety of different priorities, which are influenced by their ideological, partisan and policy motivations. Provincial leaders also represent provinces that differ significantly in size and wealth, both of which influence and constrain the view that they are likely (to be able) to take about federal initiatives, particularly if federal funds are involved.²⁶⁶ These different priorities and interests limit the capacity and willingness of the provinces to engage in collective decision-making.²⁶⁷ Quebec usually opposes federal initiatives that it perceives to encroach; this reflects the clear connection that is drawn between provincial jurisdiction and national identity in that province.²⁶⁸ But not infrequently, one or more of the provinces tolerate or support federal initiatives that Quebec or one or more of the other provinces perceives to encroach on provincial jurisdiction.²⁶⁹ This allows the federal government to pursue a divide and conquer strategy, pointing to provincial support to discredit any provincial opposition.²⁷⁰

In addition, the collective action problems that inhibit the provinces

²⁶⁶ See R. Simeon, “Recent Trends in Federalism and Intergovernmental Relations in Canada”, in T.C. Salmon and M. Keating, eds., *The Dynamics of Federalism* (Montreal: McGill-Queen’s University Press, 2001), 57 (noting that the bigger, wealthier provinces more often seek to wrestle initiatives from Ottawa, limit its ability to intrude into areas of shared jurisdiction, and assert their autonomy, while “for the smaller, poorer provinces, autonomy is less important than ensuring the continued flow of federal dollars”).

²⁶⁷ Simeon & Nugent, note 65, above, 62 (making this observation).

²⁶⁸ Quebec is discussed in more detail in Part III(C)(g), below.

²⁶⁹ Swinton, note 4, above, 49; and Inwood et al., note 158, above, 83.

²⁷⁰ Bolleyer, note 59, above, 4, 74; and Rocher, note 26, above, 108.

from joining forces to oppose existing or proposed federal initiatives also limit their ability to ‘preempt’ federal intervention by working together to harmonize provincial policies. The provinces have established a variety of different interprovincial forums to engage in collective inter-provincial decision-making, including the Council of the Federation, which brings together all of the provincial premiers.²⁷¹ However, research suggests that these different interprovincial forums tend to focus more on interprovincial ‘position-taking’ (formulating common provincial positions to put to the federal government) than on the harmonization of provincial policy.²⁷² In addition, research also shows that these interprovincial forums are weakly institutionalized. As a result, personnel changes, on the political or bureaucratic level, regularly sideline any progress that is achieved, and decisions are made by consensus, giving every province a de facto veto, making them vulnerable to the risk that a ‘joint decision trap’ will yield no or lowest-common-denominator results.²⁷³ These problems can be traced, at least in part, to the different priorities and interests that inhibit the provinces from joining forces to oppose federal initiatives. However, the provinces may also be reluctant to harmonize their policies, even though doing so may

²⁷¹ See Parts III(A), III(B)(d), above, for discussion of these interprovincial bodies.

²⁷² See, e.g., Bolleyer, note 59, above, 73.

²⁷³ *Id.*, ch. 3. See also F. Scharpf, “The Joint-Decision Trap: Lessons from German Federalism and European Integration” (1988) 66 *Public Admin.* 239.

‘preempt’ federal intervention, because they are reluctant to make decisions that may somehow limit their decision-making autonomy in the future.²⁷⁴

However, interprovincial cooperation’s importance as a source of leverage should not be underestimated. First, even though the provinces have different priorities and interests that inhibit them from joining forces to oppose federal initiatives, there are situations in which the provinces do so, and in these situations, the fact of interprovincial cooperation does seem to have an impact.²⁷⁵ In fact, there is research that suggests that the provinces are less reluctant to cooperate in opposing federal initiatives than they are to cooperate in harmonizing provincial policies.²⁷⁶ In addition, the provinces can still have an impact even if they do not act unanimously in opposing federal initiatives. For example, Alberta and Quebec have worked together in the past to resist “unilateral action by the federal government” and “roll back federal intrusions into provincial fields of responsibility”.²⁷⁷ Similarly,

²⁷⁴ *Id.*, 89. Quebec seems to be particularly sensitive to this concern. Quebec’s willingness to engage in interprovincial cooperation has been “highly variable”, due to the concern that “intergovernmentally established national standards can be as much a threat to its autonomy as unilateral federal initiatives”: Simeon (2001), note 266, above, 57.

²⁷⁵ See, e.g., Simeon, note 54, above, 225 (suggesting, with examples, that “[o]n those issues where the provinces have been agreed ... the provinces have been influential”); Bolleyer, note 59, above, 44-46 (arguing, with reference to the federal spending power, that “[t]he cohesion of [provincial] governments in the Canadian case effectively allowed them to push against federal strings”); and *id.*, 77 (discussing the Health Care Accord in 2004).

²⁷⁶ Bolleyer, note 59, above, ch. 3.

²⁷⁷ R. Gibbins, “Alberta’s Intergovernmental Relations Experience”, in Lazar, note 224, above, 252 (and 247-270 generally).

there are regional bodies, like the Western Premiers' Conference and the Council of Atlantic Premiers, which can also be used to forge and present a common front. These smaller alliances may be sufficient in some cases to limit or prevent a federal initiative.²⁷⁸ Finally, there is evidence that the provinces have come to value common fronts more; 'position-taking' has turned out to be one of the key roles of the Council of the Federation.²⁷⁹

Second, even though the provinces have different priorities and interests that also inhibit their ability to preempt federal intervention by harmonizing provincial policies, this form of interprovincial cooperation may also be a provincial resource in some cases. To begin with, there are situations in which the provinces have worked together to harmonize provincial policies,²⁸⁰ and there is evidence that they are now doing so more regularly.²⁸¹ Reasonable people can disagree about whether the results have been adequate from a public policy perspective, but the fact that this has occurred does suggest that the harmonization of provincial policies is a possibility. In addition, even if the process works imperfectly, and some

²⁷⁸ See note 256, above, noting the potential power of one or a few provinces.

²⁷⁹ Bolleyer, note 59, above, 76-78; and Inwood et al., note 158, above, 90 (noting comment from a provincial official emphasizing the value of common fronts).

²⁸⁰ See note 188, above, discussing the 'passport system' for securities regulation. The passport system did not stave off calls for a national securities regulator, but it arguably put a heavier burden of persuasion on its advocates, and it almost certainly played a role in the Supreme Court's decision, finding a proposal for a national regulator unconstitutional.

²⁸¹ Bakvis & Skogstad, note 5, above, 11.

province-to-province variation remains, the result may still be sufficient to discourage federal intervention.²⁸² Finally, the provinces do not necessarily have to arrive at a result to preempt federal intervention. The provinces often claim to be working on doing so, and if there is some evidence to support this claim, this may be sufficient, at least for a time.²⁸³ Accordingly, even though there may be reasons to doubt the reliability of interprovincial cooperation, there are good reasons to think that it is a source of leverage that the provinces can exploit in jurisdictional disputes in some cases.

g. National Unity and The Threat of Secession

Another (admittedly extreme) source of provincial leverage is the threat of secession, the threat to exit the federation if provincial demands are not met. This strategy was used by several provinces in the early years of Confederation, which received grants from the federal government to satisfy their demands. There have also occasionally been threats of secession voiced by politicians in the Western provinces (particularly Alberta), the Maritimes, and Newfoundland and Labrador. However, in Canada the threat of secession is, of course, most associated with Quebec.

Quebec is the heartland and homeland of Canada's francophone

²⁸² Nugent, note 40, above, 70 (making this point in the U.S. context).

²⁸³ For example, the Council of the Federation regularly issues press releases that suggest that the provincial ministers responsible for specific policy areas will be "directed" to pursue the harmonization of provincial initiatives: see www.councilofthefederation.ca.

community, a community that is deeply committed to protecting its distinct language and culture, and sensitive to its position as a minority in a predominantly English-speaking country. Since the 1960s, Quebecers have consistently elected either ‘federalist’ Liberal Party provincial governments with strong provincialist ambitions or pro-sovereignty Parti Québécois provincial governments with strong separatist (or ‘sovereignist’) ambitions. These governments have consistently demanded respect for provincial jurisdiction.²⁸⁴ They have also consistently defended the view that Quebec is not a province ‘like the others’: that it is home to a group with a distinct national identity,²⁸⁵ which the Quebec government has a unique role to play in protecting. However, they have parted company on the question of how far Quebec needs to go to protect this distinct national identity. Federalist governments have taken the view that it is possible to do so *within* Canada, by protecting Quebec’s autonomy, and fighting for formal (and, in the interim, informal) constitutional and legal recognition of Quebec’s distinct national identity. Sovereignist governments have taken the view that it is only possible to protect this identity *outside* Canada, by achieving full “sovereignty”, consisting of a close economic and political partnership with

²⁸⁴ For an account, prepared for the Quebec government, see “Québec’s Positions on Constitutional and Intergovernmental Issues from 1936 to 2001” (Quebec, 2001).

²⁸⁵ “Nation” refers here to “a body of people closely connected by heritage and language, who form a relatively complete society without necessarily having (or even demanding) the status of a separate sovereign state”: Bakvis et al., note 154, above, 34.

Canada (so-called ‘sovereignty-association’) or outright independence.

The push for sovereignty came to a head in 1980 and 1995, when two pro-sovereignty Parti Québécois governments held sovereignty referendums. The first referendum, in 1980, was soundly defeated, but the second referendum, in 1995, only very narrowly missed a majority. In the interim, the push for formal constitutional reconciliation suffered three major setbacks: the first in 1982, when the federal government and all provinces proceeded to adopt a package of important constitutional amendments, including an amending formula and a *Charter of Rights*, without Quebec’s consent; the second and third in 1990 and 1992 respectively, when two different constitutional “accords” – the Meech Lake Accord and the Charlottetown Accord – were defeated. Since 1995, formal recognition of Quebec’s distinct society has been put on the back burner, and Quebecers have been forced to settle for more informal ‘victories’.²⁸⁶

The threat of secession gives Quebec a powerful source of leverage that it can exploit directly in attempting to limit or prevent federal encroachments.²⁸⁷ At a minimum, Quebec can usually be counted upon to

²⁸⁶ One of these informal ‘victories’ was a resolution passed by the House of Commons in 2006 that states: “[t]hat this House recognize that the Québécois form a nation within a united Canada”: Hansard; 39th Parl., 1st Sess.; No. 087 (27 November 2006).

²⁸⁷ This is a point that has been made by many (especially English-Canadian) federalism scholars: see, e.g., Cameron and Simeon, note 155, above, 69; and H. Bakvis and D. Brown, “Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States” (2010) 40 *Publius* 484, 502.

resist new federal initiatives that touch upon provincial jurisdiction. Even absent the threat of secession, this may have an impact, because federal encroachments are more likely to occur if they usually, even often, go unopposed. However, the threat of secession also gives Quebec's concerns added weight, because federal encroachments are no longer simply about threats to provincial jurisdiction; they are also about threats to culture and identity and, possibly, to national unity. Canadians outside Quebec often complain that Quebec makes too many demands, but most Canadians do not want a hole in the middle of the country, dividing the east from the west, and, equally importantly, Canadian identity is associated with an image of a country that includes a unique French-speaking province and community.²⁸⁸ Accordingly, no "prime minister wants the country to break up under his or her watch".²⁸⁹ The result is a concern for national unity that can be directly exploited by Quebec in attempting to limit or prevent federal overreach.²⁹⁰

The threat of Quebec secession also gives the provinces as a whole a source of leverage that can be exploited indirectly in attempting to limit or

²⁸⁸ Hogg and Wright, note 116, above, 355. However, this may be changing: see "The View from the Outside: Quebec and the Rest of Canada" (Abacus, 2012) (finding only 52% of Canadians outside Quebec would vote against independence, with 22% unsure).

²⁸⁹ Savoie, note 239, above, 116.

²⁹⁰ Simeon, note 54, above, 222 (noting that "Ottawa's commitment to ... maintaining national unity can lead to weakness on more substantive issues"); *id.*, 170-72, 208-9.

prevent federal encroachments.²⁹¹ The other provinces are certainly not always as resistant as Quebec to new federal initiatives, especially if federal funds are on offer. In addition, in recent years, there has been a rise in ‘asymmetrical federalism’, often involving one arrangement being worked out by the federal government and Quebec, and another being worked out by the federal government and the other provinces.²⁹² However, if Ottawa does reach a separate deal with Quebec, that deal may still have an impact on the deal it works out with the other provinces.²⁹³ If enough of the provinces insist on being offered the same (or just a similar) deal as Quebec, the federal government may find it very difficult to refuse, for fear of provoking a backlash in English Canada, where there is strong support for the view that all provinces should be treated equally. The result is a concern to maintain national unity that also provides the other provinces

²⁹¹ Hogg and Wright, note 116, above, 345; D.L. VanNijnatten, “Intergovernmental Relations and Environmental Policy Making”, in Fafard and Harrison, note 224, above, 43 (suggesting the “Quebec question” helps explain the provinces’ strength in Canada).

²⁹² A number of terms have been used to describe this type of arrangement: see R. Gibbins, “Taking Stock”, in L. Pal., ed., *How Ottawa Spends, 1999-2000* (Toronto: Oxford University Press, 1999) (“9-1-1 federalism”); and A. Noël, “Without Quebec”, in T. McIntosh, ed., *Building the Social Union: Perspectives, Directions and Challenges* (Regina: Saskatchewan Institute of Public Policy, 2002) (“federalism with a footnote”).

²⁹³ For example, the Labour Market Development Agreements discussed in Part(III)(D)(b), below, all include an ‘equality of treatment’ (or ‘me too’) clause that allows the provinces to take advantage of any more favorable provisions negotiated by any other province. Similarly, Keith Banting has argued that Quebec’s demands for greater control over immigration recently “triggered a broader decentralization” of immigration in other parts of the country as well: see K. Banting, “Remaking Immigration: Asymmetric Decentralization and Canadian Federalism”, in Bakvis and Skogstad, note 5, above, 265.

with an indirect resource that can be utilized in disputes about jurisdiction.

The impact of the threat of Quebec secession should not be overemphasized. It is possible that there is a trend towards decreased public support for secession in Quebec,²⁹⁴ although, as Richard Simeon notes, “such predictions have been made before, only to see support rise after some perceived shock”.²⁹⁵ In addition, even if there is no such trend, public support for secession in Quebec does seem to fluctuate over time and according to the type of secession that is contemplated,²⁹⁶ and of course Quebec not infrequently elects federalist provincial governments. Since the threat of secession needs to be credible for it to influence federal decision-making, it is hardly surprising that the federal government has been particularly willing to make concessions to Quebec and the other provinces during periods in which public support for secession rises, and a sovereigntist government is in power. However, the threat of secession may still play a role at other times, because any perceived federal encroachment

²⁹⁴ See, e.g., G. Laforest, “What Canadian Federalism Means in Quebec” (2010-11) 15 *Rev. Const. Stud.* 1, 2 (questioning whether “the dream of full political sovereignty” is dead). However, a recent poll conducted in Quebec suggests that the sovereigntist movement is far from dead: see “On constitutional questions, it’s still Quebec vs. the rest of Canada”, *Globe and Mail* (April 12, 2012) (noting poll finding that “53.6 of francophone Quebecers prefer independence to the [constitutional] status quo”). And, in 2012, Quebecers elected a minority pro-sovereignty Parti Québécois government, replacing the federalist Liberal government that had been in power for almost 10 years.

²⁹⁵ Simeon (2001), note 266, above, 52. See also D. Cameron, “Quebec and the Canadian Federation”, in Bakvis & Skogstad, note 5, above, 54-55 (similar point).

²⁹⁶ See S. Brooks, “Canadian Political Culture”, in Bickerton & Gagnon, note 239, above, 48-50 (suggesting the level of public support in Quebec has ranged from 20-60%).

has the potential to foster secession, by providing evidence to support the sovereignist claim that Quebec cannot be accommodated *within* Canada. As Steven Kennett has noted, “[f]ew if any federal policy initiatives ... will be without a national unity angle”.²⁹⁷ The threat of secession can also still play a role when federalist governments are in power, because they must be careful about supporting federal initiatives that touch upon provincial jurisdiction, for fear of being branded “too weak-kneed with Ottawa” by their sovereignist opponents.²⁹⁸ This is significant because, as Richard Simeon has noted, provincial leaders will have leverage if federal decision-makers know that they cannot concede to a federal initiative that touches upon provincial jurisdiction due to political conditions back home.²⁹⁹

This section has described what I take to be the primary sources of leverage that are available to the provinces when they attempt to utilize the intergovernmental safeguards of federalism to limit or block federal initiatives. It does not claim that these sources of leverage will be available in all cases, or that the provinces will always have more leverage in disputes

²⁹⁷ S.A. Kennett, “Securing the Social Union” (Kingston: Institute of Intergovernmental Relations, Research Paper No. 34, 1998), 2.

²⁹⁸ See, e.g., “Quebec refuses to implement Harper’s crime bill”, *Globe and Mail* (March 13, 2012) (noting claims by the pro-separatist Parti Québécois that “Jean Charest’s federalist government is too weak-kneed and timid before Ottawa to get any results”).

²⁹⁹ Simeon, note 54, above, 222.

with the federal government over jurisdiction. On the contrary, it refers to various situations in which specific sources of leverage may not be available to the provinces, and it acknowledges that the federal government may have more leverage in some or all of these situations. This, as I argue below, is one of the major weaknesses of the intergovernmental safeguards of federalism.³⁰⁰ However, there are situations in which these sources of leverage will be allocated in such a manner to give the provinces the ability to limit or block federal initiatives. The next section discusses two examples, with an eye to illustrating the role that the intergovernmental safeguards can and do play in safeguarding provincial jurisdiction.

However, before I turn to these examples, it is worth emphasizing that this section does not purport to provide the last word on the sources of provincial leverage, or to be exhaustive. On the contrary, in various places I have acknowledged the need for further research, and while I have attempted to describe what I take to be the primary sources of provincial leverage that are available, I acknowledge that future research may highlight additional sources of leverage. For example, federalism scholars in the United States have suggested that ties between unelected federal and state officials may “give state regulatory interests leverage” over the decision-making of federal administrative agencies, which are now

³⁰⁰ See Part III(E), below.

responsible for a good deal of federal decision-making.³⁰¹ This article has not attempted to account for the impact that unelected officials may have on federal decision-making, but it is possible that future research will show that something similar occurs in Canada.³⁰² Similarly, federalism scholars in the United States have suggested that the “normative values” of federal decision-makers may also give the states leverage in some situations, by compelling them in a direction that is “unrelated to the individual interests at stake”.³⁰³ Richard Simeon made a similar point about Canada in his 1972 study of federal-provincial relations.³⁰⁴ There has been no detailed update of Simeon’s analysis, but future research may also reveal particular “normative values” that work to the provinces’ advantage in some cases.

D. Examples

I turn now to providing a detailed account of two examples, both involving situations where the provinces utilized the intergovernmental safeguards to challenge federal initiatives that they perceived to overreach.

³⁰¹ See, e.g., G. Metzger, “Administrative Law and the New Federalism” (2007-08) 57 *Duke L.J.* 2023, 2075 (citing three sources in support); see further *id.*, 2074-2083.

³⁰² It has been suggested that intergovernmental affairs units were established in the provinces partly due to concerns that provincial civil servants in line departments were too readily agreeing to hand over decision-making authority to their federal counterparts: Woolstencroft, note 159, above, 14. It is not clear that perception matched reality, but even if it did, at least in part, the same may no longer hold true today, at least across the board.

³⁰³ Ryan, note 25, above, 97 (discussing various types of “normative leverage”).

³⁰⁴ Simeon, note 54, above, 229-233. Many of the “norms” that Simeon identified no longer seem to hold true - e.g., “don’t gang up on Ottawa”: *id.*, 228.

a. Active Labour Market Programs

The first example involves labour market development and training, or so-called ‘active labour market programs’ (“ALMP”).³⁰⁵ ALMP refers to government programs, such as institutional training, on-the-job training and employment centers, designed to help the unemployed enter or re-enter the workforce. It is distinct from ‘passive labour market programs’, such as employment insurance or social assistance, which provide financial aid to the unemployed while they look for work or upgrade their job skills. ALMP expanded rapidly in the 1960s. Until 1996, the federal government played a significant role in devising, funding, managing and delivering ALMP. In 1996, the federal government devolved a significant portion of its ALMP to the provincial (and territorial) governments. The intergovernmental safeguards of federalism played an active role in achieving this result.

How so? Prior to 1996, federal ALMP fell into four broad categories. The federal government funded training and apprenticeship programs delivered by provincial community colleges and the private sector. It operated national employment centres that offered job counseling

³⁰⁵ This section draws heavily on the following sources: H. Lazar (with P. Stoyko), “Canadian Labour Market Policies”, in Salmon & Keating, note 266, above, ch. 9; H. Bakvis, “Checkerboard Federalism?: Labour Market Development Policy in Canada”, in H. Bakvis and G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Oxford: Oxford University Press, 2002), ch. 11; R. Haddow, “Canadian Federalism and Active Labour Market Policy”, in F. Rocher and M. Smith, eds., *New Trends in Canadian Federalism*, 2d ed. (Peterborough, ON.: Broadview Press, 2003), ch. 9; and K. Wood and T. Klassen, “Bilateral federalism and workforce development policy in Canada” (2009) 52 *Can. Public Admin.* 249.

and job search facilities to the unemployed. It engaged in job creation strategies, directly or indirectly financing the creation of jobs. Finally, it collected, analyzed, and distributed labour market information. The balance between and amongst these four categories varied over time, but until 1996, the federal government played a fairly active role in all four of them.

The federal government insisted that it had the constitutional authority to pursue ALMP, by virtue of its power over unemployment insurance (s. 91(2A)) and/or its spending power. It also insisted that federal ALMP was justified as a matter of public policy, because only it could “foster mobility within the Canadian labour market” by adopting a national approach, and “its money and expertise [were] needed to maintain an adequate ALMP infrastructure, especially in the poorer provinces”.³⁰⁶ However, the federal government’s ALMP encountered strong provincial opposition. The loudest and most persistent opposition came from Quebec. Quebec insisted that federal ALMP intruded inappropriately on its *exclusive* jurisdiction over “education” (s. 93) and “property and civil rights” (s. 92(13)); that it could design ALMP to meet local needs more efficiently and effectively than Ottawa; and that control over labour market matters was essential to preserving its unique cultural identity. The other provinces did not voice their opposition to federal ALMP as loudly or as persistently as

³⁰⁶ Haddow, previous note, 202-3.

Quebec, but other provinces, like Alberta, did raise similar objections.

The provinces that had constitutional and public policy objections to federal ALMP did not look to the courts³⁰⁷ but rather to the intergovernmental safeguards of federalism to push their objections. The process took a number of years, and involved a number of different forums and strategies, including public complaints, provincial resolutions,³⁰⁸ and interprovincial reports.³⁰⁹ However, the eventual result was a public concession in a speech by Prime Minister Chrétien in October 1995 that the provinces have primary jurisdiction over labour market training, and a commitment that the federal government would not launch any new

³⁰⁷ That said, the Supreme Court of Canada did eventually enter the fray, vindicating the federal government's argument that its power over unemployment insurance extended to ALMP: see *Confédération des syndicats nationaux*, note 97, above. But, the case was decided in 2008, 12 years after the federal government had devolved many of its ALMP to the provinces. In addition, the case was initiated by a group of Quebec labour unions. Although two provinces (Quebec and New Brunswick) did intervene, Quebec focused its argument on the validity of conditional spending under the federal spending power. There was also a 1989 decision of the Supreme Court of Canada that did seem to cast doubt upon the federal government's jurisdiction to pursue ALMP under its unemployment insurance power: *YMHA Jewish Community Centre of Winnipeg v. Brown* [1989] 1 S.C.R. 1532. But, the case was initiated by private individuals, not the provinces. In addition, the decision seems to turn more on statutory interpretation than the scope of federal jurisdiction. The decision was given short shrift in the *Confédération* case (see para. 47).

³⁰⁸ In December 1990, Quebec's National Assembly unanimously passed a resolution affirming its position that the provinces (or at least Quebec) have exclusive jurisdiction over all aspects of labour market training: Bakvis (2002), note 305, above, 202.

³⁰⁹ In 1995, the Ministerial Council on Social Policy Reform and Renewal, which is composed of all provincial and territorial ministers in the social policy field, released a report to the provincial premiers that recommended, among other things, that: responsibilities within the federation over ALMP be clarified and realigned, and corresponding resources be transferred; that joint federal-provincial responsibilities in relation to ALMP be minimized; and that the federal spending power be utilized only with the agreement of the provinces, not "to unilaterally dictate program design". *Ibid.*

programs involving labour market training in the absence of a province's express agreement. This was followed by the federal government's offer in May 1996 to devolve a "significant" part of its ALMP to the provinces.³¹⁰

This concession, and the commitment and offer that followed it, were not without precedent. The ill-fated Charlottetown Accord of 1992 included passages that affirmed provincial jurisdiction over labour market training, and offered to transfer most aspects of federal ALMP to the provinces. In addition, after the failure of the Charlottetown Accord, the short-lived Conservative federal government of Kim Campbell reached a bilateral agreement with Quebec in 1993 that agreed to devolve most aspects of federal ALMP to it. However, this agreement was nullified when the Liberal government of Jean Chrétien won the federal election in October 1993. The Liberal Party's election platform (the so-called 'Red Book') envisioned a strong role for the federal government in ALMP, promising a national apprenticeship program, an employment initiative for youth, and an effort to increase workplace training. The May 1996 devolution offer "constituted an abrupt change in direction" for the Liberal government.³¹¹

What aspects of federal ALMP were devolved? In 1995, the federal government enacted a new Employment Insurance Act, and the second part

³¹⁰ Lazar, note 305, above, 151, 53.

³¹¹ *Id.*, 150.

of that Act significantly overhauled the federal government's labour market training and job creation programs.³¹² The Act divided these training and job creation programs into five categories. The federal government offered to transfer the financial, administrative, and human resources to deliver all five of these categories of ALMP to the provinces, as well as various related programs and services, like the employment and skills counseling services offered by the national employment centres. As Herman Bakvis notes, the federal government's offer caught many off guard, since it "offer[ed] far more than what many observers, and many provinces, were expecting".³¹³

The offer of devolution was 'significant' but not absolute. The federal government attached conditions to the offer of devolution, including a requirement to deliver programs within the five categories and to satisfy three "results targets", which related to the individuals to be served and the results to be achieved. In addition, the federal government did not agree to transfer ALMP relating to youth, Aboriginal people, and the disabled.

However, the offer of devolution was only the first stage in the process, and the federal government's role in ALMP was diminished even further when the federal government and the provincial governments negotiated the implementation of the offer. To benefit from the offer of

³¹² Bakvis (2002), note 305, above, 204.

³¹³ *Id.*, 205.

devolution, the federal government required the provinces to negotiate and sign a so-called Labour Market Development Agreement (LMDA). In the initial round of negotiations, six provinces decided to take advantage of the full offer of devolution.³¹⁴ These provinces were able to limit the impact of the conditions attached to the offer of devolution, by, for example, having their existing ALMP programs defined as satisfying the five federal program categories, thereby saving them from establishing new programs, and securing a provincial role (and, in effect, a provincial veto) in setting the results targets that the provinces would be required to satisfy. The other four provinces did not take advantage of the full offer of devolution. One province, Nova Scotia, decided to negotiate a “strategic partnership” that essentially left the delivery of federal ALMP in that province largely unchanged, and the other three provinces negotiated co-management LMDAs that effectively left the administration of federal ALMP to the federal government.³¹⁵ However, these three provinces were also able to limit the role of the federal government, by negotiating the establishment of joint management committees that gave provincial officials a role to play in planning, designing, and evaluating all federal ALMP covered by the

³¹⁴ The six provinces were: Alberta, New Brunswick, Quebec, Manitoba, Saskatchewan, and eventually Ontario, in 2005. Ontario negotiated an LMDA later than the other provinces, due to disagreements over, among other things, the federal funds offered.

³¹⁵ The provinces were: Newfoundland and Labrador, P.E.I., and British Columbia.

LMDA, as well as (in effect) a veto over any developments they opposed.

The initial round of LMDAs also set the stage for a further round of offers to devolve even more aspects of federal ALMP to the provinces. For example, the Conservative federal government under Stephen Harper re-negotiated full devolution LMDAs with the four provinces that originally negotiated co-management LMDAs in 2008, as well as a series of bilateral agreements that devolved many other aspects of federal ALMP.³¹⁶ Ottawa seemed increasingly “out of the game”, interested in dabbling only “around the edges of labour market policy.”³¹⁷ However, in March 2013, the federal government announced a new federal program, the Canada Job Grant, which would give businesses with a plan to train individuals for an existing or better job a grant of up to \$15,000 per individual. The intergovernmental safeguards have been re-engaged. The provinces strongly objected to this ‘federal intrusion’ into their jurisdiction, and there have been threats (or, in the case of Quebec, clear commitments) to refuse to support the program,³¹⁸ eliciting clear indications from Ottawa that it was willing to compromise.³¹⁹

³¹⁶ For an account as of September 2008, see Wood & Klassen, note 305, above, 260.

³¹⁷ *Id.*, 261.

³¹⁸ See “Premiers pan Ottawa’s Canada Job Grant”, *Toronto Star* (July 25, 2013).

³¹⁹ See “Ottawa willing to compromise on job grant program after opposition from provinces, businesses”, *Toronto Star* (October 7, 2013); “Ottawa bends to provinces in new push to launch job training program”, *Globe and Mail* (January 15, 2014); and “Ottawa offers provinces new Canada Jobs Grant package”, *Canadian Press* (January 24, 2014).

Why did the federal government offer to devolve ALMP in 1996? There are a number of possible explanations. The first is financial. The Liberal government's Conservative predecessor saddled it with a large budget deficit. In 1994, the government initiated a 'Program Review' that required all federal departments to review their program objectives and expenditures with an eye to cutting costs. This Program Review set the stage for major cutbacks at Human Resources Development Canada, the department responsible for most federal ALMP. This coincided with the federal government's offer to devolve many of its ALMP to the provinces.

The second possible explanation is ideological. The federal offer occurred in a climate dominated by "neoconservative ideas about the appropriate role of the state and markets in the economy and society, the rise of New Public Management, and the application of private sector principles, values, and goals to the public sector".³²⁰ Emphasis was placed on public sector efficiency, efficacy, and responsiveness and accountability to citizens, values that, many argued, would be better served by, among other things, deregulation and the decentralization of government decision-making.³²¹ This ideological climate also coincided with the federal government's offer to devolve many of its ALMP to the provinces.

³²⁰ Inwood et al., note 158, above, 35.

³²¹ *Id.*, 37.

The third possible explanation is grounded in the need to accommodate provincial demands, particularly from Quebec. In September 1994, the sovereigntist Parti Québécois defeated the federalist Liberal Party in the Quebec election. The Parti Québécois government held a sovereignty referendum in October 1995 that failed by only a razor thin margin. As noted above, Quebec had been particularly loud and persistent in opposing federal ALMP. It was during the referendum campaign that the Prime Minister explicitly stated that the provinces have primary jurisdiction over labour market training. It was shortly after the referendum that the Prime Minister agreed to pursue no new federal ALMP without provincial consent (in November 1995), and that the devolution offer was made (in May 1996).

Which of these explanations best accounts for the 1996 devolution of federal ALMP? It is possible that the budgetary and ideological climate that prevailed in the mid-1990s softened the ground for the offer of devolution. However, there is general agreement in the political science literature that the decisive explanation is the third. Harvey Lazar makes the point clearly: “[t]he decentralization that took place under the LMDAs was caused by federal government attempts to diffuse nationalist tensions within Quebec by giving in to long-standing provincial demands for control over training and other active programs. This was accompanied by sustained pressure on the part of other provinces, particularly Alberta, for a greater

role in this area.”³²² The 1995 referendum left the federal government anxious to show that Canadian federalism was flexible enough to accommodate Quebec. But, the federal government could not make an offer to devolve federal ALMP only to Quebec. The offer had to be made available to all provinces, because other provinces were also pushing for a greater role in ALMP, and an offer to Quebec alone might create a backlash from, and in, those provinces. The result was to give Quebec and the other provinces the leverage to secure a ‘significant’ devolution of federal ALMP.

b. Environmental Assessments

The second example involves environmental assessments (or EAs).³²³ EAs are a planning tool used by government decision-makers to identify, assess and, if possible, mitigate the environmental impacts of a proposed project before taking any action that allows it to proceed. The federal government began to play an active role in performing EAs in the late 1980s. The provinces had already established their own EA regimes,

³²² Lazar, note 305, above, 153; see similarly Haddow, note 305, above, 252; and G. DiGiacomo, “The Democratic Content of Intergovernmental Agreements in Canada” (Saskatchewan Institute of Public Policy, Public Policy Paper No. 38, 2005), 27-8.

³²³ This section draws heavily on the following sources: Harrison, note 178, above; M.S. Winfield, “Environmental Policy and Federalism”, in Bakvis & Skogstad (2002), note 305, above, ch. 7; K. Harrison, “Passing the Environmental Buck”, in Rocher and Smith, note 305, above, ch. 12; Bakvis et al., note 154, above, ch. 12; M. Winfield and D. Macdonald, “The Harmonization Accord and Climate Change Policy: Two Case Studies in Federal-Provincial Environmental Policy”, in H. Bakvis and G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 2d ed. (Oxford: Oxford University Press, 2008), ch. 13; and the articles in Fafard & Harrison, note 224, above.

and they strongly opposed the federal government's entry into the EA field.³²⁴ In 1998, the federal and all provincial governments (except Quebec) signed the Canada-Wide Accord on Environmental Harmonization, which was fleshed out in three sub-agreements, including a Sub-agreement on Environmental Assessment. The sub-agreement was then fleshed out in various federal-provincial bilateral agreements. The Accord, sub-agreement, and bilateral agreements all envisioned a limited role for the federal government in situations where both federal and provincial EAs were required. They also set the stage for a significant reduction in the number and nature of federal EAs. As with federal ALMP, it was the intergovernmental safeguards the provinces utilized to push for this result.

What was the background to the Accord? Before the late 1960s and early 1970s, both the federal government and the provincial governments expressed little interest in environmental protection. However, the few environmental protection (or 'conservation') laws that did exist were largely provincial. This reflected the position, routinely and conveniently adopted by federal governments at that time, that "the conservation of natural resources within the provinces is primarily a provincial responsibility".³²⁵

The federal government first demonstrated an interest in

³²⁴ Harrison, "Intergovernmental Relations and Environmental Policy: Concepts and Context", in Fafard & Harrison, note 224, above, 17.

³²⁵ House of Commons Debates, 30 January 1953, 1491.

environmental protection in the late 1960s and early 1970s, in tandem with the first wave of federal (and global) interest in environmental protection. The federal government first demonstrated an interest in EAs in 1973 in an informal cabinet policy; this informal policy was codified in 1984 in the Environmental Impact Assessment and Review Process Guidelines Order.³²⁶ However, the federal government's interest in EAs was initially more notional than real, because until the late 1980s, the federal government treated the cabinet policy and (later) the Guidelines Order as discretionary, and largely deferred the performance of EAs to the provinces. This changed in the late 1980s. The initial catalyst is often said to have been a 1989 Federal Court decision, secured by environmental groups, which held that compliance with the Guidelines Order was mandatory.³²⁷ This decision had the effect of forcing the federal government to perform EAs of all proposed projects requiring federal regulatory approvals. However, the federal cabinet had already decided to develop legislation that would replace the Guidelines Order in 1987, in tandem with the second wave of federal interest in environmental protection. The Federal Court's decision simply lent this decision "much greater urgency".³²⁸ The result, the

³²⁶ SOR/84-467, as per *Department of the Environment Act*, R.S.C., 1985, c. E-10, s. 6.

³²⁷ *Cdn. Wildlife Fed. v. Can.* [1989] 3 F.C. 309 (T.D.), aff'd (1989) 99 N.R. 72 (C.A.).

³²⁸ Harrison, note 178, above, 133.

Canadian Environmental Assessment Act,³²⁹ was introduced in June 1990, enacted in June 1992, and proclaimed in force in January 1995. The CEEA restored an element of discretion to the federal EA process, but it also affirmed the federal government's more active role in relation to EAs.³³⁰

The provinces strongly and unanimously opposed the CEEA, although some provinces (like Ontario, Manitoba and British Columbia) were more open than others (like Quebec, Alberta and Saskatchewan) to cooperative federal-provincial approaches to EAs.³³¹ The provinces objected to the CEEA on the basis that it was unnecessary, arguing that the provinces were already doing the job under their own EA regimes, and over-inclusive, arguing that it required federal EAs too readily.³³² The provinces also objected to the CEEA on constitutional grounds, arguing that the federal government was invading provincial jurisdiction over natural resources, by using narrow areas of federal jurisdiction (for example, over fisheries) as a pretext to justify all-encompassing environmental reviews.³³³

The provinces adopted a two-prong strategy in opposing the CEEA. The first prong, unlike with federal ALMP, involved the courts. The

³²⁹ S.C. 1992, c. 37.

³³⁰ See, for further discussion, Harrison, note 178, above, 136.

³³¹ *Id.*, 136-37.

³³² *Id.*, 137.

³³³ *Ibid.*

Constitution Act, 1867 does not explicitly allocate “the environment” to either order of government. It was widely acknowledged at the time that the provinces had the jurisdiction to regulate natural resources and the environment, by virtue of their status as owners of vast amounts of public (Crown) land and the associated natural resources, and their regulatory authority over, among other things, “property and civil rights” (s. 92(13)). There were also a number of federal powers that appeared to give the federal government the jurisdiction to regulate the environment, including the federal fisheries power (s. 91(12)), the federal criminal law power (s. 91(27)), and the ‘national concern’ branch of the federal ‘peace, order and good government’ power (s. 91, opening words).³³⁴ However, the scope of federal jurisdiction over EAs was uncertain, partly because it was largely untested. In addition, the Supreme Court of Canada had just released a decision, in *R. v. Crown Zellerbach* (1988),³³⁵ in which only a slim majority held that the federal government could prohibit the dumping of waste “at sea”, in provincial coastal waters, under the national concern branch of the federal ‘p.o.g.g.’ power. The majority and dissent appeared to agree that both orders of government can regulate the environment, but appeared to be deeply divided about the proper source and the scope of federal jurisdiction.

³³⁴ For more discussion, see Hogg, note 48, above, sec. 30.7.

³³⁵ [1988] 1 S.C.R. 401. The Court split 4-3.

In early 1990, Alberta, with the support of five other provinces,³³⁶ decided to test the scope of the federal government's jurisdiction to conduct EAs, by appealing the decision of the Federal Court in *Friends of the Oldman River Society v. Canada*.³³⁷ That decision, which involved a dam on the Oldman River being built by Alberta, extended the situations in which the federal government would be required to perform EAs under the Guidelines Order from cases involving federal regulatory approvals to cases involving any area of federal jurisdiction. However, the provinces failed resoundingly. On appeal, the Supreme Court of Canada held, unanimously on this point, that the federal government had the jurisdiction to require an EA of the dam.³³⁸ The effect was to confer "on the federal Parliament the power to provide for an environmental impact assessment of any project that has any effect on any matter within federal jurisdiction".³³⁹ The case involved the Guidelines Order, but it effectively foreclosed a constitutional challenge to the CEEA, which was making its way through Parliament.

The decision in *Oldman River* forced the provinces to focus on the

³³⁶ The five provinces that actively supported Alberta were Quebec, New Brunswick, British Columbia, Saskatchewan, and Newfoundland. Three provinces, Ontario, Nova Scotia, and Prince Edward Island, took no official position in the case. However, one province, Manitoba, and one territory, the Northwest Territories, broke ranks and supported the federal government. Both were downstream of the Oldman River dam project.

³³⁷ [1990] 2 F.C. 18 (C.A.).

³³⁸ [1992] 1 S.C.R. 3.

³³⁹ Hogg, note 48, above, sec. 30.7(b).

second prong of their strategy: the intergovernmental safeguards of federalism. The provinces focused their efforts in this regard on the Canadian Council of Ministers of the Environment (CCME). The CCME is an intergovernmental council that is comprised of all 14 federal-provincial-territorial environment ministers. The CCME is “Canada’s pre-eminent body for multilateral intergovernmental action on environmental issues”.³⁴⁰ The provinces utilized the CCME to voice their grievances about the CEEA, and to push the federal government, directly and indirectly, for favored (or more favorable) outcomes.³⁴¹ The major push to utilize the CCME in this way came from Alberta, which, as Canada’s largest oil producer, was particularly opposed to the CEEA. Alberta appreciated the CCME’s value as an intergovernmental forum where the provinces could form and present a united front to the federal government, and it feared the “temptation of the provinces to jump ship and strike deals with the feds”.³⁴²

Before the CEEA was enacted, in 1992, the provinces utilized the CCME in two different ways. First, and most obviously, the provinces utilized the CCME to push the federal government, through the federal

³⁴⁰ Inwood et al., note 158, above, 183.

³⁴¹ The exception was Quebec. After the failure of Meech Lake in 1990, Quebec refused to participate in federal-provincial meetings; after the CEEA was proclaimed in force, it refused to participate in the CCME. Quebec attacked the CEEA in the media, calling it “totalitarian federalism”; it sent letters and telegrams to the federal environment minister opposing it; and it lobbied senators. Harrison, note 178, above, 135, 139.

³⁴² *Id.*, 143.

environment minister, for amendments to the CEEA, including an amendment to limit the scope of federal EAs to matters relevant to a particular federal power. This would have addressed the provinces' concern that the federal government was going to rely on narrow sources of federal power to conduct all-encompassing EAs. Two different (provincial) chairs of the CCME also appeared before the federal parliamentary committee considering the CEEA to push for these amendments. The federal government rejected the bulk of the provinces' amendments, although it did agree to make consultation with the provinces mandatory in certain cases.

Second, the provinces utilized the CCME to push cooperative federal-provincial approaches to environmental protection. This strategy resulted in a number of multilateral and bilateral agreements in the early 1990s, including the 1991 Cooperative Principles for Environmental Assessment, a multilateral agreement that emphasized intergovernmental cooperation in relation to EAs. "The impetus for collaboration came from the provinces, and in particular those provinces [like Alberta] most sensitive to federal 'intrusion'".³⁴³ The push for cooperation reflected a conscious strategy on the part of these provinces to preclude federal unilateralism and immobilize the federal government with federal-provincial consultations.³⁴⁴

³⁴³ Harrison, note 323, above, 334.

³⁴⁴ Harrison, note 178, above, 143.

The CEEA was enacted in 1992, over the objection of the provinces, but the provinces did not give up; they simply shifted from opposing its enactment to attempting to limit its impact. The provinces' attempts to do so became wrapped up in the bigger push at that time to harmonize federal-provincial environmental regulation. It is telling, as with the push for cooperative federal-provincial approaches, that this push for harmonization was wholeheartedly supported by the provinces, like Alberta, that were the most strongly opposed to federal EAs. The push for harmonization reflected a strategy to get the federal government to limit its role in performing EAs, by agreeing to a 'one window' approach to environmental protection, including EAs, with the provinces typically staffing the delivery 'window'.

The push for harmonization resulted in the so-called "harmonization initiative", which was launched by the CCME in 1993.³⁴⁵ The initiative brought together all provinces, and at its peak, it involved almost 125 federal-provincial-territorial officials, and an elaborate system of committees, meetings and public consultations. The initiative encountered major opposition from environmental groups and the federal cabinet and caucus, due to concerns that the federal government was improperly abdicating its environmental protection role to the provinces. And it took more than four years, stalled several times, and resulted in one failed effort

³⁴⁵ Harrison, note 178, above, 158.

– the 1994 draft Environmental Management Framework Agreement.

However, it ultimately resulted in the 1998 Accord and EA sub-agreement.

What did the federal government agree to in the Accord and EA sub-agreement? The Accord and the sub-agreement agreed to by the federal government had a clear provincialist thrust, committing the federal government to limit its involvement in performing EAs where both orders had the ability to act.³⁴⁶ This was illustrated most clearly in the sub-agreement, which fleshed out the general principles articulated in the Accord. The sub-agreement, in keeping with the spirit of the Accord, emphasized the one-window delivery of EAs. It did so by requiring a ‘lead party’ to be identified, and stipulating that the process of the lead party was to be used for the EA. Each government retained its authority to refuse regulatory permits, and to disapprove a proposed project, but it committed to do so on the basis of the results that emerged from the ‘one-window’ EA process. The provincialist thrust of the sub-agreement was clearly reflected in the allocation of the role of lead party. The sub-agreement referred to

³⁴⁶ I use the past tense, because Stephen Harper’s Conservative government recently repealed the CEEA and enacted a new federal EA regime as part of the 2012 budget implementation bill: see *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, s. 52. The new federal EA regime greatly scales back federal EAs, by focusing federal EAs on larger projects with national implications, cutting back the number of smaller projects that are subject to any EA, and handing over EAs for many projects to the provinces. It remains unclear how the new regime will impact the aspects of the Accord related to EAs, the sub-agreement, and the implementation agreements. The new federal EA regime could be interpreted as the culmination of years of provincial opposition, but it is more likely that it reflects the ideological and partisan concerns of the Alberta-strong Harper government.

only two situations where the federal government was to be the lead party: a) proposed projects on federal lands where federal approvals apply; and b) EAs required by an Aboriginal land claim or self-government agreement. The “[p]rovinces [were] to be the lead parties for all other assessments”.³⁴⁷

The reduced federal role contemplated by the Accord and the EA sub-agreement was evident in the approach that the federal government took to EAs after signing the Accord and sub-agreement in 1998. For example, the sub-agreement contemplated that it would be implemented by bilateral implementation agreements. By early 2012, the federal government had negotiated implementation agreements with Alberta, British Columbia, Manitoba, Newfoundland and Labrador, Ontario, Quebec, Saskatchewan, and the Yukon. All of these agreements stayed true to the provincialist thrust of the sub-agreement, by emphasizing ‘one window’ delivery of EAs, with the provinces typically staffing the window.³⁴⁸ Similarly, the literature suggests that, in practice, the federal government did actually defer to the provinces in relation to EAs after signing the Accord and sub-agreement.³⁴⁹

Why did the federal government agree to let the provinces take the lead in conducting EAs in the Accord and EA sub-agreement? The most

³⁴⁷ Winfield, note 323, above, 130.

³⁴⁸ See <http://www.ceaa.gc.ca/default.asp?lang=En&n=CA03020B-1#1> (accessed: April 12, 2012), which provides a complete list of, and links to, the various agreements.

³⁴⁹ See, e.g., Winfield and Macdonald, note 323, above, 272.

convincing answer to this question, in my view, is the intergovernmental safeguards of federalism. The provinces had been pushing the federal government to abandon or at least limit federal EAs since it announced that it intended to enact the CEEA, and during the harmonization initiative the provinces were able to exploit the intergovernmental safeguards to negotiate limits on the federal government's role, partially satisfying their demands. Why did the provinces finally succeed in having their demands partly met? The literature points to a number of factors that may have played a role.

The first factor is financial. As with federal ALMP, the Accord and sub-agreement were negotiated against the backdrop of the federal government's 'Program Review', and the resulting cuts in spending and staff, including in the environmental area.³⁵⁰ These cuts may have increased (or perhaps reinforced) the federal government's willingness to consider giving the provinces the lead role in the Accord and sub-agreement.³⁵¹ They may also have given the provinces greater leverage at the negotiating table, because the provinces may have known that the federal government (felt it)

³⁵⁰ For example, 31.7% of Environment Canada's budget was cut between 1994-98, and another 3.5% was cut in 1998-99. These cuts resulted in a 25% reduction in Environment Canada's workforce. See D. Savoie, "Towards a Different Shade of Green: Program Review and Environment Canada", in P. Aucoin and D. Savoie, eds., *Managing Strategic Change* (Ottawa: Canadian Center for Management Development, 1998), 71-97.

³⁵¹ Inwood et al., note 158, above, 191 (noting comment that "Program Review was an important part of the context for the ... Accord"); see also Harrison, note 324, above, 4; S.A. Kennett, "Meeting the Intergovernmental Challenge of Environmental Assessment", in Fafard & Harrison, note 323, above, 109; and Winfield, note 323, above, 131.

lacked the capacity, in the form of money and staff, to play an extensive role in conducting EAs. As Gregory Inwood, Carolyn Johns, and Patricia O'Reilly suggest, "Ottawa did not have the capacity to challenge or act in a leadership role related to most environmental issues during this period".³⁵²

The second factor is ideological. Again, as with federal ALMP, the Accord and sub-agreement were negotiated against the backdrop of an ideological climate that emphasized ideas like efficiency, deregulation and decentralization. These ideas may also have increased (or reinforced) the federal government's willingness to consider giving the lead role to the provincial governments in the Accord and sub-agreement.³⁵³ The importance that the Accord and sub-agreement place on the streamlined delivery of EAs is consistent with the emphasis placed during this period on efficiency and deregulation. The provincialist thrust of the Accord and sub-agreement is also consistent with the emphasis placed on decentralization.

The third factor is the threat of Quebec secession. Again, as with federal ALMP, the Accord and sub-agreement were negotiated, in large part, in the lead up to and the aftermath of the 1995 sovereignty referendum

³⁵² *Id.*, 213. See also Harrison, note 324, above, 9 (noting the argument of "some" that the federal government agreed to limit its role in the Accord and sub-agreements because it "did not have sufficient resources to develop and enforce environmental standards across the country"); and Bakvis et al., note 154, above, 211 (noting the federal government refused to take a leadership role because "leadership is costly"). The provinces were also under budgetary pressures around the same time: Inwood et al., note 158, above, 192.

³⁵³ Fafard (1998), note 224, above, 214-15; Harrison, note 324, above, 8; Winfield, note 323, above, 131; and Inwood et al., note 158, above, 35-9, 180.

in Quebec. The federal Minister of Intergovernmental Affairs, Stephane Dion, acknowledged, following a post-referendum tour of the provinces, that ALMP and environmental protection, particularly EAs, were the two “leading irritants in federal-provincial relations”.³⁵⁴ As a result, the harmonization initiative became a central plank of the federal government’s efforts to demonstrate to the provinces, especially Quebec, that Canadian federalism can work, and can accommodate provincial demands.³⁵⁵

The fourth factor is interest group opposition. Environmental groups were, on the whole, highly critical of the harmonization initiative, and repeatedly called for the federal government “to retain a strong role in the development and implementation of environmental policy in Canada”.³⁵⁶ This reflected their position that “provincial governments cannot be trusted to ensure adequate environmental protection because of close ties to resource industries”.³⁵⁷ In contrast, industry groups supported the objective of the harmonization initiative, and although they tended to support intergovernmental cooperation in relation to environmental standards, the “vast majority” of them also called for the provinces to play the

³⁵⁴ Winfield, note 323, above, 127.

³⁵⁵ Harrison, note 324, above, 4, 8-9. See also Kennett, note 351, above, 109; Bakvis et al., note 154, above, 211; and Inwood et al., note 158, above, 39.

³⁵⁶ Fafard (2000), note 224, above, 88.

³⁵⁷ *Ibid.*

“predominant” role in conducting EAs.³⁵⁸ There is no evidence that industry groups supported giving the provinces this role for federalism-related reasons; the evidence suggests, rather, that they did so “as a means to an end, the end being” the streamlining and deregulation of environmental protection.³⁵⁹ However, these groups were given the chance by individual governments, like Alberta and Quebec, and by the CCME, to express their views on the harmonization initiative.³⁶⁰ There is also evidence that some provinces, like Alberta, actively lobbied industry groups to support and call for provincial regulation.³⁶¹ And, as Patrick Fafard notes, “Ottawa and the provinces did proceed with the harmonization of their roles and responsibilities with respect to the environment and, by and large, the result is more in keeping with the preferences of powerful organizations representing industry and business than ... of [environmental groups]”.³⁶²

The fifth, and final, factor is public opinion. The Accord and sub-agreement were negotiated during a period when the environment had lower salience than economic issues. The public was not completely uninterested in the environment; it simply “remained secondary to economic growth and

³⁵⁸ *Id.*, 93.

³⁵⁹ *Id.*, 91-94.

³⁶⁰ *Id.*, 87.

³⁶¹ Harrison, note 178, above, 137-38.

³⁶² Fafard (2000), note 224, above, 96.

other pressing policy issues, such as health care”.³⁶³ The state of public opinion during this period may have had an impact on the Accord and sub-agreement in two ways. First, it may have encouraged the federal government to ‘pass the buck’ to the provinces.³⁶⁴ On this view, the federal government only decided to enact the CEEA because environmental issues were salient with (or prioritized by) the public, giving the federal government an incentive to attempt to ‘claim credit’ from voters. The federal government decided to defer to the provinces in the Accord and sub-agreement because the salience of the environment had decreased by the time they were negotiated and signed, giving the federal government an incentive to ‘avoid the blame’ of regulated industries and the provinces.

Second, and less cynically, it is also possible that the federal government remained concerned for the environment, but that the state of public opinion convinced it that it did not have the public support that it needed to deflect the complaints and criticisms of regulated industries and the provinces. There is evidence that some key federal decision-makers had concerns about the extent to which the federal government was being asked to hand over environmental protection to the provinces.³⁶⁵ These concerns

³⁶³ Inwood et al., note 158, above, 212-13.

³⁶⁴ Harrison, note 178, above. See also Harrison, note 323, above.

³⁶⁵ For example, the House of Commons Standing Committee on the Environment and Sustainable Development issued a report in December 1997 calling on the federal

stalled the harmonization initiative, but were ultimately overridden by the Prime Minister's Office, which directed the environment minister to secure an agreement with the provinces.³⁶⁶ The state of public opinion may have raised questions about the extent to which the public was willing to rally around environmental protection initiatives, federal or provincial. This may have worked to the benefit of the provinces, by tempering the federal government's (or, specifically, the PMO's) resolve in the face of the opposition of regulated industries and the provinces, particularly if the federal government believed that it was just duplicating provincial efforts. As Herman Bakvis, Gerald Baier and Douglas Brown note, unilateral action by the federal government on the environment "require[s] strong public support, and Canadians' record on that score has not been consistent".³⁶⁷

There is good reason to believe that all of these factors explain the provincialist thrust of the aspects of the Accord and sub-agreement relating

government to delay signing the Accord; the Committee concluded that "there was inadequate evidence of duplication and overlap to justify the accord, and was also critical of the devolutionary approach implied by the accord": Harrison, note 324, above, 10.

³⁶⁶ It may be tempting to conclude that the Prime Minister had little personal commitment to the environment, but the Prime Minister committed to reduce greenhouse gas emissions in 1997, during the negotiation of the Accord, and then agreed to ratify the Kyoto Protocol on climate change in 2002, even though there was "no compelling evidence of a third wave of public environmental concern": Harrison, note 323, above, 339. The ratification of the Kyoto Protocol has been described as a "triumph of personal commitment": *id.*, 340. Contrast this with Harrison's earlier claims, discussed in note 368, below.

³⁶⁷ Bakvis et al., note 154, above, 211.

to EAs.³⁶⁸ The provinces had been pushing the federal government to abandon or limit federal EAs since the federal government announced that it intended to pursue federal EA legislation, and after several failures, including inside the courts, the provinces were able to utilize the intergovernmental safeguards of federalism to have their demands partly met. These factors combined to bring about this result, by reducing the federal government's willingness and ability to resist provincial demands.

E. Evaluating the Intergovernmental Safeguards

The two examples discussed in the previous section illustrate the role that the intergovernmental safeguards of federalism can and do play in safeguarding provincial jurisdiction. The examples illustrate the various opportunities that the intergovernmental safeguards provide to the provinces to oppose federal initiatives. These opportunities arise both pre-enactment

³⁶⁸ Compare Harrison, note 178, above; and Harrison, note 323, above. Harrison argues that “the balance of federal and provincial roles ... in the environmental field have evolved primarily in response to trends in public opinion concerning the environment”: Harrison, note 323, above, 212-13. Harrison’s account turns on the assumption that political decision-making is motivated primarily by a concern for re-election. It makes little allowance for the possibility, supported by scholarship in Canada and the United States, that political decision-making may have other motivations, such as a desire to satisfy ideological commitments: see note 115, above. (Although interestingly, Harrison appears to accept that “public officials’ personal commitments to environmental values may *at times* outweigh their political calculus”: note 323, above, 314 [emphasis added]). Harrison’s account also treats federal decision-making in relation to environmental protection as if it occurs in a vacuum, isolated from federal decision-making in other areas. And yet, the Accord and sub-agreement were worked out around the same time that federal ALMP was being devolved to the provinces. There is general agreement in the literature that this occurred because the federal government was anxious to satisfy provincial demands. Harrison fails to acknowledge this claim, either to challenge or to distinguish it.

(as the EA example shows) and post-enactment (as both the ALMP and EA examples show). The examples also illustrate the resources that may be available to the provinces when they utilize the intergovernmental safeguards to oppose federal initiatives. The resources that are available vary by situation, and include the threat of secession, provincial capacity, interest group opposition, and public opinion. The examples also illustrate the interaction between the courts and the intergovernmental safeguards. At times, the provinces utilize the intergovernmental safeguards in concert with, or after launching an unsuccessful, judicial challenge (as the EA example shows), but in other cases, the intergovernmental safeguards of federalism function as an alternative to a judicial challenge (as the ALMP example shows). Finally, the examples illustrate the potential impact of the intergovernmental safeguards. In some cases, the intergovernmental safeguards may be mobilized to curtail federal initiatives (as the EA example shows), while in other cases they may be mobilized to block specific federal initiatives, or to push the federal government to the margins in specific regulatory areas more generally (as the ALMP example shows).

Two examples may seem insufficient to provide any comfort that the intergovernmental safeguards play anything more than a marginal role in safeguarding provincial jurisdiction. However, a similar story could be, and in some cases has been, told about a variety of other situations where

the provinces looked beyond the courts to the intergovernmental process to limit or block perceived federal encroachments. For example, the Supreme Court has alluded – quite rightly, in my view – to the possibility that there are political forces that restrain the federal government from utilizing the long-unused federal disallowance and declaratory powers – powers that, if they were revived, could pose a serious threat to provincial jurisdiction, particularly since, when they were used, the courts showed little interest in imposing limits on their use.³⁶⁹ These various examples, taken together, provide strong evidence that there are political safeguards of federalism in Canada that play a key role in safeguarding provincial jurisdiction.³⁷⁰

However, there are also good reasons to give only ‘two cheers’ to the intergovernmental safeguards as safeguards of provincial jurisdiction.³⁷¹

First, the provinces are not always inclined to mobilize the

³⁶⁹ See note 49, above. For brief discussions of both powers, including references to resources that chart their demise, see Hogg, note 48, above, secs. 5.3(e), 5.3(i). See also, for additional examples, Simeon, note 54, above, ch. 3 (discussing the negotiation of the Canada and Quebec pension plans); and McRoberts, note 181, above, ch. 3 (discussing how various provinces were able to “thwart federal action” in relation to the National Energy Policy, direct grants to municipalities, and direct grants to universities).

³⁷⁰ Even if the provinces are unsuccessful in mobilizing the intergovernmental safeguards to limit or rebuff a federal initiative, this is not necessarily the end of the matter. The provinces may have other opportunities to limit or rebuff a federal initiative as it is implemented or enforced, especially, but not only, if they are called upon to play a role in implementing or enforcing the initiative. These ‘administrative safeguards of federalism’ provide the provinces another, more subtle, line of defence, outside the courts, against perceived federal encroachments. Their potential as political safeguards has been explored in the United States (see, e.g., Bulman-Pozen and Gerken, note 198, above; and Nugent, note 40, above, ch. 5), but not in Canada. I put off a discussion of them to future work.

³⁷¹ With apologies to Ernest Young: see note 69, above.

intergovernmental safeguards of federalism to resist federal encroachments. The provinces, particularly Quebec, regularly do complain about federal initiatives that they regard to encroach on provincial jurisdiction.³⁷² This may give the impression that the provinces are always vigilant about federal encroachments.³⁷³ And yet, as various scholars have noted, there are situations in which federal encroachments go unchallenged by all or most of the provinces.³⁷⁴ In these situations, the provinces may prefer to reach a negotiated settlement with the federal government, which may only seek to limit the extent of the federal encroachment. The provinces may passively tolerate or actively support the federal encroachment.³⁷⁵ Or, the provinces may have different preferences, and thus disagree about how to respond.

The provinces may resist federal encroachments for a variety of

³⁷² Hogg and Wright, note 116, above, 346-47; and Choudhry (2003), note 48, above, 82 (“provincial claims have often been framed in the language of jurisdiction, with federal initiatives often opposed by the provinces not merely as being unwise on public policy grounds, but also as representing unconstitutional intrusions [on] provincial competence”).

³⁷³ See *Siemens v. Man.* [2003] 1 S.C.R. 6, para. 34 per Major J. (suggesting “that both federal and provincial governments guard their legislative powers carefully”).

³⁷⁴ See, e.g., P.E. Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968), 137 (documenting the “sometimes subtle, sometimes brazen, and usually tolerated encroachments by one government upon the jurisdiction of the other”); R.A. Young et al., “The Concept of Province Building” (1984) 17 *Can. J. Pol. Sc.* 783, 787-90 (noting “federal incursions have been accepted” in various regulatory areas).

³⁷⁵ And in fact, in some cases, some provinces may actively seek to initiate, rather than passively tolerate or actively support, what other provinces regard as federal encroachments. This possibility has been acknowledged and explored in the United States: see, e.g., Baker and Young, note 36, above, 109-12, 117-28. However, to my knowledge, it has not been explored, at least in any detailed way, in the Canadian federalism literature.

reasons.³⁷⁶ They may do so for principled reasons, out of concern for the protection of the federal system specifically or the Constitution more generally. They may do so for short-term instrumental reasons. For example, the provinces may view a federal encroachment as improper credit claiming, an attempt to steal the provinces' thunder by pursuing politically-popular initiatives that fall within politically-profitable areas of provincial jurisdiction, like health; or they may oppose a federal encroachment to advance the ideological or programmatic goals of provincial leaders. Finally, the provinces may do so for more long-term, rather than short-term, instrumental reasons, in order to avoid "the risk of creating a precedent that will be problematic", from either a programmatic or strategic perspective, "when the next (not so appealing) federal initiative comes around".³⁷⁷

However, the incentive that these sorts of considerations may provide the provinces to resist federal encroachments may be counterbalanced by a variety of other considerations. For example, a province may be reluctant to oppose federal encroachments that are popular with the electorate, in order to avoid the possible political backlash or the opportunity cost, measured in time, money, and political capital, which may

³⁷⁶ The discussion in the next two paragraphs draws heavily from Simeon, note 54, above, ch. 8 (discussing Canada); and D. Levinson, "Empire-Building Government in Constitutional Law" (2005) 118 Harv. Law Rev. 915, 938-944 (discussing the U.S.).

³⁷⁷ M.A. Adam, "The Spending Power, Co-operative Federalism, and Section 94" (2008) 34 Queen's L.J. 175, 219 (suggesting "a good deal of intergovernmental energy on the part of the provinces is spent curbing [federal] initiatives to prevent future invasions").

be incurred, or it may be happy to ‘pass the buck’, tolerating or even encouraging federal encroachments in order to avoid the political risk involved in addressing issues that are politically fraught in a particular province.³⁷⁸ A province may be reluctant to oppose federal encroachments for ideological or programmatic reasons, where the substance of a federal initiative is consistent with the ideological or programmatic commitments of provincial leaders. A province may be reluctant to oppose federal encroachments that will inject federal money into their province; this is particularly true of the poorer (and usually smaller) provinces that rely heavily on federal money for programs and services. A province may be worried that its opposition to a federal encroachment in one area will have consequences in other areas with federalism implications. Or, a province may fail to resist a federal encroachment simply because it does not regard a federal initiative to encroach on provincial jurisdiction, due to a good faith, but mistaken, interpretation of the division of powers. These (and no doubt other) considerations will color the way the provinces view, and determine whether the provinces decide to oppose, particular federal encroachments.

The reluctance of the provinces to oppose federal encroachments in some situations is a problem for the intergovernmental safeguards of federalism as safeguards of provincial jurisdiction. The intergovernmental

³⁷⁸ On passing the buck, see Harrison, note 178, above.

safeguards are, by definition, government-focused, and they will obviously not play a role in limiting or preventing federal encroachments in those situations where the provinces are reluctant to, or do not, mobilize them for this purpose. In addition, even if some provinces do decide to challenge a federal encroachment, the ability of those provinces to exploit the intergovernmental safeguards may be compromised if some provinces stay neutral or even actively support the federal government. The lack of a common front may reduce the leverage of the opposing provinces, by calling into question the credibility of their opposition, and undermining their ability to justify their opposition to their voters; or it may simply deny the provinces an advantage that they otherwise may enjoy where they work together.³⁷⁹ This is a concern that is often voiced by and within Quebec: that Quebec's attempts to protect its distinct society are undermined, not only by the federal government, but also by the other provinces, since they "do not want the kind of decentralization or responsibilities that Quebec does".³⁸⁰

Second, even if all or some of the provinces do decide to mobilize the intergovernmental safeguards of federalism in response to potential or actual federal encroachment, there is no guarantee that they will succeed. The ability of the provinces to mobilize the intergovernmental safeguards to

³⁷⁹ See further Part (III)(C)(f), above.

³⁸⁰ See Facal, note 104, above, 221-222. See further Part III(C)(g), above.

limit or rebuff federal encroachments will turn in any given case on whether the provinces have sufficient leverage and utilize it effectively. I described what I take to be the sources of leverage that are most likely to be available to the provinces earlier in this part.³⁸¹ As noted above, it is difficult (and perhaps impossible) to provide a general conclusion about the strength of the intergovernmental safeguards: difficult because more research is needed that considers a wider range of policy areas, and that tests when and where these sources of leverage are most likely to be available; perhaps impossible because “each policy generates its own constellation of supporters and opponents, takes place in a particular political, cultural, social and economic context, and is driven by complex factors that may be difficult for the scholar to discern.”³⁸² However, it is clear that there will be situations where the provinces lack the requisite leverage, or utilize their leverage ineffectively, giving the federal government the upper hand. The sources of leverage identified in this article are all contingent in nature, subject to changes in the larger political, social or economic circumstances, and thus the provinces sometimes ‘win’ and sometimes ‘lose’ when they mobilize the intergovernmental safeguards to limit or rebuff federal encroachments.

Third, and relatedly, even if there are periods during or issues on

³⁸¹ See Part III(C), above.

³⁸² Nugent, note 40, above, 217.

which the intergovernmental safeguards work to safeguard provincial jurisdiction reliably, there is no guarantee that this will not change. The intergovernmental safeguards are not formally constitutionally entrenched, and thus the nature of the intergovernmental safeguards and the role they play in protecting provincial jurisdiction are politically contingent. It is not necessarily a bad thing that federalism safeguards allow the division of powers a certain amount of flexibility to adapt to new or changed circumstances.³⁸³ The need for this sort of flexibility is, of course, one of the key arguments offered in support of a ‘living tree’ approach to constitutional interpretation.³⁸⁴ However, the flexibility of the intergovernmental safeguards is also a potential disadvantage, if the concern is with safeguarding provincial jurisdiction, because there is no guarantee that intergovernmental safeguards that work to safeguard provincial jurisdiction reliably in some periods and on some issues will not become unreliable, due to changing circumstances. This is a risk with all federalism safeguards that are not constitutionally (or at least politically) immunized from changes that may undermine their efficacy as federalism safeguards.

Finally, even if there are periods during or issues on which the intergovernmental safeguards work generally to the advantage of the

³⁸³ See Bednar, note 141, above, 181-191 (discussing the need for experimentation and adjustment that allows the division of powers to respond to new or changed circumstances).

³⁸⁴ See Hogg, note 48, above, sec. 15.9(f) (discussing ‘progressive interpretation’).

provinces, it is not clear that this is necessarily a good thing. The intergovernmental safeguards ultimately rely on the federal government and the provincial governments to define what counts as a federal encroachment, although their views will undoubtedly be informed by what the courts have had to say on the topic. The provinces may be overzealous in defining what counts as a federal encroachment, for the sorts of reasons referred to earlier.³⁸⁵ The political system may act as a brake on provinces that get too far out of line with the electorate in opposing federal initiatives, but there is no guarantee that this will occur, particularly if the residents of one or more provinces identify primarily or even exclusively with their provincial government, and are willing to “forgive or ignore (or even reward) its opportunistic behavior, or be blind to it altogether”.³⁸⁶

These are good reasons to give only ‘two cheers’ to the intergovernmental safeguards of federalism, but it would be a mistake, in my view, to take them as reasons to dismiss the intergovernmental safeguards altogether. Many scholars (often, but not exclusively, from Quebec) insist that the courts have not done enough to protect provincial jurisdiction; some of these scholars have charged the courts with having a

³⁸⁵ See the text accompanying notes 377-78, above.

³⁸⁶ Bednar, note 141, above, 112.

centralist bias.³⁸⁷ The intergovernmental safeguards should provide some comfort to these scholars because, as the EA example shows, they provide an alternate way for the provinces to challenge federal initiatives that have been upheld by the courts. In addition, even if this complaint is overblown, as I believe that it is,³⁸⁸ the courts do have finite resources, and it may take a while for federal encroachments to make their way into the courts, if they make it there at all. The intergovernmental safeguards may play a role in these situations. Finally, even if the intergovernmental safeguards do fall short in some cases, there are cases in which they can and do have real impact. The intergovernmental safeguards can play a role, not only where there are existing judicially-defined limits, but also where, as is increasingly the case, the federal and provincial governments share de jure or de facto jurisdiction, or the courts have not been asked, or have refused, to intervene.

CONCLUSION

There is a dearth of legal scholarship in Canada that explores whether there are political safeguards that protect provincial jurisdiction in Canada's federal system. Some legal scholars have suggested that there are aspects of the political process that protect provincial jurisdiction from

³⁸⁷ See Hogg, note 192, above (identifying several scholars that make this claim about bias, and challenging the claim's accuracy); see also A. Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26 Can. J. Pol. Sc. 3.

³⁸⁸ Hogg and Wright, note 116, above, 347-351 (making this argument).

federal encroachments, but the majority of legal scholars seem skeptical that these political safeguards exist – or if they do, that they are especially robust. The federal government, the view seems to be, has and will typically come out on top in disputes with the provinces over jurisdiction in the political arena, outside the courts. And yet, neither of these views has been defended in the legal scholarship in any sustained, systematic manner.

This article considers whether there are political safeguards of Canadian federalism – arguing that there are. It argues that these political safeguards do not arise from the sorts of intragovernmental safeguards that some scholars have emphasized in the United States, like the Senate. It argues, rather, that these political safeguards arise primarily from the intergovernmental apparatus. It describes the institutional capacity, opportunities and leverage that these intergovernmental safeguards provide to safeguard provincial jurisdiction. It does not argue that these intergovernmental safeguards provide the provinces with a sure-fire veto over federal policy-making – and in fact it questions whether this would be desirable. It argues, rather, that, in some cases, these intergovernmental safeguards do provide the provinces the means to check federal overreach and influence federal policy, by frustrating federal initiatives altogether in some cases, and influencing their design and implementation in others. The qualified nature of this conclusion may strike some as unsatisfying, but in

my view, it accurately captures the complexities and nuances of how provincial jurisdiction fares in practice in Canada's federal system today.

The Supreme Court of Canada in recent years has embraced an approach to judicial review of the division of powers that defers (although not entirely, as recent cases show) to the political branches; that tolerates (even celebrates) de facto shared jurisdiction; and that attempts to facilitate 'cooperative federalism'. The promise and pitfalls of the Court's approach remain to be examined. This article suggests that the starting point for any such examination should not be the claim that, outside of the courts, the provinces are typically helpless to stop the federal government from expanding the jurisdiction that it controls at the expense of the provinces.

THIRD ARTICLE:
COURTS AS FACILITATORS:
INTERGOVERNMENTAL DIALOGUE, DEFERENCE AND
JUDICIAL REVIEW OF THE DIVISION OF POWERS IN CANADA

There are two metaphors that have often been used in Canada, by the courts and legal scholars, in discussing the role the courts do and should play in cases involving the federal-provincial division of powers: umpire and arbiter.¹ These two metaphors have usually been used, interchangeably, to convey the image of courts that do, and should, play the exclusive, or at least decisive, role in clarifying and enforcing any jurisdictional constraints, and of political branches that do, and should, play at most a secondary role, by ensuring that their initiatives respect these jurisdictional constraints, and looking to the courts if they prove unclear, or a dispute about them arises.

The image conveyed by these metaphors sits uncomfortably with the way that Canada's federal system operates in practice. The courts play an important role in the division of powers context, but the political branches also play an important, but often underappreciated, role as well – not only by deciding which initiatives to pursue, and how, but also by working out their own solutions, in the intergovernmental arena, where questions arise

¹ For further discussion, with references, see Part I(A), below.

about how jurisdiction is and should be allocated.² The umpire and arbiter metaphors obscure the role that the political branches play in this regard.³

The image conveyed by these metaphors also sits uncomfortably with the way that the Supreme Court of Canada now seems to envision its role. The umpire and arbiter metaphors cast the courts in the role of clarifier and enforcer in chief. However, in its recent division of powers decisions, the Court has regularly cast itself in a different role: as a *facilitator* of “cooperative federalism”.⁴ In this role, the Court appears to be concerned, primarily, with encouraging the federal and provincial governments to work out their own mutually acceptable allocations of jurisdiction, and rewarding them where they do so, and only secondarily with trying to clarify and enforce jurisdictional constraints. The Court has not completely abandoned an umpire or arbiter role, a fact that recent decisions, imposing constraints on both federal and provincial jurisdiction, make abundantly clear.⁵ But, the Court only seems to be interested in playing this role in cases where there is intergovernmental disagreement about an allocation of jurisdiction. The

² For further discussion, see Parts I(C)(a), and II(A), below.

³ This might not seem true of arbiter, which may evoke arbitration, which occurs when negotiations break down. However, the two terms usually seem to be used interchangeably.

⁴ For references, see Parts I(B) and I(C)(b), below. See also W.K. Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada” (2010) 51 S.C.L.R. (2d) 625 (identifying and discussing this role). (This article is included as part of this dissertation: see “First Article”.)

⁵ For further discussion of these decisions, with references, see Part I(B)(b), below.

precise impact that “cooperative intergovernmental efforts” have on the Court’s decision-making is difficult to pinpoint; the Court has insisted that they cannot “override or modify” the division of powers.⁶ And yet, the impression that emerges is of a Court that is very reluctant to interfere with such cooperative efforts, and thus is inclined to defer to them, at least to some extent. Unlike the primary decision-making role that courts seem expected to play as umpires or arbiters of the division of powers, this seems to cast the courts in a secondary role, as facilitators that encourage, accommodate, and reward mutually agreeable allocations of jurisdiction.

There is a dearth of legal scholarship that critically evaluates the facilitative role adopted by the Court in these recent decisions. There is scholarship that identifies the Court’s references to facilitating cooperative federalism,⁷ but this scholarship is generally either descriptive or focused on a critical analysis of judicial doctrine, with limited discussion of the broader theoretical issues that this facilitative role raises.⁸ The facilitative role

⁶ *Reference re Securities Act* [2011] 3 S.C.R. 837, paras. 58-62.

⁷ See, e.g., E. Brouillet, “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” (2011) 54 S.C.L.R. (2d) 601, 616-17.

⁸ The most notable exception is R. Schertzer, *Judging the nation: The Supreme Court of Canada, federalism and managing diversity* (Ph.D. Diss., The London School of Economics, 2012). Schertzer, a political scientist, defends the facilitative role embraced by the Court, focusing on its capacity to address, or mitigate, reasonable pluralism concerns. Schertzer’s work resonates with the recent work of Hoi Kong: “Beyond Functionalism, Formalism and Minimalism: Deliberative Democracy and Decision Rules in the Federalism Cases of the 2010-2011 Term” (2011) 55 S.C.L.R. (2d) 355. However, Kong argues that

embraced by the Court is thus ripe for deeper examination.⁹ This sort of deeper examination seems particularly timely, because the implications of this facilitative role have become the subject of heated debate, among litigants¹⁰ and, in recent decisions, among the members of the Court itself.¹¹

This article responds to this gap in the literature, by critically evaluating the idea that the courts should play a facilitative role that casts them as facilitators of “cooperative federalism” – or what I call “intergovernmental dialogue”.¹² In doing so, it focuses largely on the idea that the courts should defer to intergovernmental dialogue where it occurs.¹³ It focuses largely on this idea, because it is the primary, and most obvious, way that this facilitative role manifests in the Court’s decision-making, and

courts should “construct ... doctrine with the aim of facilitating deliberation about the constitutional values of federalism” (*id.*, 368), not intergovernmental negotiation. He also appears to envision a more active role for the courts in protecting (provincial) jurisdiction.

⁹ Katherine Swinton alluded to the idea that the courts should play a facilitative role, before the Court took up the idea, but did not develop the idea: see “Federalism Under Fire: The Role of the Supreme Court of Canada” (1992) 55 L. & Contemp. Probs. 121, 138.

¹⁰ See *Marine Services International v. Ryan Estate* 2013 SCC 44 (Attorney General of Canada’s Factum, para. 99) (“In division of powers litigation [since 2007] much has been made of the objective of ‘co-operative federalism’ by both provinces and the federal government depending on the particular outcome sought in the specific case”).

¹¹ For further discussion, with references, see Part I(B)(b), below

¹² By intergovernmental dialogue, I mean situations where there is federal-provincial agreement, policy-focused or court-focused, about an allocation or exercise of jurisdiction: for further discussion, see Part I, below; see also Wright, note 4, above, 629-28.

¹³ By deference, I mean an approach that treats intergovernmental dialogue as either: a) a conclusive reason to refrain from interfering with an initiative; or b) a persuasive but not a conclusive reason to refrain from doing so. See Parts I(C)(b) and III(D)(c), below.

the thinking underlying it (that, as facilitators, the courts should encourage, accommodate and reward intergovernmental dialogue by refusing to interfere with it where it occurs) is central to this facilitative role. A detailed examination of the idea thus provides a useful way to expose and explore the promise and pitfalls of this facilitative role. However, the article also reflects briefly on the Court's facilitative role as a whole in the conclusion.

The article argues that, despite its surface appeal, the courts should be reluctant to embrace the idea of deferring to intergovernmental dialogue. It highlights the arguments that seem to weigh in favour of the idea, and it then proceeds to demonstrate why they do not hold up – well or at all – when subjected to closer critical scrutiny. It argues that it is far from obvious that the idea addresses the argument that judicial review is necessary to safeguard (especially provincial) jurisdiction, since political branch actors are not necessarily always inclined to safeguard the jurisdiction of their governments, or adequately equipped to do so. It argues that the extent to which the idea answers the criticism from democracy is open to question, since various democratic concerns can be raised about intergovernmental dialogue as well. It argues that it is far from obvious that the idea addresses, or even mitigates, the criticism from reasonable pluralism and institutional competence, since the courts would have to decide when, to whom, and how much to defer, raising precisely the sorts of

choices that underlie these criticisms. Finally, it argues that the idea raises a variety of new concerns, including about stability and predictability.

The ideas explored in the article resonate with the literature exploring process-based approaches to constitutionalism. There is a growing body of literature in Canada that highlights the extent to which the Court in recent decades has turned to “creatively designed procedures to address difficult and potentially divisive substantive problems” in a variety of different constitutional contexts.¹⁴ This turn to process corresponds with the rich body of scholarship developing process-based theories of constitutionalism.¹⁵ The facilitative role discussed in this article, which seems to cast courts as catalysts for intergovernmental dialogue, rather than as elaborators and enforcers that impose specific outcomes, is in keeping with this turn to process.¹⁶ This article explores the potential and pitfalls of this role, and in doing so, engages with and contributes to the debate in the scholarship about process-based theories of constitutional interpretation.

The ideas explored in the article also resonate with the literature exploring shared and dialogic theories of constitutional interpretation. This

¹⁴ L. Sossin, “The McLachlin Court and the Promise of Procedural Justice”, in A. Dodek and D.A. Wright, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011), 58 (providing an overview). See also C. Sheppard, “Inclusion, Voice and Process-Based Constitutionalism” (2013) 50 Osgoode Hall L.J. 547 (same).

¹⁵ For brief overviews, see, e.g., Sossin, previous note; and Sheppard, previous note.

¹⁶ On “courts as catalysts”, see J. Scott and S. Sturm, “Courts as Catalysts: Re-Thinking the Judicial Role in New Governance” (2006) 13 Colum. J. Eur. L. 565.

large and growing body of literature challenges traditional court-focused theories of constitutional interpretation, by exploring the role that non-judicial actors do and should play in interpreting the Constitution.¹⁷ For example, the theory of *Charter* dialogue challenges the traditional view that the courts have the last word when they strike down laws on *Charter* grounds, and considers whether this does and should have implications for the role that judges play in *Charter* cases.¹⁸ Similarly, legal pluralism and new governance scholars, in both Canada and abroad, have also highlighted how non-judicial actors do and could play a role in interpreting and applying constitutional norms.¹⁹ The facilitative role discussed in this article echoes with the ideas explored in this literature, setting up a three-way dialogue of sorts about the division of powers in which the courts and

¹⁷ For an excellent overview (circa 2006/2007) of these theories, albeit with a focus on Canada and the U.S., see C. Bateup, “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue” (2005-06) 71 *Brook. L. Rev.* 1109; and C. Bateup, “Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective” (2007) 21 *Temp. Int. & Comp. L.J.* 1.

¹⁸ See, e.g., P.W. Hogg & A.A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 71; and K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001). For my own contribution to this debate, see P.W. Hogg, A.A. Bushell Thornton, and W.K. Wright, “*Charter* Dialogue Revisited – Or ‘Much Ado About Metaphors’” (2007) 45 *Osgoode Hall L.J.* 1. For commentary on the theory of *Charter* dialogue, see, e.g., the articles in (2007) 45 *Osgoode Hall L.J.*, at 67-191.

¹⁹ See, e.g., R. Macdonald and R. Wolfe, “Canada’s Third National Policy: The Epiphenomenal or the Real Constitution?” (2009) 59 *U.T.L.J.* 469 (adopting a legal pluralism perspective); and C. Ford, “In Search of the Qualitative Clear Majority: Democratic Experimentalism and the *Quebec Secession Reference*” (2001) 39 *Alta. L. Rev.* 511 (adopting a new governance perspective). See also S. Choudhry and R. Howse, “Constitutional Theory and The *Quebec Secession Reference*” (2000) 13 *C.J.L.J.* 143 (noting the shared interpretive role contemplated in the *Quebec Secession Reference*).

federal and provincial political actors all play a role. This aspect of these decisions has yet to be explored, at least in any detailed way.²⁰ This article begins this exploration, and in doing so, engages with and contributes to this debate about shared or dialogic theories of constitutional interpretation.

The article is organized in three parts. In Part I, I set the stage for a critical examination of the idea that the courts should defer to intergovernmental dialogue. In Part II, I attempt to unpack why the Court appears to be attracted to the idea, by considering the arguments that have been, or can be, offered in support of it. In Part III, I consider the problems that emerge when the idea is exposed to deeper scrutiny. I conclude by considering where the courts should go from here, including by identifying several reasons to be sceptical of the Court's facilitative approach as a whole, and, with an eye to future research, by briefly illustrating why it may be premature for the courts to dismiss facilitative approaches altogether.

I. Intergovernmental Dialogue in the Supreme Court

This part sets the stage for the discussion of the idea that courts

²⁰ But see E. Brouillet & Y. Tanguay, "The Legitimacy of the Constitutional Arbitration Process in a Multinational Federative Regime" (2012) 45 U.B.C. L. Rev. 47, 92-5 (suggesting, without reference to this facilitative role, that dialogue theory does not apply in the division of powers context); and D. Greschner, "The Supreme Court, Federalism, and Metaphors of Moderation" (2000) 79 Can. Bar Rev. 47, 73-4 (same).

Legal scholars in the United States have been more active in applying process and shared theories of constitutional interpretation in the federalism context: see, e.g., E. Young, "Two Cheers for Process Federalism" (2001) 46 Vill. Law Rev. 1349; and E. Ryan, *Federalism and the Tug of War Within* (Oxford: Oxford University Press, 2012).

should defer to intergovernmental dialogue in Parts II and III. I situate the idea, by describing the conventional role that the courts are allocated as umpires or arbiters of the division of powers, and describing and contrasting it with the facilitative role that the Court has embraced in its recent division of powers decisions. This is important, because the idea of deferring to intergovernmental dialogue is one of the central elements of this facilitative role. I then describe how the idea manifests in the Court's decisions.

I pieced together an account of this facilitative role from the Court's decisions in a previous article.²¹ I draw here on that earlier article in describing this facilitative role. However, after that article was published, in 2010, the Court released several decisions that sent mixed signals about its commitment to, and the implications of, this facilitative role. Accordingly, I augment that earlier account with a brief discussion of these decisions, with an eye to revealing what they may have to tell us about this facilitative role.

A. The Conventional Role: Courts as Umpires or Arbiters

There appears, at first sight, to be little agreement in the Canadian legal scholarship about the role that the courts should play in division of powers cases. Some argue, for example, that the courts should favour a "classical paradigm" that emphasizes exclusive areas of federal and provincial jurisdiction, while others argue that the courts should favour a

²¹ Wright, note 4, above.

“modern paradigm” that embraces more de facto overlap in jurisdiction.²² Similarly, some argue that the courts should favour federal jurisdiction, while others argue that the courts should favour provincial jurisdiction, in both cases often invoking particular textual and historical sources, judicial precedents, and instrumental values (like efficiency or cultural diversity) in support.²³ And yet, there are actually significant points of agreement in the legal scholarship about the role that courts should play in division of powers cases. These points of agreement are important, because they frame much of the debate in Canada about judicial review of the division of powers.

First, there is fairly general agreement in the legal scholarship that the courts have an important – indeed essential – role to play as umpires or arbiters of the division of powers.²⁴ There are exceptions, to be sure, but these remain just that – exceptions.²⁵ Indeed, this idea appears to be so well

²² Compare B. Ryder, “The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations” (1991) 36 McGill L.J. 308 (defending a combination of both); with L. Sossin, “Can Canadian Federalism Be Relevant?”, in A. Anand, ed., *What’s Next for Canada?: Securities Regulation After the Reference* (Toronto: Irwin Law, 2012), 105 (“exclusivity should ... be the exception”).

²³ P.W. Hogg and W.K. Wright, “Canadian Federalism, The Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005) 38 U.B.C. L. Rev. 329 (describing this debate in more detail); and Ryder, note 22, above, 319 (same).

²⁴ P. Russell, “Constitutional Reform of the Canadian Judiciary” (1969) 7 Alta. L.R. 103, 123 (“both in the popular imagination and the view of most Canadian statesmen, the primary role of the ... [Court] is to act as the final arbiter of the Constitution or the ‘umpire of the federal system’”); and Schertzer, note 8, above, 68 (“the role of the judiciary as the enforcer of the constitutional order is generally accepted”). See also note 34, below.

²⁵ P. Weiler, *In The Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974), ch. 6 (arguing that division of powers disputes should be

accepted by legal scholars that it is usually simply taken for granted.²⁶

Second, there is also fairly widespread agreement that, as umpires or arbiters, the role of the courts is to clarify and enforce hard lines or boundaries defining the 'scope' or 'limits' of federal and provincial jurisdiction, and distinguishing valid (*intra vires*) from invalid (*ultra vires*) federal and provincial initiatives. There are, to be sure, significant disagreements as to *where* these lines or boundaries should be drawn. But, it is generally accepted that there are hard lines or boundaries, and that the primary role of the courts, as umpires or arbiters, is to engage in a line-drawing exercise that clarifies and enforces them. The term *division of powers*, which is the term that is usually used in discussions of federalism in the legal scholarship in Canada, reflects this fundamental assumption.

Third, there is also widespread agreement that, as umpires or arbiters, the word of the courts in defining the scope or limits of federal and provincial jurisdiction is, or at least should be, decisive. Here again, there

resolved through “continual negotiation and political compromise”); and P. Monahan, “At Doctrine’s Twilight: The Structure of Canadian Federalism” (1984) 23 U.T.L.J. 47 (arguing that division of powers disputes should be left to “political processes”); contrast P. Monahan, *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), ch. 10 (suggesting that a role for the courts may not be much of a problem after all, since federalism decisions usually have little impact in practice). See also A.W. MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” (2001) 80 Can. Bar Rev. 241 (defending a different metaphor – courts as “players”).

²⁶ See K. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990), 21 (making this point); and B. Ryder, “The End of Umpire?: Federalism and Judicial Restraint” (2006) 34 S.C.L.R. (2d) 345, 347 (making this point more recently).

would seem to be disagreements about what this entails, although the extent of these disagreements is unclear, because the issue is rarely addressed openly.²⁷ Most legal scholars take the view that the courts should have at least the primary and final word, in the sense that what the courts have to say is binding on the political branches;²⁸ but many legal scholars also appear to take the view that the courts should have the exclusive, not simply final, word.²⁹ The political branches, it seems, may play a role in ‘setting’ the de facto division of powers, by deciding which initiatives to pursue and how, but in doing so, they must operate *within* the constitutional constraints clarified and enforced by the courts. They do not participate in clarifying and enforcing these constraints, or if they do, they are certainly not free to ignore the courts, unless a formal constitutional amendment is secured.

Finally, and related to the third point, there is also general agreement that the lines or boundaries of federal and provincial jurisdiction are or should be relatively fixed and stable. It is, of course, well accepted that the political branches may alter the lines or boundaries of federal and provincial

²⁷ The *Charter* legal scholarship has discussed the issue more: see, e.g., B. Slattery, “A Theory of the Charter” (1987) 24 *Osgoode Hall L.J.* 701; and the sources in note 18, above.

²⁸ This would appear, for example, to be Donna Greschner’s view: see note 20, above, 74 (“the umpire’s decision is final”); see also the two sources cited in note 24, above.

²⁹ Choudhry and Howse, note 19, above, 151, 53 (describing this view as an ‘intuition’ “held by the various actors in the Canadian constitutional scheme ... in a systematic way”); D. Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen’s University Press, 2010), 39 (noting the “generally accepted view that the judiciary is assigned the exclusive power to interpret the constitution”).

jurisdiction through formal constitutional amendments. It is also fairly well accepted, at least in Canada, that the courts do and may alter these lines or boundaries in the process of interpreting its ‘living’ Constitution in new or changed circumstances.³⁰ However, the general expectation is for fixity and stability over time.³¹ This expectation is captured in the regular references to the Constitution, including the division of powers, as “supreme”, “entrenched” and “enshrined”, all of which suggest “a certain permanence or unchanging character”.³² Accordingly, the political branches may not alter the lines or boundaries of federal and provincial jurisdiction in the ordinary course of politics; they must resort to the extraordinary process of securing a formal constitutional amendment. And the courts are expected to act cautiously in adapting the lines or boundaries of federal and provincial jurisdiction to new or changed circumstances; the division of powers may be a “living tree”, but it is a living tree with firm roots, or “natural limits”.³³

³⁰ P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007+), sec. 15.9(f).

³¹ See, e.g., W. Lederman, “Unity and Diversity in Canadian Federalism” (1975) 53 Can. Bar Rev. 597, 607-8 (suggesting the “balance of subjects” should remain “stable – reasonably constant – subject only to a process of gradual changes when these are rendered truly necessary by the demands of the conditions in our society from time to time”).

³² G.C.N. Webber, *The Negotiable Constitution* (Cambridge: Cambridge University Press, 2009), 30-1 (making this point, albeit with reference to rights-oriented provisions).

³³ This idea is drawn from *Edwards v. A.-G. Can.* [1930] A.C. 114, 136, per Lord Sankey (P.C., Can.) (suggesting that “the B.N.A. Act [now the *Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits”).

B. Embracing a New Role: Courts as Facilitators

a. The Emergence of Courts as Facilitators

Legal scholars are not, of course, unique in embracing the idea that courts should function as umpires or arbiters of the division of powers. The courts, including the Supreme Court of Canada, have also embraced the idea.³⁴ And, like legal scholars, the courts have often simply taken this idea for granted.³⁵ Much of the legal scholarship about the division of powers has focused on assessing the courts' performance as umpires or arbiters.

The new facilitative role discussed in this article emerged gradually, and with little fanfare. This new role appears to have its roots, in part, in the highly deferential approach adopted by the Court in its division of powers cases in the 1990s and early 2000s.³⁶ It also appears to have its roots, in part, in the process-based approach that the Court has adopted in constitutional decisions in a variety of other contexts; these decisions cast the courts as catalysts for consultation (as in the Aboriginal rights 'duty to

³⁴ See, e.g., *The Queen v. Beaugard* [1986] 2 S.C.R. 56, para. 27 ("courts emerged as the ultimate umpire of the federal system"); *Reference re Remuneration of Judges of the Provincial Court of P.E.I.* [1997] 3 S.C.R. 3, para. 124 ("arbiter"); *Canadian Western Bank v. Alta* [2007] 2 S.C.R. 3, para. 24 ("final arbiters of the division of powers"); and *Securities Reference*, note 6, above, paras. 55-57 ("arbiter"; "final arbiter"). And generally, see, e.g., *N.S. v. Martin* [2003] 2 S.C.R. 504, para. 31 ("final arbiters of constitutionality").

³⁵ See, e.g., *Northern Telecom Canada Ltd. v. Communication Workers of Canada* [1983] 1 S.C.R. 733, 741 ("It is inherent in a federal system ... that the courts will ... control the limits of the respective sovereignties of the two plenary governments").

³⁶ For an account of this link, see Wright, note 4, above, Parts I and II.

consult' cases)³⁷ or negotiation (as in the *Quebec Secession Reference*),³⁸ rather than as elaborators and enforcers that impose particular outcomes.³⁹

As noted earlier, I pieced together a detailed account of this new facilitative role in an earlier article.⁴⁰ In doing so, I drew heavily on the Court's 2007 decision in *Canadian Western Bank v. Alberta*, because that decision provided the most detailed account of this new facilitative role.⁴¹ However, as I noted in that article, *Canadian Western Bank* simply made explicit an approach that seemed to have been quietly animating the Court's decision-making in division of powers cases for a number of years.

The facilitative role that I described in that earlier article casts the courts in two roles – one primary, the other secondary. First, and primarily, it casts the courts as facilitators of “cooperative federalism”⁴² – or what I call intergovernmental dialogue. Intergovernmental dialogue refers to mutually acceptable allocations of jurisdiction that are worked out by the political branches without judicial intervention. The courts function as

³⁷ See, e.g., *Haida Nation v. B.C.* [2004] 3 S.C.R. 511.

³⁸ *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

³⁹ See Schertzer, note 8, above, ch. 4 (exploring the link between the Court's decision in the *Quebec Secession Reference* and its turn to a facilitative approach to judicial review of the division of powers); see also Sossin, note 14, above (exploring the Court's turn to process in a variety of different contexts); and Sheppard, note 14, above (same).

⁴⁰ Wright, note 4, above, Parts I & II.

⁴¹ See note 34, above.

⁴² For references, see Wright, note 4, above; and Brouillet, note 7, above, 616-17.

facilitators of, or catalysts for, intergovernmental dialogue, by creating the space for and encouraging it to occur, and then to some extent rewarding it where it does occur.⁴³ The principal tool that the courts use to facilitate intergovernmental dialogue is deference: judicial deference provides the opportunity, the reward, and the incentive for intergovernmental dialogue.

Second, this facilitative role casts the courts as umpires or arbiters. This is important: the courts still play a role as umpires or arbiters of the division of powers under this facilitative approach.⁴⁴ However, this role is secondary to the role that the courts play as facilitators of intergovernmental dialogue. This umpire or arbiter role is reserved primarily for those cases where the political branches fail to agree to a mutually acceptable allocation of jurisdiction, and thus there is intergovernmental disagreement about the scope or limits of jurisdiction.⁴⁵ The Court did not provide a clear sense of how much leeway that the political branches would be given where intergovernmental dialogue was involved. The Court emphasized the importance of a “certain degree of predictability with regard to the division of powers”, implying that the courts would continue to police at least some

⁴³ This resonates with new governance thinking about the role of the courts in the constitutional context: see, e.g., Scott and Sturm, note 16, above (defending a role for “courts as catalysts”); and M. Dorf, “Legal Indeterminacy and Institutional Design” (2003) 78 N.Y.U. Law Rev. 875 (defending a model of “experimentalist appellate review” in which courts create “frameworks for resolution rather than ... comprehensive blueprints”).

⁴⁴ See, e.g., *Canadian Western Bank*, note 34, above, para. 24 (“final arbiters”).

⁴⁵ For discussion of this point, see Part I(B)(b), below.

minimal substantive limits on jurisdiction, in order to ensure that the political branches do not upset the balance of power too dramatically.⁴⁶ And yet, the Court emphasized a deferential posture, coupled with jurisdictional overlap and flexibility, suggesting that they would be given a healthy amount of leeway, especially if intergovernmental dialogue was involved.

How does this theory differ from the role that the courts are expected to play as umpires or arbiters of the division of powers? The answer is, fairly significantly. Take first the idea that the role of the courts as umpire or arbiter is to engage in a line-drawing exercise, clarifying or enforcing lines or boundaries that separate federal and provincial jurisdiction. This facilitative approach casts the courts as facilitators first and umpires or arbiters second. As facilitators, the courts de-emphasize their line-drawing role, and attempt to encourage, accommodate and reward intergovernmental dialogue. They do so by tolerating large areas of overlap in jurisdiction, areas in which the political branches have the opportunity and, it is assumed, the ability to work out their own mutually acceptable allocations of jurisdiction, and by exercising caution in reviewing the allocations of jurisdiction that result. The role of umpire or arbiter is reserved primarily for cases involving intergovernmental disagreement.

Take next the idea, central to the legal scholarship and cases that

⁴⁶ See, e.g., *id.*, para. 23. See also Wright, note 4, above, 639-40.

cast courts as umpires or arbiters, that the courts do and should have the final (and perhaps exclusive) word in clarifying and enforcing the scope or limits of federal and provincial jurisdiction. This facilitative role clearly does not give the courts the exclusive word. On the contrary, by casting courts as facilitators, it seems to set up a dynamic three-way inter-institutional (court-political branch) and intergovernmental (federal-provincial) dialogue about the division of powers, a three-way dialogue in which the courts and both the federal and provincial governments all play a part. In addition, although the Court clearly did not say that the political branches do and should also have the final word, in the sense that they should have the authority to act on their own interpretations of the division of powers, even if, in doing so, this involves open disagreement with the courts, the deferential posture that the Court appears to adopt in reviewing initiatives that it perceives to manifest intergovernmental dialogue may often give the political branches the final word in practice, if not in theory.⁴⁷

Take finally the idea, central to the legal scholarship and cases that cast the courts as umpires or arbiters, that the lines or boundaries of federal and provincial jurisdiction should be fairly fixed and stable over time. This facilitative role appears to contemplate lines or boundaries of jurisdiction that are both dynamic and negotiated as well as fairly fixed and stable. The

⁴⁷ See Part I(C)(b), below.

former consist of the lines or boundaries of jurisdiction that are worked out by the political branches in designing and implementing new and existing initiatives, either alone or together; these (theoretically) more flexible lines or boundaries emerge from political processes, and can fluctuate fairly considerably over time (or not), depending on the underlying dynamics of the political process.⁴⁸ The latter consist of the lines or boundaries that are clarified and enforced by the courts as arbiters or umpires; these (theoretically) less flexible lines or boundaries determine the large area of de facto shared jurisdiction where the political branches are left to work out their own allocations of jurisdiction, and the constraints they must respect in designing and implementing particular initiatives, either alone or together.⁴⁹ The extent to which the Court is prepared to allow the political branches to push against – and in doing so, shift – the lines or boundaries that it clarifies and enforces as arbiter or umpire is not entirely clear. But if, as it appears, the Court is prepared to allow these lines or boundaries to give at least somewhat in the service of ‘facilitating’ intergovernmental dialogue, these lines or boundaries may become (theoretically) more dynamic and negotiated as well – as with the previous point, in practice, if not in theory.

⁴⁸ The Court’s decision in *Canadian Western Bank* is replete with references to the need for flexibility in the division of powers: see note 34, above, paras. 31, 42, 45, 89, 123. I say theoretically because, in practice, some judicially-derived allocations of jurisdiction are quite unstable, and some politically-derived allocations of jurisdiction are quite stable.

⁴⁹ See Part III(C), below, linking this to questions about the nature of the Constitution.

b. The Return to Umpire or Arbitrator?

The Court's decisions did not provide a clear sense of how far that it was prepared to go to 'facilitate' 'cooperative federalism', but they did suggest that it was fairly unified in its commitment to this facilitative role. However, beginning in late 2009, the Court released several decisions that raised questions about its commitment to this facilitative role, or at least what it entailed. In these decisions, the Court often disagreed about the reasoning used, the result reached, or both,⁵⁰ as well as the implications of this role.⁵¹ In addition, the Court appeared to abandon its deferential posture, by imposing limits on both federal and provincial jurisdiction, suggesting a move back towards a conventional role as umpire or arbitrator;⁵²

⁵⁰ See *Consolidated Fastfrate v. Western Canada* [2009] 3 S.C.R. 407 (dividing 6-3); *Que. v. Moses* [2010] 1 S.C.R. 557 (dividing 5-4); *Que. v. Lacombe* [2010] 2 S.C.R. 453 (dividing 7-1-1); *Que. v. Cdn. Owners and Pilots Assn.* [2010] 2 S.C.R. 536 (dividing 7-1-1); *NIL/TU,O Child and Family Services Society v. B.C.G.S.E.U.* [2010] 2 S.C.R. 696 (dividing 6-3 as to reasoning only); *C.E.P.U.C. v. Native Child and Family Services of Toronto* [2010] 2 S.C.R. 737 (companion case to *NIL/TU,O*; same result); *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 (dividing 4-4-1). For an excellent overview, see B. Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Division of Powers" (2011) 54 S.C.L.R. (2d) 565, 568-71.

⁵¹ See, e.g., the discussion of *Lacombe* (cite in previous note) in the next paragraph.

⁵² See *Lacombe*, note 50, above (majority, per McLachlin C.J., finding a by-law regulating the location of aerodromes invalid and inapplicable; LeBel J. wrote a concurring opinion finding the by-law valid and applicable but inoperative; Deschamps J., dissenting, found the by-law valid, applicable, and operative); *COPA*, note 50, above (majority, per McLachlin C.J., finding a provincial land-use law prohibiting the construction of aerodromes in designated agricultural regions inapplicable; LeBel and Deschamps JJ., dissenting, found the law valid, applicable, and operative); *RAHRA*, note 50, above (4-1-4 split, finding sections of the Act invalid; LeBel and Deschamps JJ. wrote for four members of the majority; Cromwell J. wrote separately, agreeing and disagreeing in part with the majority; McLachlin C.J. wrote for the dissent); and *Securities Reference*, note 6, above (unanimous per curiam decision finding a proposed federal *Securities Act* invalid).

in doing so, the Court often divided into camps, with some members of the Court appearing to favour federal jurisdiction and others appearing to favour provincial jurisdiction.⁵³ The Court did not disagree in every division of powers case,⁵⁴ but it did so strongly and often enough to raise questions about its commitment to, or the implications of, this new facilitative role.

The Court's decision in *Quebec (Attorney General) v. Lacombe* (2010) is illustrative.⁵⁵ In *Lacombe*, McLachlin C.J., writing for seven members of the Court, held that a municipal by-law that regulated the location of private aerodromes was invalid, and even if valid, inapplicable, on the basis that it encroached improperly on federal jurisdiction over aeronautics. It was argued that the federal government had not regulated the location of aerodromes, and that if it wished to do so, it could displace any contrary provincial law, by triggering the federal paramountcy doctrine. McLachlin C.J. suggested that it would be inappropriate to place the burden on Parliament to legislate if it wished to overcome or supplement provincial

⁵³ The 'centralist' bloc typically included McLachlin C.J. and Binnie and Fish JJ., the 'decentralist' bloc Deschamps and LeBel JJ.: see Ryder (2011), note 50, above, 572.

⁵⁴ See *Can. v. PHS Community Services Society* [2011] 3 S.C.R. 134 (unanimous decision); *Securities Reference*, note 6, above (unanimous decision); *Que. v. Can.* [2011] 3 S.C.R. 635 (unanimous decision); *Tessier Ltée v. Que.* [2012] 2 S.C.R. 3 (unanimous decision); and *Marine Services Int. v. Ryan Estate* 2013 SCC 44 (unanimous decision).

⁵⁵ Note 50, above. *Lacombe* was released concurrently with *COPA* (see note 50, above). For further discussion of both cases, see, e.g., R. Elliot, "*Quebec (Attorney General) v. Lacombe* and *Quebec (Attorney General) v. C.O.P.A.*: Ancillary Powers, Interjurisdictional Immunity and 'The Local Interest in Land Use Planning against the National Interest in a Unified System of Aviation Navigation'" (2011) 55 S.C.L.R. (2d) 403.

or municipal rules as to the location of aerodromes. The Chief Justice's decision in general, and this argument in particular, was unexpected, because *Canadian Western Bank* had clearly suggested that the Court would favour, as much as possible, "the ordinary operation of statutes enacted by both levels of government".⁵⁶ Two members of the Court dissented. Deschamps J. held that there was no division of powers impediment to the municipal by-law, while LeBel J. held that the municipal by-law was inoperative under the federal paramountcy doctrine, due to an operative conflict. Deschamps J., seemingly with the support of LeBel J.,⁵⁷ strongly criticized the majority, charging them with betraying "the letter and spirit of *Canadian Western Bank*", "undermin[ing] ... co-operative federalism", and promoting "a more dualistic or ... more centralized form of federalism".⁵⁸

The Court's decision in *Lacombe* is characteristic of the divided, and seemingly less deferential, division of powers decisions released during this period. The decisions limiting federal and provincial jurisdiction appear to signal a retreat from the facilitative role described earlier, and a return to a more conventional umpire or arbiter role, where the Court casts itself as elaborator and enforcer in chief. And the accusations that a decision betrays

⁵⁶ *Canadian Western Bank*, note 34, above, para. 37 [emphasis added].

⁵⁷ *Lacombe*, note 50, above, paras. 71-2 per LeBel J. (concurring with Deschamps J.).

⁵⁸ *Id.*, paras. 109, 116, 184.

the ‘letter and spirit’ of *Canadian Western Bank* appear to reveal deep disagreements about what this facilitative role entails in individual cases.

And yet, while disagreements clearly have emerged about what this facilitative role entails in individual cases, it seems clear that the Court has not rejected it altogether. The decisions in which the Court acted as umpire or arbiter, by imposing limits on federal or provincial jurisdiction, all involved situations in which there was *intergovernmental disagreement* about an allocation of jurisdiction. The Court was clearly divided in some cases as to the proper location of these limits, but, in keeping with a facilitative role, it focused its efforts as umpire or arbiter on those cases where there was intergovernmental disagreement. It did not abandon its commitment to encouraging intergovernmental dialogue, and it continued to look favourably on perceived instances of intergovernmental dialogue, by acknowledging, celebrating, and refusing to interfere with their occurrence.

Consider again the Court’s decision in *Lacombe*. There was actually intergovernmental disagreement in *Lacombe* about whether provinces or municipalities have the constitutional authority to regulate the location of aerodromes. The federal government intervened to argue that they did not, while Quebec, with the support of several provinces, argued that they did.

Consider also the Court’s decision in the *Securities Reference*.⁵⁹

⁵⁹ Note 6, above. For further discussion of the decision, see Anand, note 22, above.

There, the Court held, unanimously, that the federal government's proposed federal *Securities Act* was not a valid exercise of the general branch of the federal trade and commerce power. The decision might be thought to be in tension with *Canadian Western Bank*, to the extent that the Court casts itself as umpire or arbiter, and imposes hard limits on the scope of federal jurisdiction.⁶⁰ However, while the Act was supported by Ontario, it was opposed by Quebec, Alberta, Manitoba, New Brunswick, British Columbia and Saskatchewan. This hardly seems surprising, because the goal of the Act was "to wholly displace provincial regulation of the field, which had been in place in one form or another since the 19th century".⁶¹ The Court emphasized that its decision did not foreclose a larger federal role in regulating securities, and it hinted at various points at possible sources of federal jurisdiction.⁶² It also affirmed that the Court had "moved to a more flexible view of federalism that accommodates overlapping jurisdiction and

⁶⁰ The Court referred to itself as the federal "arbiter" several times: *id.*, paras. 55-57.

⁶¹ Hogg, note 30, above, sec. 20.3. The Act included an opt-in mechanism that stipulated that it would apply only in those provinces that voluntarily opted into the federal scheme. The Court suggested that the opt-in weighed against the constitutionality of the Act, on the basis that it undermined the claim, central to the federal government's case, that "the success of its proposed legislation requires the participation of all the provinces": note 6, above, para. 123. Peter Hogg has suggested that this "renders somewhat hollow the Court's frequent exhortations of cooperation federalism": this note, sec. 20.3. However, the Court was clearly sensitive to the provincial opposition to the scheme, and the reality that the federal government would, if the Act was sustained, be placed in a position where it could later amend the Act to 'preempt' the laws of those provinces that refused to opt in.

⁶² Note 6, above, paras. 32, 46-47, 129.

encourages intergovernmental cooperation”,⁶³ and repeatedly encouraged the federal and provincial governments to establish a cooperative federal-provincial scheme for securities regulation.⁶⁴ In effect, in order to ‘facilitate cooperative federalism’, the Court seemed to assume a sort of advice-giving role, pointing to possible sources of federal intervention, and strongly urging intergovernmental cooperation in relation to securities regulation.⁶⁵

Consider finally the Court’s decision in *NIL/TU, O Child and Family Services Society v B.C.G.S.E.U.* (2010).⁶⁶ In that case, the Court held that the Society’s labour relations fell within provincial jurisdiction over labour relations, rather than federal jurisdiction over “Indians”, even though it only provided child welfare services to seven First Nations in the province of British Columbia. Abella J., writing for the majority, suggested that “[t]oday’s constitutional landscape is painted with the brush of co-operative

⁶³ *Id.*, paras. 57-58.

⁶⁴ See, e.g., *id.*, para. 9 (“It is open to the federal government and the provinces to exercise their respective powers over securities harmoniously, in the spirit of cooperative federalism. The experience of other federations in the field of securities regulation ... suggests that a cooperative approach might usefully be explored”); paras. 11-20 (describing various recommendations for national securities regulation that “envisaged cooperation between the provinces and the federal government”); and paras. 130-133 (urging cooperation). See also B. McLachlin, “The Place of Federalism in Canadian Constitutional Law” (Speech to the Scottish Public Law Group, 2012), 12-14 (acknowledging, extrajudicially, the Court’s efforts to encourage cooperation in the *Securities Reference*).

⁶⁵ See further, N. Katyal, “Judges as Advicegivers” (1998) 50 *Stan. L. Rev.* 1709.

⁶⁶ Note 50, above. The Court divided 6-3; Abella J. wrote for the majority; McLachlin C.J. and Fish J. wrote a concurring opinion. The disagreement was doctrinal, and McLachlin C.J. and Fish J. did not reject Abella J.’s remarks concerning cooperation.

federalism”, and that the Society’s “operational features are painted with the same co-operative brush”.⁶⁷ Abella J. noted that the Society exists “because of a sophisticated and collaborative effort by the Collective First Nations, the government of British Columbia, and the federal government”, and that “the federal government actively endorsed the province’s oversight of the delivery of child welfare services to Aboriginal children in the province, including ... by *NIL/TU,O*”.⁶⁸ This, Abella J. suggested, did not represent “an abdication of regulatory responsibility by the federal government nor an inappropriate usurpation by the provincial one”, but was, rather, “an example of flexible and co-operative federalism at work and at its best”.⁶⁹

These decisions do not seem indicative of a Court that has turned its back on the facilitative role described in *Canadian Western Bank*. The Court is clearly prepared to function as an umpire or arbiter, by clarifying and enforcing the lines or boundaries of federal and provincial jurisdiction, where it feels that the political branches have failed to work out a mutually acceptable allocation of jurisdiction in a particular context; the *Securities Reference* is a case in point. The Court is also clearly not of one mind as to where these lines or boundaries properly lie; *Lacombe* is a case in point. But

⁶⁷ *Id.*, paras. 42-43.

⁶⁸ *Id.*, paras. 43-44.

⁶⁹ *Id.*, para. 44.

the Court still seems committed to pursuing a facilitative role. This commitment manifests in the Court's attempts, evident in the *Securities Reference*, to encourage intergovernmental dialogue, and its continued reluctance, evident in *NIL/TU,O*, to interfere with its perceived occurrence.

C. Facilitating Intergovernmental Dialogue and Deference

The facilitative role described above manifests most clearly in those cases where the Court is faced with what it perceives to be an expression of intergovernmental dialogue. This sub-part describes how intergovernmental dialogue typically presents itself to the Court, and how the Court responds.

a. The Forms of Intergovernmental Dialogue

The forms of intergovernmental dialogue that have presented themselves to the Court can be organized into three groups. The first group consists of forms of intergovernmental dialogue that occur *outside the courts, in the political process*, during the formation, implementation, or enforcement of policy. These forms of (what I call) 'policy-focused' intergovernmental dialogue can consist of interlocking intergovernmental schemes that result directly from federal-provincial negotiation, as with the interlocking federal-provincial chicken marketing scheme considered in *Fédération des producteurs de volailles du Québec v. Pelland* (2005),⁷⁰ and

⁷⁰ [2005] 1 S.C.R. 292. For further discussion, see Wright, note 4, above, 653-654.

the complex mix of legislation, agreements, policies and so on considered in *NIL/TU,O*.⁷¹ They can also consist of interlocking intergovernmental schemes that result from more subtle, indirect forms of intergovernmental dialogue, as with the federally-accommodated, provincially-approved lottery scheme discussed in *Siemens v. Manitoba* (2003),⁷² and the complementary prohibitions on electoral activities by civil servants discussed in *Ontario v. OPSEU* (1987).⁷³ The key distinguishing feature of these two forms of policy-focused intergovernmental dialogue is that they occur outside the courts, during some stage of the policy process.⁷⁴

The second group of intergovernmental dialogue consists of forms of intergovernmental dialogue that occur inside the courts, when the constitutionality of an initiative is challenged on division of powers

⁷¹ Note 50, above. See the text accompanying notes 66 to 69, above.

⁷² [2003] 1 S.C.R. 6. For discussion of the scheme, see Part (I)(C)(b), below.

⁷³ [1987] 2 S.C.R. 2. The Court was asked to consider, among other things, whether provincial legislation that prohibited provincial civil servants from various electoral activities in federal (and provincial) elections was constitutionally inapplicable by virtue of the interjurisdictional immunity doctrine. The federal government had enacted a similar prohibition. Dickson C.J. (seemingly with the support of Lamar J.; *id.*, 58) relied in part on the federal prohibition in rejecting the interjurisdictional immunity argument; the fact that both governments had “enacted legislation based on the same ... approach” reflected, he implied, an implicit agreement they had the necessary jurisdiction to do so: *id.*, 19-20.

⁷⁴ I do not include here unilateral efforts at ‘cooperation’ that are not taken up by the other order of government, like the equivalency provisions considered in *R. v. Hydro-Quebec* [1997] 3 S.C.R. 213, para. 153, and *RAHRA*, note 50, above, paras. 102-104, 152-54, 272. Both provisions permitted the provinces to limit federal schemes (in relation to the environment, in *Hydro-Quebec*, and assisted human reproduction, in *RAHRA*), by pursuing a provincial scheme that the federal government judged to be sufficiently ‘equivalent’. The schemes in both cases encountered provincial opposition, especially from Quebec.

grounds. This form of (what I call) ‘court-focused’ intergovernmental dialogue usually takes the form of an intervention,⁷⁵ in a division of powers challenge initiated by a third party, in which the order of government that is not before the court supports the constitutionality of an initiative of the order of government that is before the court.⁷⁶ This form of intergovernmental dialogue is not unusual, especially in more recent division of powers cases.⁷⁷ Like the second form of policy-focused intergovernmental dialogue, there is not necessarily any evidence of direct federal-provincial negotiations; the order of government that is not before the court simply intervenes to support the initiative being challenged. But, unlike policy-focused intergovernmental dialogue, court-focused intergovernmental dialogue occurs in court, in the context of a constitutional challenge, not outside the courts, as part of the policy process.

⁷⁵ All attorney generals in Canada have notice and intervention rights in constitutional, including division of powers, cases: see further, Hogg, note 30, above, sec. 59.6(a).

⁷⁶ I say usually because it might be argued that the failure of the order of government that is not before the court to intervene should also be understood as an implicit form of intergovernmental dialogue. Dickson C.J. suggested that a failure to intervene, and an intervention involving actual support, should be taken into account in making a division of powers determination in *OPSEU*: see note 73, above, 19-20. The Court has cited this suggestion with approval in later cases, but in the cases where it has done so, the relevant order of government (the federal government) intervened in support: see *Kitkatla Band v. B.C.* [2002] 2 S.C.R. 146, para. 73; and *R. v. Demers* [2004] 2 S.C.R. 489, para. 28. Lower courts have, however, picked up on this idea in cases where there actually was a failure to intervene: see, e.g., *Ont. v. Chatterjee* (2007) 86 O.R. (3d) 168, para. 17 (Ont. C.A.) (aff’d [2009] 1 S.C.R. 624). Compare, e.g., *Sechelt Indian Band v. B.C.* 2013 BCCA 262 (B.C. C.A.) (provincial law constitutionally inapplicable, despite a federal failure to intervene).

⁷⁷ *Kitkatla*, note 76, above, para. 73; *Siemens*, note 72, above, para. 34; *Demers*, note 76, above, para. 28; *Rothmans, Benson & Hedges v. Sask.* [2005] 1 S.C.R. 188, para. 26.

The third group of intergovernmental dialogue consists of a combination of these two forms of intergovernmental dialogue. This form of intergovernmental dialogue combines an element of intergovernmental dialogue, direct or indirect, that occurs outside the courts, during the policy process, with intergovernmental dialogue that occurs inside the courts, when a division of powers challenge is initiated by a private third party. All of the cases cited in support of the first group actually fall into this third group. This is understandable, but it is not inevitable; governments may refuse to defend the constitutionality of an initiative that is the product of policy-focused intergovernmental dialogue in a later court challenge for various reasons, including a change in government or electoral support.

b. The Court's Response to Intergovernmental Dialogue

A court asked to determine whether an initiative that reflects intergovernmental dialogue is consistent with the constitutional division of powers could adopt several different approaches.⁷⁸ First, it could hold that intergovernmental dialogue is constitutionally suspect, at least in some cases, and warrants a more searching standard of review. Second, it could hold that intergovernmental dialogue is irrelevant, and that initiatives that reflect intergovernmental dialogue should not be treated any differently from those that do not. Third, it could hold that intergovernmental dialogue

⁷⁸ See Wright, note 4, above, 684.

justifies a more deferential standard of review, at least in some cases, but is not determinative. Fourth, it could hold that intergovernmental dialogue is determinative, at least in some cases. Finally, it could hold that intergovernmental dialogue is determinative and necessary, at least in some cases, meaning that its absence precludes a finding of constitutionality.

Which approach does the Court support? It seems clear that the Court does not support the view that intergovernmental dialogue is constitutionally suspect or irrelevant (the first and second approaches); both approaches would run counter to the facilitative role embraced by the Court, and described in this part. It also seems clear that the Court does not support the view that intergovernmental dialogue is necessary (the fifth approach); the Court has explicitly rejected arguments to this effect in several cases.⁷⁹

The more difficult task is identifying which of the remaining two approaches (the third and fourth approaches) the Court supports. The Court has stressed repeatedly that intergovernmental dialogue is not determinative.⁸⁰ It has also emphasized the importance of predictability and

⁷⁹ *Re Firearms Act (Can.)* [2000] 1 S.C.R. 783, para. 56 (rejecting an argument that lack of consultation by the federal government with the provinces before enacting federal gun control legislation reflected negatively on its constitutionality); and *Re Anti-Inflation Act* [1976] 2 S.C.R. 373, 421 (rejecting a similar argument about federal anti-inflation legislation). See also *Reference re Canada Assistance Plan* [1991] 2 S.C.R. 525 (rejecting arguments that would have restricted the ability of governments to unilaterally amend their intergovernmental agreements, making mutual consent necessary in some cases). For discussion of whether intergovernmental agreements can be legally binding, see note 329.

⁸⁰ *OPSEU*, note 73, above, 19-20 (“the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that

stability in the division of powers, implying that it may be prepared to intervene where the political branches upset the balance of power too dramatically, even if intergovernmental dialogue is involved.⁸¹ And, as if to drive home these points, the Court consistently performs a conventional division of powers analysis in cases involving intergovernmental dialogue. However, the Court has also repeatedly stressed that intergovernmental dialogue should be taken into account in determining whether an initiative respects the division of powers, implying that a more deferential standard of review is and will be applied where intergovernmental dialogue is involved. The Court has made very clear statements to this effect in cases involving court-focused intergovernmental dialogue,⁸² but there is also support for this idea in cases involving policy-focused intergovernmental dialogue.⁸³

boundary”); *Kitkatla Band*, note 76, above, para. 73 (“not determinative”); *Rothmans*, note 77, above, para. 26 (“obviously not determinative”); *B.C. v. Lafarge* [2007] 2 S.C.R. 86, para. 88 (“consent cannot confer jurisdiction”); and *Securities Reference*, note 6, above, paras. 61-62 (suggesting “flexibility and cooperation ... cannot override or modify the separation of powers”, and that “constitutional boundaries ... must be respected”).

⁸¹ See, e.g., the discussion accompanying note 46, above.

⁸² *OPSEU*, note 73, above, 19-20 (courts should “attach some significance to”, and be “particularly cautious” before intervening in cases involving, court-based intergovernmental dialogue); *Kitkatla Band*, note 76, above, para. 73 (courts should “exercise caution”); *Demers*, note 76, above, para. 28 (“court should be cautious”). Lower (including provincial appellate) courts have picked up on this idea in division of powers cases: see, e.g., *Chatterjee*, note 76, above, para. 17 (citing *OPSEU*); and *Jim Pattison Enterprises v. B.C.* (2011) 329 D.L.R. (4th) 433, para. 57 (B.C. C.A.) (citing *OPSEU*, and suggesting that “significant deference must be given to the cooperative arrangements of governments exercising their mandates in legislative areas of overlapping jurisdiction”).

⁸³ See, e.g., *Pelland*, note 70, above, paras. 15, 38 (suggesting, in upholding the provincial component of a federal-provincial chicken marketing scheme, that it “reflects and reifies Canadian federalism’s ... cooperative flexibility”, and finding “no principled basis for

The Court's decision in *Siemens* is illustrative.⁸⁴ In *Siemens*, the Court held that Manitoba legislation that authorized municipalities to hold a plebiscite to ban video lottery terminals was valid, and did not encroach improperly on the federal criminal law power (s. 91(27)). The federal *Criminal Code* included an exception to the gaming and betting offences where a province had established a provincial lottery; the exception had, it seems, been included by Parliament to allow each province to determine for itself whether it wished to establish a provincial lottery. The federal government also intervened before the Court to support the constitutionality of the provincial law. Major J., writing for the Court, said that "governments, in the absence of jurisdiction, cannot by simple agreement lend legitimacy to a claim that legislation is *intra vires*", but that "given that both federal and provincial governments guard their legislative powers carefully, when they do agree to shared jurisdiction, that fact should be

disentangling what has proven to be a successful federal-provincial merger", even though it raised constitutional doubts, by regulating the production of chicken destined for the interprovincial market); and *NIL/TU/O*, note 50, above (celebrating the "collaborative" allocation of jurisdiction in relation to child welfare services worked out by the federal and provincial governments and various First Nations as "flexible and co-operative federalism at work and at its best"); see also *Lafarge*, note 80, above, para. 86 ("the courts should not be astute to find ways to frustrate rather than facilitate [intergovernmental] cooperation where it exists if this can be done within the rules laid down by the Constitution"). For favorable references to policy-based intergovernmental dialogue in earlier cases, see *Coughlin v. Ont.* [1968] S.C.R. 569, 576 per Cartwright J.; and *Reference re Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198, 1296 per Pigeon J.

⁸⁴ Note 72, above.

given careful consideration”.⁸⁵ He also suggested that particularly ‘careful consideration’ should be given where a government “has intentionally designed a structure ... that ... promotes federal-provincial cooperation”.⁸⁶

This appears to support the third approach: the Court insists that intergovernmental dialogue is not determinative of the constitutionality of an initiative on division of powers grounds, but it also says that it should be “given careful consideration”.⁸⁷ And yet, rhetoric notwithstanding, it seems possible that the Court is actually more inclined to the fourth approach. The Court has not struck down or interfered with an initiative that it has suggested manifests an element of intergovernmental dialogue since embracing the facilitative role discussed in this article; as noted earlier, the decisions in which the Court has recently imposed limits on jurisdiction have all involved an element of intergovernmental disagreement.⁸⁸ It is

⁸⁵ *Id.*, para. 34.

⁸⁶ *Id.*, para. 35.

⁸⁷ This might be thought to be inconsistent with the Court’s decision in *A.-G. N.S. v. A.-G. Can.* [1951] S.C.R. 51 (the “Nova Scotia Inter-delegation Case”). That case has been understood to prevent one order of government from agreeing, through explicit inter-delegation, to “enlarge the [legislative] powers of another by authorizing the latter to enact laws which would have no significance or validity independent of the delegation”: *Pelland*, note 70, above, para. 54. However, the Court has significantly circumscribed the effect of this decision, by embracing a number of devices, like administrative inter-delegation and referential incorporation, that allow “Canadian legislative bodies ... [to] do indirectly what they cannot do directly”: Hogg, note 30, above, sec. 14.7. And of course, the inconsistency exists only if this approach is understood to permit the orders of government to jointly *alter* the division of powers; there is no inconsistency if it is understood to turn on a joint determination *by the political branches* that an initiative *respects* the division of powers.

⁸⁸ See Part I(B)(b), above.

difficult to know for sure how much weight the Court actually places on intergovernmental dialogue, but this suggests that the Court may be inclined to give intergovernmental dialogue very ‘careful consideration’ indeed. And this may take us closer, in practice, to something like the fourth approach.⁸⁹

It seems fairly clear that the Court is attracted to the idea of deferring to intergovernmental dialogue.⁹⁰ And yet, as the previous few paragraphs make clear, it remains difficult to pinpoint the impact that intergovernmental dialogue has on the Court’s decision-making. The idea has surfaced regularly in the Court’s decisions, but the Court typically gives it short shrift; for instance, only two brief paragraphs were devoted to the

⁸⁹ The Court has not always adopted a deferential posture in the face of a perceived instance of intergovernmental dialogue. In *Lafarge*, note 80, above, it intervened, by finding the federal paramountcy doctrine to be engaged, in order to preserve a “cooperative framework”: see Wright, note 4, above, 679-681. As far as I am aware, this is the only case where the Court has *intervened* to protect perceived intergovernmental dialogue.

⁹⁰ The idea resonates with a proposal that Paul Weiler put forward in the early 1970s, as part of his critique of judicial review of the division of power: see Weiler, note 25, above, 179-83. Under this proposal, private parties would be denied the standing to proceed with a division of powers challenge, without the consent of the Attorney General “of the jurisdiction whose ‘turf’ [was] being defended”. The effect of this proposal would be to restrict the role of the courts in the division of powers context to cases where there was explicit intergovernmental disagreement as to an exercise of jurisdiction, expressed in the context of a court challenge – although Weiler would have made an exception for cases involving a potential conflict in overlapping laws under the federal paramountcy doctrine. Weiler did not say so explicitly, but it is possible that he assumed that the Attorney General ‘of the jurisdiction whose turf was being defended’ would generally consent – or intervene – if he or she was of the view that the initiative being challenged encroached unconstitutionally on his or her ‘turf’, and thus that agreement as to constitutionality was actually implicit in the failure to consent to, or join, a challenge initiated by a third party.

For a proposal from the United States that would have courts defer to court-focused intergovernmental dialogue, see M. Solimine, “State Amici, Collective Action and The Development of Federalism Doctrine” (2011) 46 Ga. L. Rev. 355.

idea in *Siemens*.⁹¹ It seems that the Court is inclined to give intergovernmental dialogue very ‘careful consideration’ indeed, perhaps even treating it as conclusive, but if so, it seems reluctant to say so openly, and to explore where and why this should occur. In the least, it seems that the Court is inclined to give intergovernmental dialogue weight; but here again, where, how much, and why this should occur remains unclear. The rest of this article considers the idea of deferring to intergovernmental dialogue, beginning with the arguments that can be offered in favour of it.

II. THE PROMISE OF DEFERENCE TO INTERGOVERNMENTAL DIALOGUE

What case can be made for the idea that the courts should defer to intergovernmental dialogue? The Court has not provided a detailed answer to this question, although its decisions do hint at various reasons that may explain its inclination to do so. This part identifies and explores the reasons that seem to weigh in favour of the idea. In the process, it attempts to shed some light upon what may account for the Court’s attraction to the idea.

A. Reconciling the Theory and Practice of the Division of Powers

The first reason that can be offered in favour of the idea that the courts should defer to intergovernmental dialogue – a reason that seems to account, at least in part, for the Court’s attraction to the idea – is that it

⁹¹ See the text accompanying notes 84 to 86, above.

takes seriously the practical realities of Canada's federal system, and helps reconcile these practical realities with theoretical accounts of the division of powers and the judicial role. There is a striking gap between the division of powers as it is thought, or at least expected, to work in theory, and the division of powers as it actually works in practice, in the workaday world of governance. The idea of deferring to intergovernmental dialogue seems appealing, in part, because it provides a way to bridge this gap, acknowledging and harnessing the part that the political branches already play in practice in Canada's federal system. I unpack this claim below, first, by describing the nature of this gap and how the idea of deferring to intergovernmental dialogue seems to respond to it, and then second, by discussing why this might be thought to weigh in favour of the idea.

First, what is the nature of this gap, and how does judicial deference to intergovernmental dialogue respond to it? We can answer this question by revisiting the points discussed in Part I. As noted, these points frame much of the debate about the division of powers in the legal scholarship.⁹²

Consider first the point about lines or boundaries. The Canadian legal scholarship conventionally casts the courts as umpires or arbiters that do, or at least should, focus on clarifying and enforcing hard lines or boundaries that the federal and provincial governments cannot cross – lines

⁹² See Part I(A), above.

or boundaries that determine “who does what” in the federal system, independently if desired. The legal scholarship does not deny that there is now a good deal of de facto overlap in jurisdiction. But, it usually takes it for granted that there are, and should be, *some* lines or boundaries and focuses on debating where and how they are and should be drawn,⁹³ and calls to cut back (or at least control additional) overlap are not uncommon.⁹⁴

There is still life left in the notion of strict jurisdictional lines or boundaries that cannot be crossed, as the Court’s recent decisions, finding both federal and provincial initiatives unconstitutional, make clear.⁹⁵ However, the focus that the legal scholarship places on the ‘who does what?’ question obscures the fact that, in practice, the question is actually now more often “who should do how much of what?” in areas of overlap.⁹⁶

⁹³ See P. Monahan et al., *A New Division of Powers for Canada* (Toronto: York University Centre for Public Law and Public Policy, 1992), 4 (noting that an approach that takes as its focus the “measurement of the relative scope of the ‘exclusive jurisdictions’” of both governments has “dominated discussions of federalism in Canada since 1867”).

⁹⁴ See, e.g., E. Brouillet, “The Federal Principle and the 2005 Balance of Powers in Canada” (2006) 34 S.C.L.R. (2d) 307, 331 (listing five sources calling for less overlap). Some scholars have recognized the risk that reducing overlap may pose to provincial jurisdiction, and thus have favored restricting the overlap that may result from *federal* overlap while accommodating *provincial* overlap: see, e.g., Ryder, note 22, above.

⁹⁵ For a discussion, with references, see Part I(B)(b), above.

⁹⁶ T. Hueglin, “The Principle of Subsidiarity” in I. Peach, ed., *Constructing Tomorrow’s Federalism* (Winnipeg: University of Manitoba Press, 2007), 212 (noting these questions, and that “little thought has been given to the possibility that the problem . . . may no longer be so much how to divide powers over entire policy fields but how to allocate different tasks within one and the same policy field”); and N. Karazivan and J.F. Gaudreault-DesBiens, “On Polyphony and Paradoxes in the Regulation of Securities Within the Canadian Federation” (2010) 49 Can. Bus. L.J. 1, 35 (same, citing Hueglin).

It is now fairly difficult to identify areas where either order of government truly has exclusive jurisdiction, if not legally, then in practice.⁹⁷ The Court has adopted an approach that tolerates a significant amount of de facto overlap in jurisdiction, and the cases it considers increasingly seem to involve policy areas – like health and the environment – over which both orders of government have at least some claim to jurisdiction. In addition, even in those cases where division of powers restraints appear to remain, regulatory options are often available that allow both orders of government to play a role in some way, to some extent.⁹⁸ A key example is conditional spending under the federal spending power; conditional spending under the federal spending power allows the federal government to play a role in relation to matters that otherwise fall within provincial jurisdiction, by attaching conditions to the receipt of federal funds by the provinces.⁹⁹ Finally, “Canada’s governments have committed themselves for decades” to collaborative priority-setting, policy-making, implementation, and

⁹⁷ See, e.g., Monahan et al., note 93, above, 4 (suggesting that “both levels of government are active across the whole range of policy fields”); R. Simeon and A. Nugent, “Parliamentary Canada and Intergovernmental Canada”, in H. Bakvis & G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3d ed. (Oxford: Oxford University Press, 2012), 64 (noting the prevalence of “overlapping and shared responsibilities” in Canada’s federal system); and W. Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada” (1962-63) 9 McGill L.J. 185, 199 (noting the “multiplication of concurrent fields” of jurisdiction in Canada 40 years ago).

⁹⁸ Monahan (1987), note 25, above, ch. 10.

⁹⁹ Conditional federal spending is controversial, but the Court seems disinclined to impose limits on it: see W.K. Wright, “The Political Safeguards of Canadian Federalism”, Part I(C)(c). (This article is included as part of this dissertation: see “Second Article”).

administration, “further blurring the answer to ‘who does what’”.¹⁰⁰

In addition, it is also fairly difficult to identify areas where either of government is truly independent. The exercise of jurisdiction by one order of government often has an impact on issues regulated by the other order of government, impacting, and even restricting, its ability, for political or practical reasons, to exercise that power unilaterally.¹⁰¹ Accordingly, even where one order of government does have a claim to exclusive jurisdiction, the two orders of government usually end up interacting in one way or another – be it cooperatively or competitively, and directly or indirectly.

The ‘who does how much of what’ question is already important for these reasons, but it seems likely to become even more important in the future. Changes in the role of government have put considerable pressure on the ‘matters’ set out in the *Constitution Act, 1867*, which was drafted with a limited role for government in mind.¹⁰² In addition, the complex, dynamic problems that now occupy governments rarely fit into neat jurisdictional

¹⁰⁰ G. Baier, “The Courts, the Constitution, and Dispute Resolution”, in Bakvis & Skogstad, note 97, above, 79. For why, see the text accompanying notes 114 to 118, below.

¹⁰¹ See, e.g., H. Bakvis and G. Skogstad, “Introduction”, in Bakvis and Skogstad, note 97, above, 7 (“finding an effective solution to a policy dilemma, even one that lies entirely within the jurisdiction of a single order of government, invariably requires collaboration”); and Lederman, note 97, above, 199 (“governments no longer work in splendid isolation”).

¹⁰² S. Choudhry, “Constitutional Change in the 21st Century: A New Debate over the Spending Power” (2008-09) 34 *Queen’s L.J.* 375, 378 (making this point in some detail).

boxes.¹⁰³ As Robert Ahdieh has noted, “the world is growing more complex, and regulation is following suit”.¹⁰⁴ The result, he notes, is that “jurisdictional line-drawing is increasingly futile”; a “litany of trends have collectively undermined the meaning – and perhaps the singular utility – of boundaries. Overlap is increasingly the reality in law and regulation”.

Consider the next point, about the courts and the political process. I noted that the legal scholarship usually focuses on the role that the courts play in clarifying and enforcing the division of powers, and either neglects or downplays the role played by the political branches.¹⁰⁵ In doing so, it often seems to work from the assumption that the courts have the exclusive, or at least decisive, authority to clarify and enforce the division of powers, and that the political branches limit themselves to court-proofing their initiatives, looking to the courts where clarity is lacking, or a dispute arises.

This view obscures the role that the political branches play, in practice, in the division of powers context. The courts can play an important role, but, as I have argued elsewhere, drawing on a wealth of (mostly) political science scholarship, the political branches play an important role in

¹⁰³ See, e.g., R. Macdonald, “The Political Economy of the Federal Spending Power” (2008-09) 34 *Queen’s L.J.* 249, 297 (“the governance challenges of today simply do not map easily onto discrete subject-matter constitutional jurisdiction”); and Simeon & Nugent, note 97, above, 64 (“virtually all important problems cut across jurisdictional lines”).

¹⁰⁴ R. Ahdieh, “From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction” (2007-08) 57 *Emory L.J.* 1, 17.

¹⁰⁵ For a discussion of the exceptions, see Wright, note 99, above, Part I(A).

setting and maintaining the division of powers as well.¹⁰⁶ Indeed, as the Court noted in *Canadian Western Bank*, “the task of maintaining the balance of powers in practice falls *primarily* to governments”.¹⁰⁷ The political branches play this role, not simply by deciding which initiatives to pursue, and how, but also by working out solutions on their own to many of the jurisdictional uncertainties and disputes that might otherwise reach the courts. The key mechanism the political branches utilize in doing so is what I have elsewhere called the ‘intergovernmental safeguards of federalism’.¹⁰⁸ The term refers to the vast intergovernmental apparatus that now exists in Canada to manage federal-provincial relations. The political branches regularly use this intergovernmental apparatus to set and ‘maintain the balance of powers’, by working out their own allocations of jurisdiction.¹⁰⁹

This view also obscures the fact that many of the problems or disputes that arise over jurisdiction are worked out through negotiation and compromise, rather than courtroom showdowns involving zero-sum, winner-takes-all competitions for jurisdiction. To be sure, problems or

¹⁰⁶ *Id.*, Part III.

¹⁰⁷ Note 34, above, para. 24 [emphasis added].

¹⁰⁸ For a more detailed description, see Wright, note 99, above, Part III.

¹⁰⁹ The intergovernmental apparatus is used for a variety of purposes: see, for further discussion of these purposes, J. Poirier, “Intergovernmental Agreements in Canada”, in J.P. Meekison et al., *Reconsidering the Institutions of Canadian Federalism* (Montreal: McGill-Queen’s University Press, 2004), 448-53. I focus here on the role that it plays in working out problems or disputes involving the allocation or exercise of jurisdiction.

disputes resolved outside the courts involve varying degrees of conflict and cooperation.¹¹⁰ In some cases, the federal and provincial governments work out an allocation of jurisdiction outside the courts fairly cooperatively, with limited conflict and competition, while in other cases, allocations of jurisdiction are hard fought, the result of months, even years, of conflict, competition, and hard bargaining.¹¹¹ But, whether the result of cooperation or conflict, negotiated allocations of jurisdiction are now quite common in Canada. As LeBel and Deschamps JJ. noted in *Quebec v. Moses* (2010), “[g]overnance through intergovernmental agreements has become increasingly commonplace in Canada and is resorted to frequently by the federal government and the provinces, and also by the provinces between themselves”.¹¹² Indeed, as Gerald Baier observes, “[n]egotiation, not litigation, is the preferred means to resolve jurisdictional conflicts”.¹¹³

There are several reasons the political branches appear to resort to negotiated solutions (or ‘intergovernmental dialogue’) rather than litigation

¹¹⁰ See Simeon and Nugent, note 97, above, 65 (“Intergovernmental relations in Canada today are a complex mixture of collaboration and competition”). See also H. Lazar, “The Intergovernmental Dimensions of the Social Union” (2006) 49 Can. Pub. Admin. 23.

¹¹¹ For two hard-fought examples, see Wright, note 99, above, Part III(D).

¹¹² Note 50, above, para. 85, per LeBel and Deschamps JJ. (dissenting).

¹¹³ G. Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia and Canada* (Vancouver: U.B.C. Press, 2006), 3. See also Hogg, note 34, above, sec. 5.5(c) (“in Canada federal-provincial conferences of various kinds now settle many of the problems of divided jurisdiction which would otherwise reach the courts”).

to work out their own allocations of jurisdiction.¹¹⁴ First, the political branches appear to do so where the scope of jurisdiction is fairly clear, but neither order of government has the jurisdiction to address a problem on its own.¹¹⁵ The political branches work together in these situations to ‘pool’ jurisdiction, thereby avoiding a division of powers impediment. Second, the political branches appear to resort to intergovernmental dialogue where they have the necessary jurisdiction, but it is not possible or desirable for them to exercise it unilaterally, for political or other reasons.¹¹⁶ Third, the political branches appear to resort to intergovernmental dialogue where the scope of jurisdiction is unclear, or contested, and the possible costs of looking to the courts to provide clarity or a resolution exceed the possible benefits.¹¹⁷ Finally, the political branches appear to resort to intergovernmental dialogue where the scope of jurisdiction is clear, but remains contested, and

¹¹⁴ See generally, Poirier, note 109, above.

¹¹⁵ See, e.g., the joint marketing scheme referred to in note 70, above. The marketing scheme utilizes techniques like administrative interdelegation to pool federal and provincial jurisdiction, in order to work out a national scheme that sidesteps limits on federal jurisdiction over intraprovincial trade and provincial jurisdiction over interprovincial trade.

¹¹⁶ See note 101, above. For example, a federal initiative may call for provincial or local policy expertise, physical resources, or enforcement capacity, or vice versa.

¹¹⁷ The spending power is an example. The federal and provincial governments appear reticent to seek a judicial determination of the validity of conditional federal spending. The federal government appears to fear an adverse judicial determination, because it would call into question a number of major federal policies, and the provinces appear to fear the opposite, because it would help to legitimize the practice, perhaps undermining its (often successful) efforts to reign it in politically: Swinton, note 26, above, 17; S. Choudhry, “Beyond the Flight from Constitutional Legalism” (2003) 12 Const. Forum 77, 81.

the possible benefits to both orders of government of working out an alternative allocation of jurisdiction that is more favourable to the order of government that lacks the desired jurisdiction exceed the possible costs.¹¹⁸

The agreements that result take various forms.¹¹⁹ For example, they may be explicit or implicit, with agreement implied in the circumstances.¹²⁰ They may involve the federal and one or more provincial governments, or two or more provincial governments. They may involve an informal, unwritten agreement, or a formal, written agreement, vastly different levels of specificity and complexity, and may or may not be legally enforceable. They may be implemented in federal and/or provincial legislation, and address the formation, implementation and/or enforcement of policy. They may even, in the case of the more formal agreements, create a substitute dispute resolution process that aims to limit or replace judicial review.¹²¹

It might be argued, in keeping with the conventional view, that, even if the political branches do play a significant role in setting and maintaining

¹¹⁸ See, for an example, Wright, note 99, above, Part III(D)(b).

¹¹⁹ For discussion, see, e.g., Poirier, note 109, above; *Moses*, note 50, above, paras. 85-86; S.A. Kennett, "Hard Law, Soft Law and Diplomacy: The Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment" (1993) 31 *Alta. L. Rev.* 644; and N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991) 29 *Alta. L. Rev.* 792.

¹²⁰ For example, agreement might be thought to be implicit in the failure to contest an initiative that upsets the balance of power in a particular context over a long period of time.

¹²¹ For example, the Agreement on Internal Trade and the Social Union Framework Agreement contain substitute dispute resolution processes: Baier, note 100, above, 87-90.

the division of powers, they do so in the shadow of the courts. To be sure, judicial decisions can impact the choice of regulatory instrument (by taking certain regulatory instruments off the table for an order of government),¹²² as well as the allocation of intergovernmental bargaining power (by giving the ‘winning’ government a legal trump card).¹²³ And yet, the courts likely cast a much less imposing shadow than the conventional view suggests.¹²⁴

The courts may not have been asked to speak to the scope of jurisdiction in a particular context, and even if they have, a final decision from the courts can take years. In addition, once a final decision is released, the scope of federal and provincial jurisdiction may remain unclear. The decision that is released may fail to provide clear guidance, whether by accident or by design – especially if, as is increasingly common, the case involves a regulatory issue, like health or the environment, that falls within an “interjurisdictional gray zone”,¹²⁵ where the issue is, not so much whether, but how much, both orders of government have jurisdiction. As noted, the political branches often negotiate rather than litigate in response to these sorts of uncertainties. Finally, even if the courts have spoken

¹²² Swinton, note 9, above, 139.

¹²³ *Ibid.* See also Wright, note 99, above, Parts I(C)(c), and III(C)(a).

¹²⁴ See Wright, note 99, above, Part I(C)(c).

¹²⁵ I borrow this term from Erin Ryan: see note 20, above, chs. 1, 5.

clearly, the courts may not get the last word, at least in practice. The political branches have often proven adept at sidestepping judicial decisions that they find inconvenient, or outright oppose, by substituting regulatory instruments or negotiating intergovernmental responses that circumvent the division of powers problem identified by the court.¹²⁶ Katherine Swinton probably had it about right when she said that the courts, while “an important actor”, are in actuality “only one of many [actors] in the cast”.¹²⁷

Consider finally the third point, about fixity and stability. I noted earlier that the legal scholarship conventionally casts the lines or boundaries of jurisdiction as fairly fixed and stable. It does not claim that these lines or boundaries are impervious to change; it accepts that they have been and may be changed through formal constitutional amendments, and, more controversially, by the courts, in the process of interpreting the ‘living’ Constitution. However, fixity and stability are usually held up as the rule, as inherent to the idea of a supreme, entrenched Constitution, whereas change is the exception, requiring extraordinary effort and/or justification.

This claim about fixity and stability sits uncomfortably with Canada’s division of powers on at least two levels. First, it is difficult to reconcile with the nature of the division of powers in the Constitution. The

¹²⁶ Monahan, note 25, above, ch. 10.

¹²⁷ Swinton, note 26, above, 18.

idea appears to reflect – borrowing from the American constitutional scholar Jack Balkin – a “skyscraper” rather than a “framework” view of the Constitution generally, and the division of powers specifically. A skyscraper view understands the division of powers to be a “more or less finished product”, which fairly conclusively allocates jurisdiction, while a framework view understands the division of powers to provide a “framework for governance that sets politics in motion and must be filled out over time”, by the courts and the political process.¹²⁸ The framework view of the division of powers seems much more accurate as a description of the division of powers than the skyscraper view.¹²⁹ The framers of the division of powers had conflicting visions of the federation, and the proper balance of power within it, and whether this was unconscious or deliberate, these conflicting visions were reflected in the text of the Constitution.¹³⁰ Moreover, and perhaps related to the previous point, the division of powers allocates jurisdiction over ‘classes of subjects’ that are often broadly framed and overlap considerably, and that did not – and, to be fair, probably could

¹²⁸ J. Balkin, *Living Originalism* (Cambridge, M.A.: Harvard U.P., 2011), 21.

¹²⁹ For a *normative* defense of the framework view in the federalism context, see, e.g., J. Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995); J. Tully, *The Unattained Yet Attainable Democracy* (Montreal: McGill-Queen’s University Press, 2000); J. Tully, “Recognition and Dialogue: The Emergence of a New Field” (2004) 7 C.J.I.S.P.P. 84; J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen’s University Press, 1994). In the rights context, see, e.g., Webber, note 32, above.

¹³⁰ Hogg and Wright, note 23, above (making this point).

not – anticipate many of the social, political, and economic changes that would occur, and thus need to be addressed. As a result, in practice, if not by design, many issues involving the division of powers were left to be resolved later, not only by the courts, but also by the political branches.

Second, and relatedly, the idea sits uncomfortably with the way that the division of powers has developed in practice. The reality is that federalism in Canada is a process, with a division of powers that shifts between and within periods.¹³¹ Canada is what Robert Schertzer has called a “plurinational federation”, in which there are “conflicting and competing perspectives on the actual and ideal nature of the federation”.¹³² These competing perspectives, which are described below,¹³³ “inform political mobilization”, and manifest, among other ways, in sustained conflict, in both the courts and the political process, over the balance of federal and provincial power between the two orders of government, as well as between private actors and governments.¹³⁴ The result is ever-present tension and

¹³¹ Brouillet (2006), note 94, above, 311 (“federalism must be understood as a process, as a model that is evolving and in perpetual adaptation rather than as a static system regulated by immutable rules); McLachlin, note 64, above, 14 (suggesting, extrajudicially, that “federalism is a process, and processes change to meet the exigencies of the time”); S. Dion, *Straight Talk: Speeches and Writings on Canadian Unity* (Montreal: McGill-Queen’s University Press, 1999), 71 (“Canadian federalism has been a dynamic system”); and Greschner, note 20, above, 67 (“the Canadian Constitution is an on-going enterprise”).

¹³² Schertzer, note 8, above, 13. Schertzer develops this argument in some detail.

¹³³ See Part II(B)(b), below.

¹³⁴ Schertzer, note 8, above, 13; and Greschner, note 20, above, 71-3.

push-and-pull in the balance of power between the two orders of government.¹³⁵ The evidence of this tension and push-and-pull lies in the shifts, well documented in the legal scholarship, which occur inside the courts between federal and provincial jurisdiction, both gradually and suddenly, and between and within particular time periods.¹³⁶ It also lies in similar shifts, well documented in the political science scholarship, which occur outside the courts, in the political and intergovernmental process.¹³⁷ It would go too far to say that the division of powers is completely unfixed and unstable; there are clearly allocations of jurisdiction that remain fairly stable, in the short term and even the more long term.¹³⁸ However, there is also a good deal of ‘play in the joints’, over time, and on particular issues.

The Court appears to be attracted to the idea of deferring to intergovernmental dialogue because it acknowledges, and responds to, the practical realities just described. The Court regularly refers to *de facto* overlap and interdependence between federal and provincial jurisdiction as

¹³⁵ McLachlin, note 64, above, 14 (“tensions between the center and the constituent units are ... ever-present”); and Greschner, note 20, above, 71-3 (making a similar point).

¹³⁶ MacKay, note 25, above, 253 (“The Court’s federalism jurisprudence ... is marked by huge pendulum swings, sometimes favouring the federal government and other times favouring the provinces”). See, more generally, Hogg, note 30, above, Part II.

¹³⁷ See, for a succinct overview, Bakvis and Skogstad, note 101, above, 4-11.

¹³⁸ For example, the two-year prison term that determines who spends time in s. 91 federal “penitentiaries” and s. 92 provincial “prisons” has been in place since 1867.

“inevitable”;¹³⁹ it has suggested, several times, that the political branches play the primary role, in practice, in setting the division of powers,¹⁴⁰ and it regularly emphasizes the fact of, and need for, flexibility in the division of powers.¹⁴¹ The idea of deferring to intergovernmental dialogue acknowledges and responds to the reality and ‘inevitability’ of jurisdictional overlap and interdependence in Canada’s federal system by de-emphasizing the line-drawing role of the courts, especially where the political branches work out their own mutually acceptable allocations of jurisdiction through intergovernmental dialogue. It acknowledges and responds to the ‘primary’ role that the political branches play, in practice, in setting the division of powers, by openly acknowledging and harnessing it – encouraging the political branches to work out their own mutually acceptable allocations of jurisdiction, and rewarding them where they actually do so. And finally, it acknowledges and responds to the flexibility of the division of powers by embracing it, giving the political branches the freedom to work out their own, potentially more fluid and flexible allocations of jurisdiction.

Why might this seem to weigh in favour of the idea of deferring to

¹³⁹ See, e.g., *Canadian Western Bank*, note 34, above, paras. 4, 24; *NIL/TU,O*, note 50, above, para. 42; and *Lacombe*, note 50, above, para. 32.

¹⁴⁰ See, e.g., note 107, above (citing *Canadian Western Bank*, note 34, above).

¹⁴¹ For references, see, e.g., *Canadian Western Bank*, note 34, above, paras. 31, 42, 45, 89; *Lacombe*, note 50, above, para. 41; *COPA*, note 50, above, para. 44; *NIL/TU,O*, note 50, above, paras. 44-45, 58; and *Securities Reference*, note 6, above, paras. 57-62.

intergovernmental dialogue? After all, the division of powers is part of the constitutionally entrenched “supreme law of Canada.”¹⁴² It would indeed be radical to argue that compatibility with existing political realities provides a *sufficient* reason, on its own, to defer to intergovernmental dialogue. This would seem to flip the notion of a constitutionally entrenched division of powers on its head, stripping it of the role that it is conventionally thought to play in enabling, but also to some extent *constraining*, political decision-making. But it is another thing to argue that compatibility with political realities (especially widespread and enduring ones) provides a *good* (even a *necessary*) but *insufficient* reason to defer to intergovernmental dialogue. There is a growing body of legal scholarship that supports this sort of weaker claim about the relevance of political realities to constitutional adjudication.¹⁴³ This scholarship points to at least two reasons that can be offered in support of this weaker claim, either or both of which may help explain the Court’s attraction to deference to intergovernmental dialogue.

The first reason the scholarship points to in support of this claim

¹⁴² *Constitution Act, 1982*, s. 52(1).

¹⁴³ H. Monaghan, “Supremacy Clause Textualism” (2010) 110 *Colum. L. Rev.* 731, 790 (“Any acceptable theory of constitutional adjudication should ... have two qualities: (1) It must be normatively acceptable; and (2) *It must be able to account for most (though not necessarily every last bit) of the current constitutional order*”) [emphasis added]. See also, e.g., M. Graber, “Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship” (2002) 27 *Law & Soc. Inquiry* 309, 213, 317-30; B. Friedman, “The Importance of Being Positive: The Nature and Function of Judicial Review” (2004) 72 *U. Cin. L. Rev.* 1257, 1270-1283; and Balkin, note 128, above.

concerns institutional capacity. The argument here, in essence, is that the courts have limited institutional capital, and that this translates into limited institutional capacity, in the sense that the courts must pick their battles with the political branches. As Jack Balkin argues, “we should not expect from judges ... practices of constitutional decision-making that they simply cannot provide”, or contemplate results to which the actual system “could never be faithful”; in other words, “ought implies can”.¹⁴⁴ The second (related) reason the scholarship points to concerns legitimacy. The argument here, in essence, is that the courts should avoid decision-making that bears little or no relationship to the way the law operates in practice over time, because the failure to do so may undermine its legitimacy with the key participants in the legal system, like public officials – legitimacy that, since the courts have no armies, is vital to their efficacy over time.¹⁴⁵

These sorts of institutional capacity and legitimacy concerns may explain, at least in part, why the Court is attracted to the idea of deferring to intergovernmental dialogue. The Court has been fairly reluctant to take on

¹⁴⁴ Balkin, note 128, above, 93. See also C. Bateup, “Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective” (2007) 21 *Temp. Int’l & Comp. L.J.* 2, 27-39 (arguing that the Court “operates under a range of political constraints that ... limit the sphere of judicial action”).

¹⁴⁵ C.A. Bradley & T.W. Morrison, “Historical Gloss and the Separation of Powers” (2012) 126 *Harv. L. Rev.* 411, 456 (citing, among others, L. Fuller, *The Morality of Law* (1964), 81 (discussing importance of “congruence between official action and the law”). See also G. Metzger, “To Tax, To Spend, To Regulate” (2012-13) 126 *Harv. L. Rev.* 83, 103 (“it is not at all obvious that the Court should always hew to analytic purity whatever the political cost”, because doing so may compromise “the Court’s perceived legitimacy”).

the way the federal system operates in practice, at least in any sustained or significant way.¹⁴⁶ The use of terms like ‘inevitable’ in relation to the existence of de facto overlap suggests that the Court is attuned to the limits on its ability to confront the messy realities of jurisdiction in Canada today.

B. Mitigating Criticisms About The Desirability of Judicial Review

The Court may also be attracted to the idea of deferring to intergovernmental dialogue because it seems to mitigate a number of different criticisms directed at the *desirability* of judicial review of the division of powers. This part unpacks this claim. These criticisms all draw upon concerns about judicial discretion in division of powers cases, so I begin with a brief overview of these concerns about judicial discretion.

a. Indeterminacy and Judicial Discretion

There is a longstanding debate in the legal scholarship about whether, and how much, formal legal materials (especially the text of constitutional provisions, like the division of powers, and judicial decisions) determine the outcome of particular cases, or leave the outcome to judicial discretion. This debate, about the ‘indeterminacy’ of constitutional law,

¹⁴⁶ Baier, note 113, above, 123 (noting the Court hasn’t been in “serious conflict” with the model of Canadian federalism at work in practice); see also Bateup, note 17, above, 24-7 (arguing the Court doesn’t tend to deviate much from public opinion in *Charter* cases). But see D. Schneiderman, “Making Waves: The Supreme Court of Canada Confronts Stephen Harper’s Brand of Federalism”, in Anand, note 22, above, ch. 5 (suggesting the Court has taken a less deferential posture recently partly to preserve an institutional role for itself).

tracks, and draws inspiration from, similar debates about law generally.

The conventional view that once dominated the legal scholarship about the division of powers (and the constitutional and legal scholarship more broadly) was that formal legal materials usually, if not always, determined the outcome of particular cases, and accordingly left the courts with very little, if any, discretion. This view – ‘legal formalism’ – was exposed to withering and steady criticism, and it is “now common ground that, in at least some cases, the legal materials do not dictate any uniquely correct answer”.¹⁴⁷ However, there are still ongoing debates about how much discretion the courts actually have in division of powers cases.¹⁴⁸

One (smaller) group takes the view that formal legal materials always, or almost always, fail to ‘dictate any unique correct answer’, and thus that the courts always, or almost always, have discretion in deciding division of powers cases.¹⁴⁹ The advocates of this view do not claim that the text of the division of powers has “no meaning”; or that the judicial doctrine and decisions interpreting and applying it have “no intelligible content”; but that, together, they are always, or almost always, *under-determinate*, in the

¹⁴⁷ Monahan (1984), note 25, above, 47.

¹⁴⁸ Greschner, note 20, above, 62-3 (making this point); and MacKay, note 25, above, 250-60 (same, and providing a helpful, brief survey of the debates over judicial discretion).

¹⁴⁹ This group includes, e.g., Paul Weiler (see note 25, above), Patrick Monahan (see note 25, above), and Wayne MacKay (see note 25, above, 256). See also B. Laskin, “Tests for the Validity of Legislation” (1955) 11 U.T.L.J. 114, 127 (suggesting, as an academic, that the “constitution is as open as the minds of those called upon to interpret it”).

sense of being “insufficient to resolve the issues posed by federalism disputes”.¹⁵⁰ Another (larger) group takes a more middle-ground view.¹⁵¹ Like the first group, this group does not deny that, in at least some cases, formal legal materials may not ‘dictate any uniquely correct answer’, and that, in these cases, the courts will have at least some discretion. However, unlike the first group, it takes a more moderate view, not only of how often this occurs, but also of the amount of discretion that the courts have where it does occur. The members of this group often concede that the text is itself insufficient, for many of the same reasons offered by the first group, but they are more optimistic about the ability of judicial doctrine and precedent, and various other institutional constraints, to restrict judicial discretion.¹⁵²

This debate underpins three of the most common criticisms directed at the *desirability* of judicial review of the division of powers: the criticism from reasonable pluralism, the criticism from democracy, and the criticism from institutional competence. Not surprisingly, the first group draws

¹⁵⁰ Monahan (1984), note 25, above, 48. See also Baier, note 113, above, 20-21 (discussing Weiler, and noting that his was not a “blanket criticism of the law”).

¹⁵¹ This group includes, e.g., William Lederman (see (1975), note 31, above, 617-19); Katherine Swinton (see note 26, above, 5, 54-55); Peter Hogg (see note 30, above, secs. 5.5(b), 15.5(h)); David Beatty (see *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995), ch. 2); and Donna Greschner (see note 20, above, 65).

¹⁵² Peter Hogg articulates this view with characteristic clarity. Hogg accepts that there will always be an element of discretion in the cases *that reach the appellate courts*, but says that the *scope* of discretion “in a judicial decision is reduced to a very narrow compass by the substantive constraints of the language of the constitutional text and decided cases, and by the procedural constraints of the litigation process”: note 30, above, sec. 5.5(b)n.

different conclusions from these three criticisms than the second group; unlike the second group, it takes them to call into question (either all or most) judicial review of the division powers.¹⁵³ However, concerns about judicial discretion, and the criticisms of judicial review that flow from it, also figure prominently in the work of the second group, both explicitly and by implication. The members of this group have disagreed, quite often and quite broadly, about whether and how the courts should respond to them,¹⁵⁴ and even where they appear to agree, these disagreements often seem to linger just below the surface.¹⁵⁵ The Court may be attracted to the idea of deferring to intergovernmental dialogue because, as I argue below, it might seem to mitigate these criticisms, and to provide a way past these debates.

b. Mitigating the Criticism From Reasonable Pluralism

The fact that judges exercise discretion in division of powers cases might be less of a concern if there was widespread agreement about how the courts should interpret and apply the division of powers. But, as those who

¹⁵³ This is true of Paul Weiler and Patrick Monahan. Wayne MacKay, another member of this group, relies on them in reconceptualizing the courts as “players”: note 25, above.

¹⁵⁴ For example, Peter Hogg has argued that concerns about judges’ lack of democratic accountability and competence weigh in favour of a posture of “restraint” in division of powers cases (note 30, above, sec. 5.5(b)), while Bruce Ryder has argued, in essence, that the need to protect provincial autonomy overrides these concerns (note 22, above).

¹⁵⁵ They linger, for example, in the debate over the classical paradigm and the modern paradigm; by implication, those that argue for the former either worry less about judicial discretion and these criticisms, or find them to be outweighed by other factors, like the importance of protecting provincial autonomy: see further, Ryder, note 22, above.

stress the criticism from reasonable pluralism remind us, this is not the case. The criticism from reasonable pluralism highlights the deep, pervasive and intractable disagreements that exist in Canada about the division of powers, and the problems these disagreements pose for judicial review. The Court might be attracted to the idea of deferring to intergovernmental dialogue because it seems to sidestep these disagreements, mitigating these problems.

What, more precisely, is the criticism from reasonable pluralism? There are competing perspectives in Canada about the nature of the nation (or political community) and the federation: a provincial equality perspective, which views Canada as a compact of equal territorial units (provinces), and grants the provinces considerable power; a pan-Canadian perspective, which views Canada as a union of peoples, and grants the federal government considerable power; and a multinational perspective, which views Canada as a compact between two¹⁵⁶ nations – an English-speaking majority nation based primarily outside Quebec, and a French-speaking minority nation based primarily inside Quebec – and grants Quebec special powers to protect the French-speaking minority nation.¹⁵⁷ There have been, and are, deep, pervasive and intractable disagreements in

¹⁵⁶ Some also argue that Canada's Aboriginal peoples also constitute a nation(s).

¹⁵⁷ For further discussion of these competing perspectives, see F. Rocher and M. Smith, "The Four Dimensions of Canadian Federalism", in F. Rocher and M. Smith, eds., *New Trends in Canadian Federalism*, 2d ed. (Peterborough, ON: Broadview, 2003), ch. 1.

Canada over these competing perspectives.¹⁵⁸ These disagreements play out in deep, pervasive, and intractable disagreements about the proper balance of power,¹⁵⁹ as well as about how the courts should interpret and apply the division of powers.¹⁶⁰ The criticism from reasonable pluralism highlights these disagreements, as well as the problems they create for judicial review of the division of powers, at least as it is traditionally understood.¹⁶¹

One form of the criticism focuses on the combination of judicial discretion and reasonable pluralism. Patrick Monahan has provided a detailed account of this form of the criticism.¹⁶² Monahan's account begins

¹⁵⁸ Rocher and Smith, note 157, above; and Schertzer, note 8, above, 57-58.

¹⁵⁹ These disagreements have led Hoi Kong to call federalism in Canada “an essentially contested concept”: H. Kong, “The Forms and Limits of Federalism Doctrine” (2008) 13 *Rev. Const. Studies* 241, 263; and Kong, note 8, above, 355-57.

¹⁶⁰ For example, they manifest in debates about the intentions of framers (see Hogg and Wright, note 23, above, 330-33); about which aspects of the text courts should emphasize, and how much (*id.*, 333-39; and Kong, note 8, above, 356, 357); about whether the courts should adopt a ‘classical paradigm that emphasizes exclusive jurisdiction, a ‘modern paradigm’ that embraces jurisdictional overlap, or a mixture of both (see, e.g., Ryder, note 22, above); about whether the courts should favour clear rules or more flexible standards (see Kong, note 8, above, 366-368); and about which ‘functional’ values – democracy, efficiency, or cultural diversity – the courts ought to emphasize, and how much (see Hogg, note 30, above, sec. 15.5(g)). In many cases, those that favour a strong(er) federal government (instead of, or in addition to, strong provinces) tend to come down on one side of these debates, and those that favour strong(er) provinces on the other. See J.F. Gaudreault-DesBiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy”, in S. Choudhry et al., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006), 199 (making this point).

¹⁶¹ Some rely on the criticism from reasonable pluralism in arguing in favour of the abandonment of judicial review of the division of powers (see Monahan (1984), note 25, above), while others rely on it in arguing for a wholesale reconceptualization of judicial review of the division of powers (see Schertzer, note 8, above; and Kong, note 8, above).

¹⁶² Monahan (1984), note 25, above.

with a full frontal assault on the notion that text, judicial precedent and judicial doctrine are ever sufficient to determine the outcome of division of powers cases; judges, he argues, always have discretion. Monahan then proceeds to outline why this is a problem, which is where the notion of reasonable pluralism comes into play. Monahan argues that the courts need a “background theory of the underlying policies and principles of Canadian federalism” to guide and cabin their discretion, but that “[t]he attempt to discover or construct such a theory encounters an overwhelming difficulty”: that “[t]here is no coherent normative theory that accounts for and justifies the Canadian federation”, only “contradictory theories that proceed from radically different assumptions about the nature of the Canadian political community”.¹⁶³ The choice judges confront in choosing between these theories is, Monahan argues, fundamentally political, and the solution, he suggests, is to leave division of powers disputes to “political processes”.¹⁶⁴

Another form of the criticism from reasonable pluralism builds upon similar claims about judicial discretion and reasonable pluralism, but takes the criticism one step further, by focusing on how judicial review of the division of powers may actually undermine the legitimacy of the courts, and ultimately even the federation. Robert Schertzer has provided a detailed

¹⁶³ *Id.*, 70, 85-86, 92.

¹⁶⁴ *Id.*, 96. Monahan argued in a later publication that judicial review might not be a problem after all, because it had little impact in practice: see (1987), note 25, above, ch. 10

account of this form of the criticism.¹⁶⁵ Schertzer argues that the conflicting perspectives described earlier, about the nature of the country and the federation, are deep, pervasive and intractable, with the result that there is, and can be, “no widely agreed upon description of the nature of the federal order”.¹⁶⁶ The trouble, Schertzer argues, with judicial review of the division of powers, at least as it is conventionally understood, is that it requires the courts to choose between these conflicting perspectives, choices that are evident in the reasoning provided and the result reached.¹⁶⁷ This is problematic because, over time, it will undermine the legitimacy of the courts and the federation. Those that hold the perspective that the courts reject, or fail to adopt, will come to see the courts, and the division of powers they (help) establish, as biased, with implications for the health of the federation as a whole. The solution, Schertzer argues, is not to abandon judicial review altogether, as Monahan argues, but rather for the courts to refrain, as much as possible, from adopting results and forms of reasoning that favour one of these perspectives,¹⁶⁸ while promoting “negotiation and

¹⁶⁵ See note 8, above. For a similar argument, see P. Weiler, “Of Judges and Scholars: Reflections in a Centennial Year” (1975) *Can. Bar Rev.* 563, 573 (suggesting “the court risks serious damage to its long-term legitimacy if it is constantly forced to come down on one side or the other of these heated battles which are the stuff of Canadian federalism”).

¹⁶⁶ *Id.*, 45.

¹⁶⁷ *Id.*, 237-38.

cooperation between conflicting parties through political processes”, and refraining from interfering with the “negotiated settlements” that result.¹⁶⁹

There is some evidence that the Court is attracted to the idea of deferring to intergovernmental dialogue because it is sensitive to the criticism from reasonable pluralism, in either or both of these forms. The best evidence of this is a brief, and uncharacteristically candid, passage in the Court’s unanimous decision in the *Employment Insurance Reference* (2005).¹⁷⁰ In this passage, the Court seemed to suggest that the courts should refrain from adopting any single theory of federalism in division of powers cases, because “the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions”, and then asserted that “[t]he task of maintaining the balance between federal and provincial powers falls primarily to governments”.¹⁷¹ This passage suggests, in keeping with the criticism from reasonable pluralism, that the Court is alive to the fact that there are different views of what federalism entails in Canada, and that the Court’s reluctance to align

¹⁶⁸ This idea resonates with the legal scholarship advocating ‘judicial minimalism’. Judicial minimalism refers to judicial decisions that say “no more than necessary to justify an outcome” and leave “as much as possible undecided”: C. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (Cambridge, M.A.: Harvard U.P., 1999), 2.

¹⁶⁹ Schertzer, note 8, above, 83-87, 224, 227-228, 237-38.

¹⁷⁰ [2005] 2 S.C.R. 669. Deschamps J. wrote for the Court.

¹⁷¹ *Id.*, para. 10.

itself with one of these views may account, in part, for the leeway that it is prepared to give the political branches in setting the division of powers.¹⁷²

How might the idea of deferring to intergovernmental dialogue seem to mitigate these two forms of the criticism from reasonable pluralism? First, it might seem to do so by restricting the role of the courts in the face of intergovernmental dialogue as to an allocation of jurisdiction. In doing so, it creates a space for the political branches to work out their own allocations of jurisdiction, a space in which the courts do not assign clear winners and losers, at least directly, and in which the political branches can reach an “overlapping consensus”, by agreeing about a particular allocation of jurisdiction, without agreeing about the underlying reasons for doing so.¹⁷³ It also rewards the political branches for working out their own allocations of jurisdiction, amid and despite these sorts of disagreements, providing an incentive for them to do so more in the future. If, as Monahan argues, division of powers cases invariably require the courts to take positions about the sorts of disagreements described earlier, this might seem to reduce how often, and how much, the courts are required to do so. And if,

¹⁷² The following passage from a speech that Chief Justice McLachlin gave in 2012 is also instructive: “In recent years, the Supreme Court of Canada, *rather than promoting a particular form of federalism*, has recognized the cooperative, shared approach that has become the Canadian constitutional reality”: note 64, above, 10 [emphasis added].

¹⁷³ This resonates with Cass Sunstein’s discussion of “incompletely theorized agreements”, which allow parties to a conflict to agree on outcomes without necessarily agreeing about the underlying reasons for arriving at them: see note 168, above, 50-51.

as Schertzer argues, division of powers cases can undermine the legitimacy of the courts, and ultimately even the federation itself, this might seem to reduce the number of legitimacy-undermining opportunities that may arise.

Second, the idea of deferring to intergovernmental dialogue might seem to mitigate these two forms of the criticism from reasonable pluralism by capitalizing on the capacity that the political branches have to navigate these underlying disagreements on their own. There is an active debate in the scholarship as to whether a final, deep and broad consensus about these disagreements is likely to emerge, in the near future, or ever.¹⁷⁴ If such a consensus is indeed unlikely, then deference to intergovernmental dialogue seems attractive, because it capitalizes on the capacity of the political branches to work out their own allocations of jurisdiction, without agreeing about the underlying reasons for doing so.¹⁷⁵ However, if such a consensus is possible, in ideal circumstances, it seems quite plausible that it is more likely to emerge from intergovernmental dialogue than it is from inside the courts, from judicial review of the division of powers.¹⁷⁶ The reason for this

¹⁷⁴ For an account of this debate, see Schertzer, note 8, above, 36-59 (discussing, among others, the work of Will Kymlicka, who embraces the possibility of such a consensus, in ideal circumstances, and James Tully, who takes the opposing view).

¹⁷⁵ But see Part III(C) below, discussing settlement- and stability-based concerns.

¹⁷⁶ Legal scholars have highlighted the capacity of shared, dialogic interpretation to produce consensus – either temporary or final – about the meaning of individual rights: see, e.g., Bateup (2006), note 17, above, 1134, 1174-75 (noting potential for dialogue to produce “deep and broad consensus about constitutional meaning”); see also Dorf, note 43,

is that intergovernmental dialogue seems more likely to produce a resolution that is agreeable to both orders of government than judicial review of the division of powers. Judicial review is typically more zero-sum than intergovernmental dialogue, in the sense that it usually assigns clear winners and losers,¹⁷⁷ and political actors seem more likely to accept allocations of jurisdiction that they actually played a role in developing.¹⁷⁸

c. Mitigating the Criticism From Democracy

The idea of deferring to intergovernmental dialogue also seems to mitigate another desirability-based criticism that is often made of judicial review of the division of powers: the criticism from democracy. Like the criticism from reasonable pluralism, the criticism from democracy (at least in one of its iterations) draws upon concerns about judicial discretion.¹⁷⁹ The criticism is that judicial review on division of powers grounds is undemocratic, because it gives unelected, unaccountable judges the value-

above, 888 (suggesting “one should not underestimate the power of direct deliberation among citizens of diverse backgrounds and views to produce workable accommodations”).

¹⁷⁷ Making this observation, see, e.g., Baier, note 100, above, 91 (discussing Canada); and E. Ryan, “Negotiating Federalism” (2011) 52 B.C. L. Rev. 1, 4 (discussing the U.S.).

¹⁷⁸ See, e.g., Balkin, note 128, above, 62-64 (arguing that having a say as to what the Constitution means helps create a broader sense of buy-in, or that it is in some way “ours”); and Webber, note 32, above, 47, 155 (making a similar point as Balkin).

¹⁷⁹ The ‘dead-hand’ version of the criticism – which takes issue with constitutional entrenchment, not simply judicial review, because it allows those in the past to limit our choices in the present – does not necessarily turn upon concerns about judicial discretion. My primary focus here is with the democratic concerns that may arise *from judicial review*.

laden power to strike down, and interfere with, the laws and policy preferences of democratically elected, accountable officials and institutions.

There are different views in the legal scholarship about whether, and how much, judicial review of the division of powers actually has an anti-democratic effect, in the sense that it precludes a response by the political branches, or influences it. Some argue that judicial review of the division of powers has little or no anti-democratic effect, because it merely *assigns* jurisdiction, and leaves at least one order of government free to enact any given law.¹⁸⁰ Others, however, argue that judicial review of the division of powers has a strong anti-democratic effect, even more so than judicial review under the *Charter*, because “[t]he legislature whose law is struck down by the Court has a fairly limited range of reply options”, and “cannot place limits on or override the division of powers, as is possible with respect to *Charter* rights”.¹⁸¹ This debate is important because, if judicial review of the division of powers has little or no anti-democratic effect, the criticism from democracy would seem to lose much (maybe all) of its force.

The better view, to my mind, is that the judicial review of the

¹⁸⁰ See, e.g., J. Allan, “A Defence of the Status Quo”, in T. Campbell et al., eds., *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003), 193 (making this claim); and N. Aroney, “Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism” (2008) 27 U.Q.L.J. 129, 141 (same).

¹⁸¹ Roach, note 18, above, 39-40. See also A. Stone, “Judicial Review without Rights” (2008) 28 Oxford J. Legal Stud. 1, 20-24; and A. Stone, “Structural Judicial Review and the Judicial Role in Constitutional Law” (2010) 60 U.T.L.J. 109, 117.

division of powers can, and does, have at least some anti-democratic effect. It is true, where the courts impose hard limits on federal or provincial jurisdiction, under the pith and substance doctrine or the interjurisdictional immunity doctrine, that the ‘winning’ order of government is not prevented from occupying the field. It is also true, where this occurs, that there are not infrequently ‘regulatory substitutes’ that allow the ‘losing’ order of government to play some sort of a continued role,¹⁸² and that governments, working together, can still negotiate intergovernmental workarounds.¹⁸³ However, the ability of the winning order of government to provide the same, or a similar, law may be constrained.¹⁸⁴ Judicial review of the division of powers can take certain regulatory instruments and options off the table for the losing order of government, now and in the future,¹⁸⁵ and amending the law to bring it within that government’s jurisdiction may require “drastic changes that will distort the policy that the law is intended

¹⁸² Monahan (1987), note 25, above, ch. 10.

¹⁸³ *Ibid.*; Wright, note 99, above, Part I(C)(c); and Swinton, note 26, above, 18.

¹⁸⁴ For example, if federal legislation establishing a nation-wide rule is struck down, any provincial substitute will be constrained by territorial limits on provincial jurisdiction that may undermine its purpose and effect: Stone (2010), note 181, above, 117; and Roach, note 18, above, 40. Similarly, if provincial legislation is struck down, a federal substitute may not result if it is supported by only a provincial majority: Roach, note 18, above, 40. There may be good federalism-related arguments for each of these results; the point here is simply that judicial review of the division of powers can have anti-democratic effects.

¹⁸⁵ Swinton, note 26, above, 19; and Monahan (1987), note 25, above, 240.

to promote’.¹⁸⁶ Finally, intergovernmental negotiations do not occur in some cases, and fail in others,¹⁸⁷ and even when they do occur, the results of, and the reasoning used in, judicial decisions that go against an order of government can have an impact on its bargaining power, undermining its ability to achieve its policy goals.¹⁸⁸ The effect in these cases is at least somewhat anti-democratic, in the sense that judicial review prevents a response by the political branches, or influences the form that it might take.

Similarly, it is true that, in recent decades, the Court has largely (but not entirely) eschewed hard limits on jurisdiction, and emphasized the role of the federal paramountcy doctrine in managing the overlap that results. It is also true, where the courts apply the federal paramountcy doctrine, that there will necessarily be a valid, overlapping (but conflicting) federal law in place; that provincial laws are rendered inoperative, not invalid, and only to the extent of the conflict; and that they will ‘revive’ (meaning come back into operation) if the conflict is later eliminated.¹⁸⁹ However, the effect is to limit the ability of provincial majorities to pursue policies that differ from federal policies – in the least, creating a federally imposed floor that must

¹⁸⁶ Roach, note 18, above, 40; see also Monahan (1987), note 25, above 240.

¹⁸⁷ Swinton, note 26, above, 19-20.

¹⁸⁸ Monahan, note 25, above, 239-40; Swinton, note 26, above, 19; Baier, note 100, above, 83, 91; Schertzer, note 8, above, 258; and Stone, note 181, above, 118-19.

¹⁸⁹ See Hogg, note 30, above, ch. 16.

be respected nationally. And again, intergovernmental negotiations do not occur in some cases, and fail in others, and when they do occur, judicial decisions finding the doctrine engaged provide the federal government with a source of leverage in intergovernmental negotiations.¹⁹⁰ The effect in these cases is also at least somewhat anti-democratic, for similar reasons.

There is also an active debate in the legal scholarship about whether, as a matter of principle, judicial review of the division of powers is susceptible to the criticism from democracy. Some argue that it is susceptible to the criticism from democracy, because it has “the same qualities on which the democratic objection ... depends”: it “confers discretion on judges to decide matters of moral or political significance in the face of reasonable disagreement”.¹⁹¹ Others, however, argue that it is not susceptible to the criticism from democracy, because “any claim that [federalism disputes] should be settled in accordance with majority opinion faces the rejoinder that it is not clear which majority – national or [provincial] – should prevail”, and it “would be contrary to the very nature

¹⁹⁰ Ryder, note 50, above, 595; and Swinton, note 9, above, 138.

¹⁹¹ Stone (2010), note 181, above, 110; see also Stone (2008), note 181, above; P. Weiler, “The Supreme Court of Canada and Canadian Federalism” (1973) 11 *Osgoode Hall L.J.* 225, 239-240 (expressing democracy-based concerns about judicial review); and Hogg, note 30, above, sec. 5.5(c) (relying, in part, on concerns about “judges’ lack of democratic accountability” in arguing for a restrained role for the courts in division of powers cases).

of a federation for [majority rule] to govern the resolution of disputes”.¹⁹²

The better view, to my mind, is that judicial review of the division of powers is susceptible to the criticism from democracy, but in a modified form. It would indeed be contrary to the very nature of a federation for federalism disputes to be settled by national majorities, but it does not follow that “considerations of participation and democracy [are therefore] irrelevant to the decision-making processes adopted by a federation”.¹⁹³ The assumption underlying the contrary view appears to be that democratic principle necessarily contemplates decision-making by national majorities, and thus that a criticism that draws upon democratic principle cannot apply, without ‘begging the question’ of which order of government is to prevail. However, democratic principle might also be said to contemplate a system in which public officials that are called upon to make decisions on disputed questions, like the division of powers, are somehow accountable to the citizens they represent, and on whose behalf they act.¹⁹⁴ The question then is whether it is possible to design a new dispute-resolution mechanism that

¹⁹² J. Goldsworthy, “Structural Judicial Review and the Objection from Democracy” (2010) 60 U.T.L.J. 137, 139; see also Aroney, note 180, above, 137 (arguing the criticism cannot apply “within a federal state in the same way that it does in a unitary state and that it has no decisive bearing on ... how federalism disputes out to be resolved); and Swinton, note 26, above, 52-3 (raising doubts about whether the criticism properly applies here).

¹⁹³ Stone (2010), note 181, above, 114.

¹⁹⁴ *Id.*, 116.

is accountable in this manner without also ‘begging the question’.¹⁹⁵ There appears to be no good reason that the criticism from democracy, understood in this way,¹⁹⁶ cannot apply to judicial review of the division of powers.¹⁹⁷

How might the idea of deferring to intergovernmental dialogue seem to mitigate the criticism from democracy, understood in this way? First, and most obviously, it seems to mitigate the criticism from democracy in a “democracy-*permitting*” way.¹⁹⁸ It does so by allocating the political branches an important role in setting the division of powers, and making the space for, and also accommodating, (at least ostensibly)¹⁹⁹ more democratically accountable decision-making in the political branches about the division of powers.²⁰⁰ Second, and perhaps less obviously, it seems to mitigate the criticism from democracy in a “democracy-*promoting*” way.²⁰¹

¹⁹⁵ *Id.*, 116-117, 130-131, 133-134.

¹⁹⁶ It is interesting to note that those that appear to have trouble with the idea that the criticism from democracy applies to judicial review of the division of powers also appear to accept that it may be a relevant consideration: see Goldsworthy, note 192, above, 142 (“not the only relevant factor”); and Aroney, note 180, above, 137 (not “decisive”).

¹⁹⁷ Indeed, the criticism might be said to apply with particular force if the federal and provincial governments agree to an allocation of jurisdiction – especially if changes of government occur, federally and provincially, alleviating concerns about opportunism.

¹⁹⁸ See Sunstein, note 168, above, 26.

¹⁹⁹ For concerns about its democratic accountability, see Part III(B), below.

²⁰⁰ This is a central claim of dialogic or shared theories of constitutional interpretation: see, e.g., Bateup (2006), note 17, above; and I. Bar-Siman-Tov, “The Puzzling Resistance to Judicial Review of the Legislative Process” (2011) 91 B.U. L. Rev. 1915, 1954-6.

²⁰¹ See Sunstein, note 168, above, ch. 2.

It does so by encouraging and rewarding, and thereby providing an incentive for further, (at least ostensibly) more democratically accountable decision-making in the political branches about the division of powers.

d. Mitigating the Criticism From Institutional Competence

The idea of deferring to intergovernmental dialogue might also seem to mitigate another desirability-based criticism that is often made of judicial review of the division of powers: the criticism from institutional competence. Like the previous two criticisms, the criticism from institutional competence draws upon concerns about judicial discretion. But, unlike the previous two criticisms, the criticism from institutional competence takes as its focus the capacity of the courts, institutionally, to make the sorts of difficult decisions involved in division of powers cases.

The criticism from institutional competence figures prominently in the legal scholarship. For example, Paul Weiler relied heavily on concerns about institutional competence in making his case against judicial review of the division of powers.²⁰² Similarly, Peter Hogg has invoked concerns about institutional competence in arguing that the “appropriate posture for the courts in distribution of powers (federalism) cases is one of restraint”.²⁰³

What, more precisely, is the nature of the criticism from institutional

²⁰² Weiler, note 191, above, 238-239.

²⁰³ Hogg, note 30, above, sec. 5.5(b).

competence? I noted earlier that division of powers cases often require the courts to make difficult normative decisions about the federal system. They also often require the courts to make complex empirical and predictive decisions – for example, about the need for a law,²⁰⁴ or its actual or likely impact.²⁰⁵ The courts are often at a disadvantage, compared to the political branches,²⁰⁶ in gathering, assimilating and evaluating the information necessary to make these sorts of complex decisions, and in predicting how they are likely to play out in the future.²⁰⁷ This disadvantage may flow from the professional background and training of judges (judges often lack the professional experience or training to make these decisions); the nature of the adjudicative litigation process (generally, judges are expected to make

²⁰⁴ For example, the general branch of the federal trade and commerce power requires courts to decide “whether the [federal] legislative scheme is such that the failure to include one or more provinces ... in the scheme would jeopardize its successful operation”: Hogg, note 30, above, sec. 20.3. This turns, at least in part, on complex empirical, predictive decisions – for example, about the likely impact of provincial hold-outs on the scheme.

²⁰⁵ For example, the interjurisdictional immunity doctrine requires the courts to decide whether (in practice usually) a provincial law “impairs”, or “significantly trammels”, the (exercise of the) “protected core” of a federal power (or, perhaps, “the vital or essential part” of an undertaking the federal government “duly constitutes”): *Canadian Western Bank*, note 34, above, paras. 33-53; *COPA*, note 50, above, paras. 25-61; and *Ryan Estate*, note 54, above, paras. 50-64. This turns, at least in part, on complex empirical and predictive decisions – for example, about when (the exercise of) a “core” is “impaired”.

²⁰⁶ I am cognizant of the risks of crude single-institution analyses: see N. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: U. Chicago Press, 1994). I am inclined to think that, *generally*, the courts are *often* at a *comparative* disadvantage in making these sorts of complex decisions, but I use the qualifier often to allow for the possibility that this might not be true in all cases.

²⁰⁷ Weiler, note 191, above, 238-239; Hogg, note 30, above, sec. 5.5(b); and Kong, note 8, above, 356-57. For a now classic statement of these arguments, on adjudication generally, see L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353.

decisions on the basis of the – perhaps limited – information presented in court, and lack the power to request information from third parties, or to solicit studies); and time and resource pressures (the courts have limited time and resources, limiting how much they can focus on any one case).²⁰⁸ The concern where the courts are asked to make these complex decisions is the risk of weak or wrong decisions, and the costs this may impose on the legal and political systems, and society more generally.²⁰⁹ One form of the criticism from institutional competence emphasizes these sorts of concerns.

Another form of the criticism from institutional competence emphasizes the difficulties that the courts face in division of powers cases in developing “judicially manageable standards”.²¹⁰ The courts have developed a variety of tests and doctrines in division of powers cases, ostensibly to assist them in deciding the case at hand, as well as to guide the interpretation and application of the division of powers in the future. These standards are often expected to meet at least two requirements if they are to be ‘judicially manageable’: they are expected to be relatively easy to understand and apply, and to (at least help) generate more predictable and

²⁰⁸ Weiler, note 191, above, 238-239; and Hogg, note 30, above, sec. 5.5(b).

²⁰⁹ For more detailed discussion of these risks, see Sunstein, note 168, above, 4, 47-52.

²¹⁰ For a recent discussion, in the U.S. context, see R. Fallon, “Judicially Manageable Standards and Constitutional Meaning” (2005-06) 119 Harv. L. Rev. 1275.

consistent results.²¹¹ The courts regularly face very real challenges in articulating standards that are ‘judicially manageable’ in these ways. For example, the federal criminal law power calls for a definition of the term “Criminal Law”, even though the proper reach of the criminal law remains highly controversial.²¹² Similarly, the interjurisdictional immunity doctrine contemplates courts trying to define the “protected core”, or the “basic, minimum, and unassailable content”, of the (in practice) federal heads of power, even though they are generally framed in broad terms.²¹³ The courts have long struggled to articulate ‘judicially manageable standards’ in these (and other) situations, struggles that are well documented in decades of legal scholarship, in the regular complaints that a test or doctrine has proven difficult (even impossible) to understand or apply, or failed to generate predictable or consistent results.²¹⁴ This form of the criticism from institutional competence highlights the challenges courts face in the division of powers context in developing ‘judicially manageable standards’.

There is some evidence that the Court is attracted to the idea of

²¹¹ See, e.g., Baier, note 113, above, ch. 1 (“[i]n its minimalist form, doctrine is a set of standards, maxims, tests, and approaches to the interpretation of the law that is used to regularize law’s application and make it more routine and predictable”) [emphasis added]; and C. Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge, MA.: Harvard University Press, 2004), 5 (doctrine is expected to offer “predictability”).

²¹² Hogg, note 30, above, sec. 18.2 (power has been “very difficult to define”).

²¹³ For references, see note 205, above.

²¹⁴ See, e.g., Weiler, notes 25, 191, above; and MacKay, note 25, above, 253.

deferring to intergovernmental dialogue (or at least to adopting a deferential approach that eschews line-drawing) because it is sensitive to the concerns highlighted by the criticism from institutional competence. The best evidence of this is the manner in which the Court has recently approached the interjurisdictional immunity doctrine. In recent decisions, the Court has been reluctant to apply the interjurisdictional immunity doctrine in new situations; the Court has defended its reluctance to do so, in part, by highlighting the concern that the Court “may overshoot the federal or provincial power in which [the interjurisdictional immunity doctrine] is grounded”, and the “daunting” task of “drawing” a “protected core”.²¹⁵

How might the idea of deferring to intergovernmental dialogue mitigate the criticism from institutional competence? It appears to do so, in part, by restricting the role of the courts. In doing so, it seems to limit the situations where the courts are required to make complex empirical and predictive decisions, providing fewer chances for judicial error, with their associated costs,²¹⁶ while also reducing the burden placed on the courts to

²¹⁵ See *PHS*, note 54, above, paras. 64, 68 (refusing to apply the doctrine in a new context, to protect a “provincial core of health”). See also *Canadian Western Bank*, note 34, above, paras. 43, 77 (saying the doctrine should “be reserved for situations already covered by precedent”, and highlighting the “serious uncertainty” that may result if courts utilize the doctrine too much). Compare *COPA*, note 50, above (aeronautics covered by precedent; intrusion sufficiently serious to engage the doctrine); *Ryan Estate*, note 54, above (maritime negligence law covered by precedent; intrusion *not* sufficiently serious).

²¹⁶ Sunstein, note 168, above, 4 (“A court that leaves things open will not foreclose options in a way that may do a great deal of harm”, and “will also reduce the risks that come from

craft ‘judicially manageable standards’. In addition, and perhaps less obviously, the idea of deferring to intergovernmental dialogue also appears to mitigate the criticism from institutional competence, by capitalizing on the role that the political branches already play in working out their own allocations of jurisdiction. The political branches are often better placed than the courts to make the sorts of complex empirical and predictive decisions involved in setting the division of powers; this seems particularly true where they pool their resources and expertise in working out their own allocations of jurisdiction. By looking beyond the courts, the idea also draws more voices into the mix in setting the division of powers, dispersing responsibility, and perhaps decreasing the risk of error.²¹⁷ It also opens up a space where the political branches have the flexibility to craft temporary, not once-and-for-all, allocations of jurisdiction, allowing for revision where changed conditions or unanticipated bad consequences seem to call for it.²¹⁸

intervening in complex systems, where a single-shot can have a range of unanticipated bad consequences”); *id.*, 47-52; see also Dorf (2003), note 43, above, 970.

²¹⁷ Advocates of shared and dialogic theories of constitutional interpretation have highlighted their capacity to reach better answers to constitutional questions, including by exposing errors or weaknesses: see, e.g., Bateup (2006), note 17, above, 1130, 1134; and D. Coenen, “A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue” (2001) 42 *Wm. & Mary L. Rev.* 1575, 1835-1842.

²¹⁸ The Court regularly points to flexibility in describing, and defending, its deferential, pro-overlap, pro-‘cooperative federalism’ approach to the division of powers: see the sources cited in note 141, above. New governance scholars, among others, have also highlighted the merits of courts that embrace flexibility as an antidote to the fact that public institutions, including courts, are regularly now required to make decisions in social and

C. Safeguarding Jurisdiction: The Necessity of Judicial Review

The previous part discussed how the idea of deferring to intergovernmental dialogue appears to mitigate the most common criticisms directed *against* the *desirability* of judicial review. One of the most common arguments offered *in favour* of judicial review of the division of powers is that it plays a *necessary* role in safeguarding (especially provincial)²¹⁹ jurisdiction from encroachments, intentional or not, by the other order of government.²²⁰ Another reason that the idea of deferring to intergovernmental dialogue might seem attractive is that it seems to answer, or alleviate, this argument for judicial review of the division of powers.

How so? The federal and provincial governments frequently (and often vigorously) oppose initiatives that they believe to encroach on their jurisdiction; they do so both inside the courts, by launching a formal constitutional challenge, and outside the courts, by utilizing the intergovernmental apparatus.²²¹ Accordingly, if the federal and provincial governments agree to an allocation of jurisdiction, through policy-focused or court-focused intergovernmental dialogue, it might seem reasonable to

economic circumstances that change rapidly, dramatically, regularly, in unexpected ways: see, e.g., Dorf (2003), note 43, above; and Scott and Sturm, note 16, above.

²¹⁹ Provincial jurisdiction is often the focus because the federal government is usually thought to have the upper hand outside the courts: Wright, note 99, above, Part III(C)(a).

²²⁰ See, e.g., Swinton, note 26, above, 41-50.

²²¹ Wright, note 99, above, Part III; see also Hogg and Wright, note 23, above, 346-47.

conclude that both orders of government also agree that the jurisdiction of their government has been respected. Indeed, in some cases, as with court-focused intergovernmental dialogue, they say so explicitly.²²² This might be thought to weigh in favour of deference, by alleviating any concern that intergovernmental dialogue may come at the expense of federal or provincial jurisdiction, and thus that judicial safeguarding is necessary.²²³

The Court made a form of this argument in *Siemens*.²²⁴ In *Siemens*, as noted earlier, the Court rejected a constitutional challenge to the validity of provincial legislation that authorized municipalities to hold a plebiscite to ban video lottery terminals. The federal *Criminal Code* included an exception to the gaming and betting offences where a province had established a provincial lottery, supplying evidence of policy-focused intergovernmental dialogue, and the federal government also intervened to defend the constitutionality of the provincial law, supplying evidence of court-focused intergovernmental dialogue. Major J., writing for the Court, invoked the argument that “both federal and provincial governments guard their legislative powers carefully” in defending his suggestion that “when

²²² Agreement may be explicit, where both orders of government engage openly with the jurisdictional implications of an instance of intergovernmental dialogue, or it may be implicit, the aggregate result of various incentives (electoral, institutional and so on) that indirectly motivate federal and provincial decision-makers to protect the jurisdiction of their governments in the intergovernmental context: see further Part III(A), below.

²²³ This argument is intentionally qualified: see Part III(A), below, discussing why.

²²⁴ Note 72, above.

they ... agree to shared jurisdiction, that fact should be given careful consideration”.²²⁵ The implication was clear: since governments “guard their legislative powers carefully”, the federal government must have decided that the provincial law respected its jurisdiction; and this “should be given careful consideration” by the court in assessing its constitutionality.

Concerns about safeguarding jurisdiction can arise, as in *Siemens*, where there is a claim that an initiative intrudes unconstitutionally on the jurisdiction of the other order of government, and is therefore either invalid or inapplicable. However, they can also arise where overlapping and constitutionally valid and applicable federal and provincial initiatives interact, where a provincial initiative is rendered inoperative under the federal paramountcy doctrine, due to an operative conflict. Indeed, the jurisdictional concerns that can arise from the interaction of otherwise constitutional initiatives may now be especially salient, given the growth of jurisdictional overlap in Canada’s federal system.²²⁶ If the federal and provincial governments agree to an allocation of jurisdiction, through policy-focused or court-focused intergovernmental dialogue, it might also seem reasonable to conclude, drawing on the assumption in *Siemens*, that the provinces believe that it does not engage federal paramountcy concerns

²²⁵ *Id.*, para. 34.

²²⁶ See Part II(A), above.

– otherwise the provinces might be expected to protest and reject it. This might also be thought to weigh in favour of judicial deference, by alleviating any concern about the need to safeguard provincial jurisdiction.

III. THE PITFALLS OF DEFERENCE TO INTERGOVERNMENTAL DIALOGUE

There might seem to be a fairly strong argument for judicial deference to intergovernmental dialogue. However, in outlining the case to be made for the idea in the previous part, I have deliberately glazed over a number of pitfalls that emerge when the idea, and the arguments that can be made for it, are subjected to closer scrutiny. This part unpacks these pitfalls.

A. Safeguarding Jurisdiction: Necessity Revisited

Start with the discussion about safeguarding jurisdiction and the necessity of judicial review. I suggested earlier that, if both orders of government agree to a particular allocation of jurisdiction, through policy-focused or court-focused intergovernmental dialogue, it might seem reasonable to conclude that both orders of government agree, explicitly or implicitly, that it respects the jurisdiction of their government, alleviating any concern that judicial intervention may be necessary in the circumstances to safeguard (especially provincial) jurisdiction. However, on closer inspection, the extent to which this might hold true is open to doubt.

Consider first policy-focused intergovernmental dialogue. Policy-focused intergovernmental dialogue, recall, involves those allocations of

jurisdiction that are worked out outside the courts, utilizing Canada's vast intergovernmental apparatus. The executive branches drive much of the key decision-making and, while unelected officials do play a key role, the final decisions generally fall to those that are elected – usually the Prime Minister or premier, the cabinet, or a specific minister.²²⁷ It is thus the possible motivations of these individuals that I take to drive the decisions of a 'government' in relation to policy-focused intergovernmental dialogue.

One problem with the argument about agreement and respect for jurisdiction is that it fails to take full account of the reasons that a government may agree to a particular allocation of jurisdiction. The fundamental assumption that underlies the argument is that federal and provincial governments 'guard their legislative powers carefully'. There is an element of truth in this assumption. As I have argued elsewhere, federal and provincial governments do often guard their jurisdiction carefully.²²⁸ They may do so for a variety of reasons, including for constitutional reasons (to protect the Constitution generally, or the division of powers specifically);²²⁹ for institutional reasons (to protect institutional

²²⁷ See Wright, note 99, above, Part III(A).

²²⁸ I draw heavily in this paragraph from Wright, note 99, above, Part III(E).

²²⁹ This is a claim that some, like 'rational choice' or 'public choice' proponents, might find implausible. For a defense of the claim, highlighting the role that an internal sense of obligation to the Constitution may play, see, e.g., R. Fallon, "Constitutional Constraints" (2009) 97 Cal. L. Rev. 975. Of course, this sort of internalized sense of obligation to the Constitution may not entail agreement about its proper *interpretation and application*.

prerogatives, in order to avoid creating a jurisdictional precedent that might open the door to future encroachments); for electoral reasons (to defend particular initiatives, or entire areas of jurisdiction, that are electorally profitable); for programmatic reasons (to oppose initiatives that interfere with their own initiatives, existing or planned); and for ideological reasons (to promote political ideologies about government policy and the role and size of government, or federal ideologies about the balance of power).

However, there are good reasons to doubt that governments are consistently and uniformly disposed to guard their jurisdiction. For one thing, the reasons that may motivate governments to guard their jurisdiction do not point uniformly in that direction. For instance, while a provincial government may be inclined to oppose federal initiatives that interfere with electorally profitable provincial initiatives or areas of jurisdiction, it may be reluctant to oppose federal initiatives that are popular with (particularly key elements of) the electorate – and in some cases it may even welcome opportunities to ‘pass the buck’, tolerating, or even encouraging, federal initiatives in order to avoid the political risk involved in addressing issues that are politically fraught in that province.²³⁰ Similarly, while the federal government may be inclined to oppose certain provincial initiatives for ideological or programmatic reasons, the opposite might also be true, where

²³⁰ K. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: U.B.C. Press, 1996) (exploring the reasons governments ‘pass the buck’).

the substance of an initiative is consistent with the political or federal ideology of the government of the day, or its programmatic agenda.

Moreover, the reasons that may motivate governments to guard their jurisdiction may be outweighed by other considerations. For instance, a provincial government may be reluctant to oppose federal initiatives that will inject federal money or resources into the province; this is especially true of the poorer provinces that rely heavily on federal money for their programs and services. Similarly, as repeat players, governments might worry about the impact that their opposition to specific initiatives will have in other contexts, now and in the future. And, in some cases, governments might agree to instances of intergovernmental dialogue that are politically popular, and that they believe to have division of powers problems, trusting that they are likely to be held unconstitutional by the courts in the future.²³¹

Finally, a particular government may not ‘guard its jurisdiction carefully’ if the relevant decision-makers conclude, mistakenly, that a particular instance of policy-focused intergovernmental dialogue actually respects its jurisdiction. A government may fail to anticipate the impact that an initiative will have on its jurisdiction in the future. In addition, in many (some might say all) cases, federal and provincial decision-makers exercise

²³¹ Mark Tushnet has highlighted this possibility, which he calls ‘position-taking’: see *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008), 89-90, 100-101.

discretion in interpreting and applying the division of powers.²³² As a result, in agreeing to a particular allocation of jurisdiction in the intergovernmental context, the relevant decision-makers may end up ‘under-enforcing’ the jurisdiction of their government, due to an honest but mistaken belief that it does, and in the future will, respect their government’s jurisdiction.²³³

This is important because it highlights the possibility that, in at least some cases, policy-focused intergovernmental dialogue may not reflect an agreement as to respect for jurisdiction. Rather, it may reflect an agreement that, all things considered, the allocation of jurisdiction is desirable, or acceptable, for other reasons – even if, in the process, a claim to jurisdiction is waived, explicitly or implicitly, in whole or in part. This might be thought to weigh against the idea of deferring to policy-focused intergovernmental dialogue, at least if safeguarding jurisdiction is the concern, by undermining the claim that it can be assumed to reflect an agreement as to respect for jurisdiction, and revealing the real risk that it may pose to jurisdiction.²³⁴

²³² See Part II(B)(a), above.

²³³ See L. Sager, “Fair Measure: The Legal Status of Underenforced Constitutional Norms” (1978) 91 Harv. L. Rev. 1212 (exploring “underenforced” constitutional norms).

²³⁴ This criticism might seem unpersuasive if intergovernmental dialogue is thought to determine constitutionality, at least in part, even if it is motivated by political, institutional and other concerns, rather than, or as well as, what we might recognize as ‘constitutional’ concerns. This raises complex questions about the relationship between constitutional meaning and ordinary political decision-making – questions that deserve a more detailed analysis than I can provide here. However, several observations seem apt. First, if there are thought to be freestanding ‘constitutional’ allocations of jurisdiction, allocations of jurisdiction that should be determined using the familiar “modalities” of constitutional interpretation (text, history, structure, precedent, practical effects and values), this claim

Another problem with the argument that policy-focused intergovernmental dialogue may reflect an agreement about respect for jurisdiction is that it fails to account for the possibility that there may be no genuine *agreement* at all. For some, policy-focused intergovernmental dialogue may conjure up the image of allocations of jurisdiction that are worked out amicably and cooperatively by both orders of government. This may be (close to) the reality in some cases. However, the allocations of jurisdiction that result from policy-focused intergovernmental dialogue may also be hard fought, the product of months or years of intergovernmental

will seem unconvincing: for evidence of this thinking in Canada, see, e.g., Kong, note 8, above, 357 (“debates about [federalism] should be undertaken in the language of constitutional reasons and not of mere preferences”); and for discussion of these modalities, see P. Bobbitt, *Constitutional Fate* (New York: Oxford University Press, 1982). Second, even if we accept – as I think we likely must, if we are willing to embrace the idea of courts deferring to intergovernmental dialogue – that intergovernmental dialogue may determine constitutionality, at least in part, even if it is motivated by the aggregation of ‘mere preferences’, the possibility that federal and provincial decision-makers may fail to protect the jurisdiction of their governments ‘carefully’ in some cases may seem like a serious pitfall, especially to those that stress safeguarding jurisdiction. The operative concern is with the strength and reliability of the incentives that federal and provincial decision-makers have to protect the jurisdiction of their governments. I have noted several reasons to be concerned about their strength and reliability, but further examination is required to assess the extent of these concerns. (Perhaps revealingly, there is much debate about this in the U.S. literature: see, for a recent consideration of the issue, J. Bulman-Pozen, “Partisan Federalism” (2014) 127 Harv. L. Rev., forthcoming.) Finally, we might accept – again, as I think we probably must, if we embrace the idea – that the political branches should be given some leeway to determine the allocation of jurisdiction, and that the failure of an order of government to guard its jurisdiction in some cases is a feature of the idea, not a bug, arising only where the incentives that an order of government has to guard its jurisdiction are overcome by other, perhaps more important, considerations. But, questions then arise about when and how much leeway should be given. These questions would raise the sorts of hard, controversial choices (for example, about whether and how to assess these ‘other considerations’) that the idea aims to avoid in the first place, simply pushing them to a different level of remove: see Part III(D), below. The Court may also have to reconsider decisions, like the *Nova Scotia Interdelegation Case*, and those following it, that seem to preclude or restrict jurisdictional waiver: see note 87, above.

competition, disagreement, hard bargaining, and pressure, inducements, even threats.²³⁵ The ability of both orders of government to ensure that policy-focused intergovernmental dialogue respects their jurisdictional and other interests will turn in these cases on whether they have the requisite leverage, and utilize it effectively. The conventional view seems to be that the federal government invariably has more leverage than the provinces. As I have argued elsewhere, the provinces often have much more leverage than the conventional view suggests. However, the sources of leverage that are available to the provinces are variable, contingent on the underlying social, political and economic circumstances; this means that, depending on the underlying circumstances, the provinces may lack the requisite leverage to ensure that their jurisdictional and other interests are respected outside the courts. In addition, even if the provinces have the necessary leverage, it may actually amount to little, if for some reason it is utilized ineffectively.²³⁶

Why is this important?²³⁷ It is important, because it exposes the risk that, in at least some cases, the allocations of jurisdiction that result from

²³⁵ The rest of this paragraph draws on Wright, note 99, above, Part III.

²³⁶ For example, the provinces will have more leverage if they work together and form a common front, but, due to collective action problems, they may not do so: *Ibid.*

²³⁷ Again, it might be argued that these differences – in the leverage available, and the ability to use it effectively – are a feature of the idea, not a bug. However, the impact that these differences do and should have are likely to be contentious. I highlight the risk of coercion, but it might be argued that a focus on coercion itself reflects a loaded normative choice. Those, for example, that privilege provincial jurisdiction and worry about federal power may be inclined to view even modest inequality in leverage as a problem.

policy-focused intergovernmental dialogue may be tainted by coercion. We might expect an order of government to refuse to agree to an instance of policy-focused intergovernmental dialogue that does not benefit it more than the alternatives, but this might not hold true if coercion is involved.²³⁸ It is difficult to provide a general assessment of how often coercion is likely to be involved; as noted below, there is no consensus about how to define coercion,²³⁹ and the ability to provide this sort of generalized assessment is complicated by the fact that each initiative “generates its own constellation of supporters and opponents, takes place in a particular political, cultural, social and economic context, and is driven by complex factors that may be difficult for the scholar to discern”.²⁴⁰ Yet, it seems plausible that, in at least some cases, the differences in leverage that are available will be so significant as to raise serious questions about whether an instance of policy-focused intergovernmental dialogue was actually tainted by coercion.²⁴¹ Again, this too might seem to weigh against deference to policy-focused intergovernmental dialogue, at least if safeguarding jurisdiction is the

²³⁸ Ryan, note 20, above, 343 (making this point).

²³⁹ For discussion, see Part III(D)(a)(ii), below.

²⁴⁰ J.D. Nugent, *Safeguarding Federalism: How States Protect their Interests in National Policymaking* (Norman, OK.: University of Oklahoma Press, 2009), 217.

²⁴¹ For example, critics of conditional grants under the federal spending power have argued that conditional grants are constitutionally suspect, because they allow the federal government to coerce the provincial governments into complying with federally-mandated conditions: see, e.g., Gaudreault-DesBiens, note 160, above, 190. See also note 369, below.

concern, by undermining the claim that it can be assumed to reflect an *agreement* as to respect for jurisdiction, and exposing the risk that it may come at the expense of federal and provincial jurisdiction in some cases.²⁴²

Now consider court-focused intergovernmental dialogue. Court-focused intergovernmental dialogue, recall, involves intergovernmental dialogue that occurs inside the courts. It usually takes the form of an intervention by one order of government that supports the constitutionality of an initiative pursued or proposed by the other order of government.

Is court-focused intergovernmental dialogue susceptible to similar concerns? It is more difficult to answer to this question. For one thing, it is unclear who, in practice, is typically allocated the final authority to decide whether an order of government will intervene in this manner. In theory, it is the federal and provincial attorneys general that have the authority to make all litigation-related decisions.²⁴³ And yet, the task of representing the federal and provincial governments in the courts usually falls, in practice, to

²⁴² Erin Ryan, who defends deference to intergovernmental dialogue (my term, not hers) in the U.S. context, accepts that “there may be instances in which unequal bargaining power unduly compromises bargaining autonomy”, and argues that this should be taken into account by the courts in determining whether to defer: Ryan, note 20, above, 342. I discuss below, in Part III(D)(a)(ii), the difficulties that this might raise for courts.

²⁴³ A. Petter, “Legalise This: The Chartering of Canadian Politics”, in J.B. Kelly and C. Manfredi, eds., *Contested Constitutionalism* (Vancouver: U.B.C. Press, 2009), 36.

Note that the title used varies. For example, federally, certain functions are allocated to the Minister of Justice, while others are allocated to the Attorney General, but the functions of both offices are performed by a single office-holder, who is both the Minister of Justice and the Attorney General. I use the title attorney general here for the sake of convenience.

government lawyers.²⁴⁴ Moreover, it is generally accepted that the attorneys general are free to consult with other members of their governments, including the Prime Minister or premier and other members of cabinet,²⁴⁵ and there is evidence to suggest that consultation (and more, like direct pressure) occurs.²⁴⁶ As a result, it is possible that, in practice, the decision to engage in court-focused intergovernmental dialogue is influenced, and ultimately made by, several different individuals, elected and unelected. It would be surprising to discover that, in practice, final authority to make these sorts of decisions is left to unelected government lawyers, at least as a matter of general practice. After all, the stakes for governments (legally-binding determinations about the scope of jurisdiction that might restrict a government's options in the future, and open its initiatives, and programmatic goals, to interference by the other order of government) can be quite high. But, case-specific information about how or why a decision is

²⁴⁴ Federal and provincial attorneys general do occasionally represent their respective governments personally in important (often constitutional) cases, but this is rare. In addition, and less rare, there are various federal and provincial agencies, commissions, and Crown corporations that have their own in-house counsel that conduct their litigation.

²⁴⁵ Petter, note 243, above, 36-37 (noting that this sort of consultation actually occurs, but suggesting that the final decision is “ultimately an attorney general’s to make”).

²⁴⁶ See, e.g., M.A. Hennigar, “Why Does the Federal Government Appeal to the Supreme Court of Canada in *Charter of Rights* Cases? A Strategic Explanation” (2007) 41 *Law & Soc. Rev.* 225, 232 (reporting that the litigation against the federal government involving same-sex marriage “was debated at the highest levels of the political executive”); and M. Hennigar, “Conceptualizing Attorney General Conduct in *Charter* Litigation” (2008) 51 *Can. Public Adm.* 193, 204, 206-10 (reporting that in “‘complex cases of national interest’ the attorney general’s counsel ‘takes directions directly from the PMO’”).

made in the litigation context is typically not made public, and there is also a dearth of information available about the general policies and procedures that may be followed, making it very difficult to verify this assumption.²⁴⁷

In addition, and relatedly, it is difficult to pinpoint the reasons that court-focused intergovernmental dialogue may occur. The attorneys general are the chief legal advisers of their governments, and as such are tasked with ensuring that the governments they serve respect the law, including the constitutional division of powers. And yet, as elected, party-affiliated legislators, and appointed members of the cabinet, who serve at the pleasure of the Prime Minister or premier, they are also susceptible to a variety of electoral, partisan, programmatic, ideological and self-interested considerations, all of which may complicate, and work in opposition to, this task. There is a debate in the legal scholarship about whether the attorneys general (and their delegates, government lawyers) have an obligation to avoid these types of considerations in determining the conduct of

²⁴⁷ The process that the federal government uses to reach these decisions has been subjected to the most scrutiny by far, but even here, the information remains scant, at least as it relates to division of powers cases. For example, it is clear that the federal Department of Justice has a National Litigation Committee, made up of senior government lawyers, that makes recommendations to the Attorney General and his or her Deputy about whether to appeal a lower court decision and the positions taken in written arguments in “significant cases”; it is also clear that “significant cases” includes “cases involving federal-provincial ... relations”: see M. Hennigar, “Players and Process: *Charter* Litigation and the Federal Government” (2002) 21 *Wind. Y.B.* Access Just. 91, 96. However, the research focuses on *Charter*, not federalism cases; and it lacks a systematic account of how often and much the Attorney General and other members of the federal government actually get involved.

constitutional litigation.²⁴⁸ There is also a debate in the legal scholarship about whether, as lawyers, government lawyers are subject to higher ethical obligations than other non-government lawyers, which would require them to ensure, as much as possible, that their ‘client’ respects the law and the Constitution.²⁴⁹ It is difficult to determine which views hold true in practice, complicating the task of pinpointing the reasons court-focused intergovernmental dialogue may occur, generally or in specific cases.

We might be inclined to think that court-focused intergovernmental dialogue is immune, or at least less susceptible, to the considerations identified earlier in relation to policy-focused intergovernmental dialogue. Court-focused intergovernmental dialogue might be thought to be more likely to reflect a mutual agreement as to constitutionality. The context – litigation raising a particular division of powers issue – might be expected

²⁴⁸ Some argue that they have a duty to do so, when to do otherwise would, in their view, violate the Constitution: see, for variations of this argument, the views expressed by, among others, John Edwards, Ian Scott (former Attorney General of Ontario), Mark Freiman (former Deputy Attorney General of Ontario), Debra McAllister (Senior Counsel, Department of Justice), John Tait (former Deputy Minister of Justice of Canada), and Kent Roach; the references are gathered in A. Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33 *Dalhousie L.J.* 1, 5-6 fn. 9-10. However, others argue that they should defer to the wishes of their government or legislature, even if, in doing so, electoral, partisan, programmatic, or ideological considerations are allowed to triumph: see J. Jai, “Policy, politics, and law: Changing relationships in light of the *Charter*” (1997) 9 *N.J.C.L.* 1, 17-18 (defending the role of cabinet); and G. Huscroft, “Reconciling Duty and Discretion: The Attorney General in the *Charter* Era” (2009) 34 *Queen’s L.J.* 773 (defending the role of the legislature).

²⁴⁹ Compare Dodek, note 248, above, 27 (arguing in favour of higher ethical obligations); with A. Hutchinson, “In the Public Interest: The Responsibilities and Rights of Government Lawyers” (2008) 46 *Osgoode Hall L.J.* 105 (taking the opposing view).

to focus the attention of both orders of government on the constitutionality of the particular initiative involved. Furthermore, the attorneys general, and the government lawyers that work for them, may well believe, as many have argued they should, that they have a duty to ensure the government they serve respects the law, including the division of powers.²⁵⁰ At a minimum, as lawyers,²⁵¹ they will have “had a common socialization – a socialization that typically entails taking law seriously on its own terms”.²⁵² Moreover, both orders of government may be less inclined to support an allocation of jurisdiction inside than outside the courts, since the former, unlike the latter, can lead to legally-binding limits on jurisdiction that cannot be (as) easily reversed, limits that can constrain future options, and open the door to interferences with initiatives, either existing or planned.

In addition, court-focused intergovernmental dialogue seems less likely to be susceptible to the sorts of coercion that might taint policy-focused intergovernmental dialogue. There is no publicly available evidence of one order of government pressuring (let alone coercing) the other order of government to intervene in a division of powers challenge to support the constitutionality of its initiatives – something that would be considered

²⁵⁰ See note 248, and accompanying text, above.

²⁵¹ Most, but certainly not all, attorneys general in Canada are lawyers: see A. Dodek, “Shouldn’t the Land’s Chief Law Officer be a Lawyer?”, *Huffington Post* (June 5, 2013).

²⁵² C.A. Bradley & T.W. Morrison, “Presidential Power, Historical Practice, and Legal Constraint” (2013) 113 *Colum. L. Rev.* 1097, 1133 (making this point in the U.S. context).

highly improper. Moreover, since both orders of government are repeat litigators, their lawyers might be inclined to worry about the “institutional credibility” they may lose with the courts if they bowed to this sort of coercion and defended (especially clear) intrusions on their jurisdiction.²⁵³

And yet, while court-focused intergovernmental dialogue may well be immune to the concerns expressed about coercion, at least for the most part,²⁵⁴ it is less than clear that it is immune to the concerns expressed about mutual agreement as to respect for jurisdiction. Recall the key assumption: that both orders of government guard their jurisdiction carefully. Assume that it is either the attorney general or government lawyers that determine whether to engage in court-focused intergovernmental dialogue, and that, in doing so, they are actually motivated by a genuine belief that their primary duty is to ensure that the government they represent respects the law, including the division of powers. This will not necessarily lead them to guard the jurisdiction of the government they represent carefully. As noted earlier, in many (some might say all) cases, the attorneys general and government lawyers exercise discretion in interpreting the division of

²⁵³ Hennigar (2007), note 246, above, 227 (noting the “federal government’s explicit desire to protect its institutional credibility with the Court” in making appeal decisions).

²⁵⁴ It seems conceivable that concerns about coercion might arise if an instance of policy-focused intergovernmental dialogue is later defended in a division of powers challenge by an order of government that was coerced into accepting it. But, a government coerced in this way may well be highly disinclined to later defend the initiative in court.

powers.²⁵⁵ As a result, in determining whether to engage in court-focused intergovernmental dialogue, the relevant federal and provincial decision-makers may actually end up ‘under-enforcing’ the jurisdiction of their government, due to an honest but mistaken belief that the initiative involved does, and in the future will, respect the jurisdiction of their government.

In addition, it is less than clear that court-focused intergovernmental dialogue is indeed likely to be immune to the sorts of electoral and other considerations referred to earlier, at least in all cases. We might be inclined to think that these sorts of considerations are unlikely to play a role if government lawyers take responsibility for making the decisions about court-focused intergovernmental dialogue. Government lawyers are not elected; they are not members of the cabinet or the government of the day; and they do not hold their positions at the pleasure of the Prime Minister or the premier. However, if government lawyers do indeed take responsibility for making the decisions about court-focused intergovernmental dialogue, there remains a risk that these sorts of considerations may still come into play indirectly, since, in some cases, government lawyers might worry about how their decisions will be received by their political superiors, for career-related reasons, or even come to identify with them, or the initiative

²⁵⁵ See the text accompanying notes 232-233, above.

in question.²⁵⁶ In any case, as noted, it is possible (indeed quite likely) that the attorneys general take ultimate responsibility for making the decisions about court-focused intergovernmental dialogue at least some of the time. And, since the attorneys general are both elected (as party-affiliated legislators) and appointed (as attorneys general), there is a real risk that they may support court-focused intergovernmental dialogue for any number of electoral, partisan, programmatic, ideological and self-interested reasons – whether of their own accord, or due to pressure from their colleagues, and even if the jurisdiction of their government is somehow impacted, and the risk of interference with its initiatives is increased.²⁵⁷ The evidence, while limited and largely anecdotal, suggests that these sorts of considerations do motivate the decisions of the attorneys general at least some of the time.²⁵⁸

²⁵⁶ See Dodek, note 248, above, 14 (identifying the risk that government lawyers will become “‘embedded lawyers’ who come to identify too closely with their client”).

The impact that these types of considerations can have in some cases is illustrated by the controversy surrounding the so-called ‘torture memos’ in the United States. Most legal commentators have concluded that these memos inappropriately twisted and stretched the law to suit the purposes of the Bush Administration: see, e.g., D. Cole, ed., *The Torture Memos* (New York: The Free Press, 2009). Although perhaps exceptional, the point here is to illustrate that government lawyers are not immune from these types of considerations.

²⁵⁷ For example, the initiative may be popular with a key element of the electorate, or further the government’s programmatic or ideological goals. This may explain the federal government’s decision to engage in court-focused intergovernmental dialogue in *Rothmans*, note 77, above. In that case, the federal government intervened to support a Saskatchewan initiative, even though it imposed stricter conditions on the marketing of tobacco products, upsetting the balance it had struck in response to a *Charter* decision finding an earlier federal initiative unconstitutional: see Wright, note 4, above, 676-8. The initiative, which was aimed at preventing underage smoking, was politically popular. And it no doubt helped that it was not the federal government that was taking the *Charter* risk.

²⁵⁸ Hennigar (2008), note 246, above, 206-10 (discussing same-sex marriage cases).

Accordingly, it is less than clear that either the attorneys general or government lawyers will be consistently inclined to guard the jurisdiction of their governments. This would seem to weigh against deference to court-focused intergovernmental dialogue, at least if safeguarding jurisdiction is the concern, by undermining the argument that it can be assumed to reflect an agreement as to respect for jurisdiction, and exposing the risk that it may come at the expense of federal and provincial jurisdiction in some cases.

B. Democratic Legitimacy: The Democratic Critique Revisited

I noted earlier that one of the primary reasons that could be offered for judicial deference to intergovernmental dialogue is that it seemed to mitigate the criticism that judicial review of the division of powers is anti-democratic. The claim that it does so turns on an implicit assumption that the two forms of intergovernmental dialogue discussed in this article have a stronger claim to democratic legitimacy than judicial review of the division of powers. However, while they may not be as anti-democratic as judicial review of the division of powers, they are not immune to anti-democratic concerns.²⁵⁹ This (at least) weakens the force of the claim that deference to

²⁵⁹ The requirements of democracy are highly disputed. I work here from a minimalist, procedural definition of the idea, which contemplates public decision-making that is for, but also to some extent by, the people. I have in mind public decision-making that is at least accountable (entailing transparency, responsiveness, and answerability to the electorate, by way of, and between, elections), but also to some extent participatory (entailing direct forms of electoral participation in political decision-making). For further discussion of the idea, including its ‘thicker’ procedural and substantive variants, see R. Dahl et al., eds., *The Democracy Sourcebook* (Cambridge: M.I.T. Press, 2003), Part 1.

intergovernmental dialogue mitigates the criticism from democracy.

Consider first policy-focused intergovernmental dialogue. As noted, the federal and provincial executive branches dominate the intergovernmental process.²⁶⁰ In theory, the members of the ‘governments’ that control the executive branches (the Prime Minister or provincial premiers and their cabinets) are accountable for the decision-making (intergovernmental and otherwise) of all the unelected officials that work under them, and the members of these governments are accountable to their electorates for their decision-making (intergovernmental and otherwise), directly, principally through elections, and indirectly, through their elected legislatures, from which they are also drawn.²⁶¹ However, as decades of political science literature have shown, there are good reasons to be sceptical about the democratic pedigree of the intergovernmental process.²⁶²

First, there are real concerns about the openness and transparency of the intergovernmental process in Canada. Much of what goes on in the intergovernmental process – including the formal and informal federal-

²⁶⁰ See the text accompanying note 227, above.

²⁶¹ Occasionally someone who is not a member of Parliament or a provincial legislature is appointed, but federally, they must then be elected to the House of Commons or (much more rarely) appointed to the Senate, and provincially, elected to the legislature.

²⁶² See, for one of the earliest and most damning criticisms, D. Smiley, “An Outsider’s Observations of Intergovernmental Relations Among Consenting Adults”, in R. Simeon, ed., *Confrontation or Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979), 105-13.

provincial negotiations that occur – takes place behind closed doors.²⁶³ In recent years, some effort has been made in particular contexts to open the intergovernmental process to ‘stakeholders’,²⁶⁴ and disagreements between governments do spill out into the public domain.²⁶⁵ But, in general, the doors of the intergovernmental process remain closed. This undermines the ability of the electorate to participate directly and actively in some way in the decisions made in the intergovernmental context. It also undermines the electorate’s ability to learn about what decisions are made, and how and why. This is a problem from a democratic perspective, since, as Allan Hutchinson notes, “[w]ithout the necessary information about what government decisions are made *and how*”, the electorate will find it difficult to hold those responsible accountable for them.²⁶⁶ Accountability is rendered largely reactive, and restricted to matters of public knowledge.²⁶⁷

²⁶³ J. Smith, *Federalism* (Vancouver: U.B.C. Press, 2004), 105 (“the exercise has a behind-the-scenes quality that precludes widespread and informed public debate”); Simeon & Nugent, note 97, above, 70 (“Most intergovernmental relations continue to take place behind closed doors”); and J. Simmons, “Democratizing Executive Federalism: The Role of Non-Governmental Actors in Intergovernmental Agreements”, in Bakvis & Skogstad, note 97, above, 321 (“meetings among executives are very rarely public”).

²⁶⁴ Simmons, previous note, 320-336; and Smith, previous note, 104.

²⁶⁵ Smith, note 263, above, 108; and Wright, note 99, above, Part III.

²⁶⁶ Hutchinson, note 249, above, 117 [emphasis added].

²⁶⁷ It might be argued that accountability is assured provided the *outcome* is transparent. Transparency may not be an unmitigated good in all cases – for example, in cases where national security or law enforcement would be compromised. However, even if we accept a focus on transparency as to outcome, a focus that advocates of deliberative democracy would find troubling (see, e.g., A. Gutmann and D. Thompson, *Why Deliberative*

Second, there are real concerns about the extent to which the legislative branches genuinely have the opportunity to hold the executive branches accountable for their intergovernmental decision-making. The executive branches typically do not consult with their legislative branches when planning and strategizing the positions that they will take in the intergovernmental process; they typically do not report back to their legislative branches about the progress of intergovernmental negotiations; and they typically do not call upon their legislative branches to ratify or approve intergovernmental agreements, unless legislation is somehow required to implement them.²⁶⁸ The input of legislatures is also limited even when they are called upon to play a role. “No government, federal or provincial, has a standing committee on intergovernmental relations, and intergovernmental issues are seldom discussed in sectoral portfolio

Democracy? (Princeton: Princeton University Press, 2004)), accountability-based concerns arguably still remain. The closed-door nature of the intergovernmental process may undermine the ability of the electorate to monitor outcomes and hold officials, particularly incompetent, dishonest, or corrupt ones, accountable – for example, by limiting access to important information that might not otherwise be revealed publicly, about the possible impact of powerful private individuals or interest groups, the evidence and rationales actually relied upon (rather than asserted), and the evidence and alternatives that were ignored, or not taken seriously. In addition, if the electorate is limited to judging outcomes, its ability to push for changes may be reduced; since an instance of intergovernmental dialogue may reflect various interconnected compromises, the electorate may find it hard to push for changes after the fact, due to the (perhaps legitimate) fear that one change will destabilize the entire outcome. For an account of the pros and cons of transparency, see M. Fenster, “The Opacity of Transparency” (2006) 91 Iowa L. Rev. 885.

²⁶⁸ G. DiGiacomo, “The Democratic Content of Intergovernmental Agreements in Canada” (Regina, Sask.: SIPP, 2005); and Simeon & Nugent, note 97, above, 72.

committees”.²⁶⁹ Intergovernmental agreements are typically presented as finished products that cannot be modified, for fear of undermining the agreement reached, and agreements are often rubberstamped, without any meaningful debate.²⁷⁰ The opposition parties also typically “have little influence [in the intergovernmental process], even though they may well hold the preponderance of seats from particular regions”.²⁷¹ This is a problem from a democratic perspective, because it undercuts one of the key avenues available in Canada’s parliamentary system to hold governments to account, particularly between elections: legislative accountability.²⁷²

The marginalization of the legislative branches in the intergovernmental context parallels the marginalization of the legislative branches in Canada’s political system more generally.²⁷³ There is no separation of powers between the legislative and executive branches in Canada. Canada utilizes the Westminster-style parliamentary system, and as such, the executive branches are controlled by the government of the day,

²⁶⁹ Simeon & Nugent, note 97, above, 72.

²⁷⁰ DiGiacomo, note 268, above, 5; and Smith, note 263, above, 104-6.

²⁷¹ Simeon & Nugent, note 97, above, 72.

²⁷² Indeed, the legislative branches might be thought to occupy a particularly important place in Canada’s Westminster-style parliamentary democracy, since there are no nationwide or province-wide direct elections for the Prime Minister and provincial premiers; only the constituents in their local ridings have the chance to vote for (or against) them directly.

²⁷³ And in fact, it has been argued that ‘executive federalism’ actually exacerbates the problem in the Canadian context in various ways: see, e.g., Smiley, note 262, above, 105-6.

meaning the Prime Minister or provincial premier and their cabinets.²⁷⁴ However, these governments, whose members also sit as elected members of their legislatures, are entitled to remain in power only so long as they hold the support of the majority of the House of Commons (federally) or the legislature (provincially). In theory, the line of accountability that flows from government to legislature to electorate provides the electorate an important opportunity to hold their federal and provincial governments to account, indirectly, for their decision-making. However, there is a large body of political science research that highlights the increasing concentration of political power in the executive branches in Canada, first in the cabinet, and more recently in the offices of the Prime Minister and the provincial premiers.²⁷⁵ The threat of party discipline, control over cabinet and committee appointments, and cabinet solidarity, among other things, allow the Prime Minister and the provincial premiers to exert considerable influence over their cabinets and ‘backbenchers’, which they can then use, if necessary, to ensure cabinet and backbench support for their initiatives during the legislative process.²⁷⁶ In addition, outside minority governments,

²⁷⁴ Legally, executive power in Canada vests in the Crown, federally and provincially, but in practice it is the elected government of the day that controls the executive branch.

²⁷⁵ See, e.g., D. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); D. Savoie, *Power: Where is it?* (Montreal: McGill-Queen's University Press, 2010); see also Wright, note 99, Part II.

²⁷⁶ See, e.g., G. White, *Cabinets and First Ministers* (Vancouver: U.B.C. Press, 2005), 64-101; D. Docherty, *Legislatures* (Vancouver: U.B.C. Press, 2005); and the previous note.

governments typically do not need the votes of the opposition parties to advance their agenda.²⁷⁷ Finally, the federal and all provincial governments in Canada use a first-past-the-post electoral system, which has “the potential to produce large discrepancies between votes received and seats won”, and to result in regions that are dramatically underrepresented.²⁷⁸ It would go too far to say that backbenchers and cabinet ministers, opposition parties, and underrepresented regions have been sidelined altogether in Canada,²⁷⁹ but their marginalization has in the least weakened the ability of legislatures in Canada to hold governments to account for their decision-making.

Finally, the electorate also faces real difficulties that impede their ability to hold their federal and provincial governments to account for their intergovernmental decision-making more directly. We might be less inclined to worry about the marginalization of the legislative branches in the intergovernmental process if the intergovernmental process, or at least the agreements that result from it, were easily accessible to the electorate, and we could be comfortable that the electorate had the knowledge needed to hold their governments to account for their intergovernmental decision-making. The levels of electoral accessibility and knowledge do seem to vary

²⁷⁷ Simeon & Nugent, note 97, above, 60-61.

²⁷⁸ *Ibid*; and Wright, note 99, above, Part II(B).

²⁷⁹ See further, e.g., Baker, note 29, above, ch. 4, and the sources in notes 275 to 276.

by area.²⁸⁰ But, in general, the electorate is often (but not always)²⁸¹ largely marginalized in the intergovernmental process.²⁸² Intergovernmental agreements are often poorly publicized, hard to find,²⁸³ and expressed in a form that is difficult to understand.²⁸⁴ And research suggests that much of the electorate often finds it difficult to identify which order of government actually is, and should be, responsible for an issue.²⁸⁵ This is a problem from a democratic perspective, because it raises questions about the ability of the electorate to pick up the slack for the legislative branches, and to hold their governments to account for their intergovernmental decision-making.

These three points, taken together, suggest that there are good reasons to question the democratic legitimacy of policy-focused intergovernmental dialogue. True, policy-focused intergovernmental

²⁸⁰ Simeon & Nugent, note 97, above, 70.

²⁸¹ The process is occasionally opened to stakeholders, and intergovernmental agreements now more often include accountability mechanisms that require governments to account to their electorates in particular ways: see Simmons, note 263, above.

²⁸² See, e.g., R. Simeon & D. Cameron, “Intergovernmental Relations and Democracy”, in H. Bakvis & G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Oxford: Oxford University Press, 2002), 288 (suggesting that “citizens are largely outside the game, more bystanders or cannon fodder than participants”).

²⁸³ For discussion, see Poirier, note 109, above, 427-428.

²⁸⁴ For example, the agreements are not infrequently expressed in area-specific jargon, and it is increasingly common for governments to negotiate broad framework agreements that are implemented by different bilateral agreements, making it necessary to piece together a number of interlocking agreements: see Simeon & Nugent, note 97, above, 65.

²⁸⁵ See Wright, note 99, above, Part III(C)(e). As I note in that article, interest groups and governments may have both the incentive and the ability to sort out responsibility, and in some cases, they may be inclined to involve the broader public in doing so: *Ibid.*

dialogue may well still have a greater claim to democratic legitimacy than judicial review. After all, the judges who exercise the power of judicial review are unelected, whereas the governments who make, or delegate the responsibility to make, the decisions about policy-focused intergovernmental dialogue are elected.²⁸⁶ And yet, the force of the criticism from democracy, and the argument that deference to policy-focused intergovernmental dialogue mitigates it, is at least “somewhat weakened by a recognition of the democratic deficiencies of the political system”.²⁸⁷

Consider next court-focused intergovernmental dialogue. As noted earlier, it is not clear who typically determines whether an order of government will engage in court-focused intergovernmental dialogue.²⁸⁸ However, there are good reasons to question the democratic legitimacy of court-focused intergovernmental dialogue regardless of who does so.

Assume first that the ultimate determination actually rests, not only legally, but also in practice, with the attorneys general. The attorneys general are accountable for the discharge of their duties to their elected

²⁸⁶ To paraphrase John Hart Ely, “we may grant until we’re blue in the face that [the executive branches] aren’t wholly democratic, but that isn’t going to make courts more democratic”: see *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, M.A.: Harvard University Press, 1980), 67 (making this point about legislatures and courts).

²⁸⁷ Swinton, note 26, above, 54. And see Baier, note 100, above, 92-3 (arguing that judicial review of the division of powers “offers actors other than governments an opportunity to be engaged and influential in the politics of intergovernmental relations”).

²⁸⁸ See the text accompanying notes 243 to 247, above.

legislatures.²⁸⁹ The litigation-related decisions that they make may also be subject to questioning, criticism, even pressure, by the Prime Minister or premier and their other cabinet colleagues, who are also elected.²⁹⁰ And ultimately, as elected members of their legislatures, the attorneys general are also accountable to their electorates. However, the attorneys general are appointed, not elected, to their positions as attorneys general, and although they are also elected members of their legislatures, only the constituents in their local ridings have the opportunity to vote for them directly, often before they will have been appointed attorneys general.²⁹¹ The attorneys general may believe, as many have argued that they should, that they should ignore partisan electoral concerns and act on their own best interpretations of the Constitution in making litigation-related decisions, a belief that, even if justified for other reasons, does, in the least, raise democracy-related concerns.²⁹² The impact, if any, that government members, like the Prime Minister or premier, may have on an attorney general's litigation-related

²⁸⁹ *Smythe v. The Queen* [1971] S.C.R. 680, 686; and Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62 (Ottawa: Law Reform Commn. of Canada, 1990), 11.

²⁹⁰ As noted, the propriety of this is controversial, but it is quite clear that it happens, at least in high profile cases: see, e.g., Hennigar (2008), note 246, above, 204 (“the attorney general/minister of justice may ultimately face questions, criticism, or pressure from his or her cabinet colleagues and the prime minister [or premier] over litigation decisions”).

²⁹¹ In the United States, in contrast, the majority of *state* attorneys general are elected, as attorneys general, in state-wide elections. The federal attorney general is appointed.

²⁹² For references, which highlight possible examples, see note 248, above.

decisions are usually kept tightly under wraps,²⁹³ raising the sorts of transparency-related concerns identified earlier.²⁹⁴ The role that the legislative branches might play in holding the attorneys general to account is limited to questioning and criticism, and is “infrequently and only lightly exercised”,²⁹⁵ undoubtedly because, outside minority governments, the legislative branches are controlled by their party.²⁹⁶ There are questions about whether the attorneys general can be asked to defend their decisions about cases that are still before the courts.²⁹⁷ And finally, “[f]ew Canadian legislatures have legal advisors who can provide legislators with independent legal advice”,²⁹⁸ without legal advice, legislators (especially those without any sort of legal training) may be ill equipped, and thus reluctant, to challenge an attorney general’s litigation-related decisions.²⁹⁹

²⁹³ For evidence of an impact, see Hennigar (2008), note 246, above, 204, 206-10.

²⁹⁴ See notes 266 to 267, and accompanying text, above.

²⁹⁵ Dodek, note 248, above, 38. See also J.L.J. Edwards, “The Attorney-General and the *Canadian Charter of Rights*” (1988) 14 *Commw. L. Bull.* 1444, 1446 (concluding “that such occasions of public accountability have been singularly sparse in number”).

²⁹⁶ Law Reform Commn., note 289, above, 11.

²⁹⁷ Dodek, note 248, above, 38; see also Law Reform Commn., note 289, above, 11. The reason for this is that such requests may also run afoul of the sub judice rule (or convention), which restricts the ability of public officials to speak to matters that are before the courts (or ‘sub judice’). See G. Steele, “The Sub Judice Convention: What to Do When a Matter is Before the Courts?” (2007) *Canadian Parliamentary Review* 1, 5-14.

²⁹⁸ Dodek, note 248, above, 48; and Law Reform Commn., note 289, above, 17.

²⁹⁹ Petter, note 243, above, 35 (“given their lack of familiarity with the law . . . , non-lawyers within government are frequently intimidated by legal opinions”); and J. Kelly, *Governing with the Charter* (Vancouver: U.B.C. Press, 2005), 43 (making a similar point).

Now assume that the ultimate determination actually rests, in practice, with government lawyers. Government lawyers, like attorneys general, may believe they should ignore partisan concerns and act on their own best interpretations of the Constitution in making litigation-related determinations. Moreover, government lawyers are not elected, and thus they lack the democratic legitimacy that direct elections can afford. And, while the attorneys general are accountable for the decisions made on their behalf by government lawyers,³⁰⁰ the forms of accountability available are vulnerable to the same weaknesses identified in the previous paragraph.

Finally, assume that the ultimate determination actually rests, in practice, with the cabinet, or the Prime Minister or premier and his or her staff. It is clear that the final *legal* authority to make litigation-related determinations rests with the attorneys general, but, as noted, it is possible, particularly in high profile cases, that the cabinet and the Prime Minister or premier may exert (perhaps considerable) influence.³⁰¹ The Prime Minister and premier and other cabinet ministers are, of course, accountable to their elected legislatures, from which they are also drawn. Yet, there is little reason to think that accountability is likely to be any stronger in these situations than it is where litigation-related decisions are actually left to the

³⁰⁰ Dodek, note 248, above, 48 (making this point).

³⁰¹ See the text accompanying notes 243 to 247, above.

attorneys general – and in fact, it may well be worse, since the influence that they may have in this context is usually kept strictly under wraps.

This suggests that there are serious reasons to doubt the democratic legitimacy of court-focused intergovernmental dialogue, regardless of who ultimately has the final say, or has some sort of influence. As with policy-focused intergovernmental dialogue, court-focused intergovernmental dialogue may well still have a greater claim to democratic legitimacy than judicial review. After all, the judges who exercise the power of judicial review are unelected, whereas those who make or influence the determinations about court-focused intergovernmental dialogue are elected, or at least answerable to those who are. But, as with policy-focused intergovernmental dialogue, the force of the criticism from democracy, and the argument that deference to court-focused intergovernmental dialogue actually mitigates it, would seem to be at least “somewhat weakened”.³⁰²

C. Settlement and Stability

One of the key arguments offered in favour of judicial review of the division of powers is that it plays an essential settlement-based function, both by settling individual disputes about the division of powers, and, in the process, by clarifying the scope of federal and provincial jurisdiction, now

³⁰² Swinton, note 26, above, 54.

and for the future.³⁰³ The argument is, in essence, that federal systems need a mechanism that has the final authority to settle the disputes that will inevitably arise about the scope of jurisdiction, and that, at least in Canada, it is the courts that are best placed to perform this settlement-based function. Without it, the concern is, we might end up with a federal system in which individual division of powers disputes go unresolved; in which the scope of jurisdiction is left unclear, hindering the ability of governments and private actors to plan for the future; and in which ‘might ultimately makes right’. The settlement-based function given to courts is reflected in the umpire and arbiter metaphors, which evoke the image of courts as dispute settlers.

Critics of judicial review of the division of powers dismiss the claim that we need the courts to settle division of powers disputes. They do not dismiss the importance of settlement, at least altogether. But, they argue that the intergovernmental process (or some other politically-oriented process) is (or could be) well-equipped to serve (much of) the settlement-based function that courts are asked to play³⁰⁴ – and that, in any case, there are good reasons to doubt how well equipped the courts are to perform this

³⁰³ See, e.g., Swinton, note 26, above, 40-48; and Lederman (1975), note 31, above, 619. See also L. Alexander and F. Schauer, “On Extrajudicial Constitutional Interpretation” (1996-97) 110 Harv. L. Rev. 1359 (noting the significance of, and need for, settlement in the constitutional context more generally, with an emphasis on the United States context).

³⁰⁴ Paul Weiler defended the ability of the intergovernmental process to resolve division of powers disputes: see note 25, above. Adrienne Stone has also questioned settlement-based arguments for judicial review of the division of powers, and offered up, tentatively, alternatives that could serve this function: (2010) note 181, above, 133-4.

function. After all, they say, the courts release decisions that are hard to reconcile with, and sometimes overrule, earlier decisions,³⁰⁵ and a division of powers decision that purports to settle a division of powers dispute may not do so, at least not politically, if there is a refusal to accept its result.³⁰⁶

This debate resonates with one of basic dilemmas of modern constitutionalism, at least in the division of powers context: how to strike the appropriate balance between stability and change.³⁰⁷ On the one hand, the division of powers is expected to exhibit a certain amount of stability and predictability. This is often thought to be inherent in the notion of a division of powers that is constitutionally entrenched;³⁰⁸ and, since “[g]overning requires long-term investments in law, institutions, and human capital”, stability also allows “governments – and the people they govern – to know where these investments are to be made”, not only now but in the future.³⁰⁹ On the other hand, a certain amount of change and flexibility seems inevitable and, in many cases, desirable. The original framers of any

³⁰⁵ Weiler, note 25, above, 172-79.

³⁰⁶ Monahan, note 25, above, ch. 10; see also Wright, note 99, above, Part I(C)(c).

³⁰⁷ T.W. Merrill, “Rescuing Federalism after *Raich*: The Case for Clear Statement Rules” (2005) 9 *Lewis & Clark L. Rev.* 823, 823-24; and Kong, note 8, above, 360.

³⁰⁸ See the text accompanying note 142, above.

³⁰⁹ Merrill, note 307, above, 823-24. The rule of law is often said to require an element of stability and predictability: see, e.g., J. Raz, “The Rule of Law and its Virtues”, in *The Authority of Law: Essays on Law and Morality* (1979), 210, 212-19 (discussing the importance of openness, clarity, and stability in the law, and their link to the rule of law).

division of powers cannot reasonably foresee all of the issues that will need to be addressed, and changing social and economic conditions may make an allocation of jurisdiction,³¹⁰ and perhaps even stability itself, undesirable.³¹¹

The idea of judicial deference to intergovernmental dialogue might seem to present an attractive response to this debate and dilemma. The idea, as noted, would see the courts defer to the political branches where they work out their own mutually acceptable allocations of jurisdiction. The courts typically focus in division of powers cases on text, history, doctrine and precedent, an approach to interpretation that, “because it is backward-looking, is heavily weighted against change in the status quo”.³¹² Deference to intergovernmental dialogue allows the political branches to play the role of “change agent”, freeing them, provided they agree, to adopt a more flexible and aggressive reading of the division of powers than the courts might be comfortable adopting on their own.³¹³ The courts, in turn, would focus on promoting stability, by encouraging intergovernmental dialogue

³¹⁰ See Part II(A), above.

³¹¹ Various legal scholars have highlighted the virtues of flexibility over stability, emphasizing how complexity, variability, and bounded rationality have undermined the search for stable allocations of jurisdiction: see, e.g., Monahan et al., note 93, above (embracing a flexible approach to the division of powers in the Canadian context); M.C. Dorf and C. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Colum. L. Rev. 267; and R.A. Schapiro, *Polyphonic Federalism* (Chicago: University of Chicago Press, 2009) (defending a model of “polyphonic federalism” that embraces flexibility).

³¹² Merrill, note 307, above, 828-29.

³¹³ *Ibid.*

and rewarding it where it occurs, and resolving division of powers disputes where it does not – perhaps backing this up with warnings that the political branches refrain from upsetting the existing division of powers, and existing precedent, too quickly or dramatically.³¹⁴ By providing the political branches an outlet for flexibility that is backed up by courts that focus on promoting settlement and predictability, deference to intergovernmental dialogue might be thought to provide an attractive response to settlement-based arguments for judicial review, and the stability-change dilemma.

However, on closer inspection, various settlement-based questions linger. First, questions linger about the settlement of individual division of powers disputes. The idea reflects a preference for division of powers disputes that are resolved outside the courts, by the political branches. But, governments and (in particular) private parties might find it hard to get some disputes on the intergovernmental agenda. The intergovernmental process is largely discretionary in nature, meaning that governments are generally under no obligation, individually and collectively, to consider particular issues or disputes. The courts, in contrast, are more mandatory in nature. Governments and private parties may not win a division of powers dispute, but the courts are usually expected to hear justiciable division of

³¹⁴ As noted earlier, the Court has implied that it may intervene, even in the face of intergovernmental dialogue, if the political branches go too far, too fast: see Part(I)(B)(a).

powers disputes that fall within their jurisdiction.³¹⁵ Governments and private parties may find it hard to attract the attention and focus of the intergovernmental apparatus for any number of reasons, including lack of a strong electoral incentive, or competing demands on time and energy.³¹⁶ Further compounding the problem, the attention and focus of various governments may be required. Intergovernmental dialogue may handle some division of powers disputes some of the time, but given its discretionary nature, it is not clear that it is equipped to do so consistently.

In addition, even if there is success in putting a dispute on the intergovernmental agenda, intergovernmental dialogue may not actually resolve the dispute, at all or in a timely manner. The intergovernmental apparatus may be taxed by other, more pressing matters, and disputes that get put on the intergovernmental agenda may fall off the agenda before they are resolved, or take years to resolve. In addition, the governments involved may simply be unable to agree. Resolutions from the courts can also take years, of course, especially if appeals occur, but “the judicial system will eventually find some judge who can give attention to the matter”,³¹⁷ and

³¹⁵ J.R. Siegel, “The Institutional Case for Judicial Review” (2011-12) 97 Iowa L. Rev. 1147, 1182-1186. Appellate courts often have the discretion to decide whether to consider an appeal, but the lower courts are typically required to at least *hear* justiciable claims.

³¹⁶ Swinton, note 26, above, 50-51; and Siegel, previous note, 1182-1186. See Baier, note 100, above, 89-90 (exploring a situation where the province of Ontario proved a reluctant ally for a company in an Agreement on Internal Trade case involving Quebec).

³¹⁷ Siegel, note 315, above, 1184.

“there are many circumstances where the pace [of the courts] exceeds that of the political process and resolves the dispute for the particular parties”.³¹⁸

Finally, even if there is success in putting a dispute on the intergovernmental agenda, *and* getting some sort of a resolution, the resolution provided may not be entirely clear, and further clarification may be required.³¹⁹ The courts provide a “focused mechanism” for the resolution of specific disputes; the intergovernmental process may also do so in some cases, but specific division of powers disputes can also become “entangled with other issues in a way that blocks a clear” resolution of the dispute.³²⁰ And, in order to reach an agreement, the intergovernmental process may have to glaze over, or sidestep, certain issues at the heart of the dispute.

These concerns might seem to be engaged only if the courts somehow compel governments and/or private parties to look to the political process to resolve their disputes. Paul Weiler argued that the courts should take a step in this direction, refusing to proceed with a division of powers challenge initiated by a private party without the consent of the attorney

³¹⁸ Swinton, note 26, above, 51.

³¹⁹ Of course, there is a distinction between the legal and political resolution of a dispute. The courts may resolve the legal division of powers issues involved, at least in the eyes of the courts, but the issue may remain alive in the political process. And if the issue is kept alive long enough, it may make its way back into the courts, which may resolve the dispute differently, for any number of reasons. See Wright, note 99, above, Part I(C)(c).

³²⁰ Siegel, note 315, above, 1178-80.

general “of the jurisdiction whose ‘turf’ [was] being defended.”³²¹ As noted, the Court seems disinclined to make intergovernmental dialogue necessary, at least at present, and seems to treat only *actual, explicit* instances of intergovernmental dialogue as persuasive, or determinative.³²² And yet, it is not clear this sort of approach necessarily avoids these concerns altogether.

Why? Deference to actual, explicit instances of intergovernmental dialogue may raise difficult questions of application. Imagine a case in which a court defers to an instance of intergovernmental dialogue, believing that it resolved the claim raised in that particular case, and questions arise in the future about whether a related division of powers dispute was also resolved by that particular instance of intergovernmental dialogue. Would the courts review the question *de novo*, and decide for themselves whether a related division of powers dispute was also covered by an instance of intergovernmental dialogue, warranting deference? Or would the courts defer to the political branches in these situations, leaving it to them to decide? If so, the settlement-based problems identified earlier might arise, perhaps especially if private parties are involved. Formal intergovernmental

³²¹ Weiler, note 25, above, 181-184. (Weiler did admit of an exception where a potential conflict in overlapping laws was involved.) Weiler was concerned about division of powers challenges brought by those with an anti-regulatory agenda, who used the courts to attack progressive initiatives, like minimum wage and health and safety laws. There is something to this concern, but, if that is the motivation for the proposal, it seems over-inclusive, since it may well also catch claims brought by those with a progressive regulatory agenda.

³²² See Part I(C)(b), above.

agreements occasionally include their own internal dispute resolution mechanisms, but they certainly do not do so consistently, or even with any regularity. And the dispute resolution mechanisms that are included may be targeted at *intergovernmental* disputes, placing additional hurdles in front of disputes initiated by private parties, if they are available to them at all.³²³

Questions would also linger about the impact that deference to intergovernmental dialogue might have on future settlement. The settlement of division of powers disputes is said to be important, not only to resolve specific disputes, but also to provide guidance about the division of powers to courts and other decision-makers, now and in the future. There are various reasons – reasons that warrant further empirical examination – to be cautious about the idea of deference to intergovernmental dialogue, assuming of course that this sort of guidance is thought to be important.

First, consider reason-giving. Reasons are regularly not provided explaining or justifying a particular instance of policy-focused intergovernmental dialogue, and the results are left to speak for themselves.³²⁴ Moreover, reasons, where they are provided, may be brief, informal, have very little to say about the division of powers issues

³²³ See, e.g., Baier, note 100, above, 87-90 (discussing the Agreement on Internal Trade (1994), which was structured to be “clearly government driven and controlled”).

³²⁴ I focus on policy-focused intergovernmental dialogue in this paragraph, because governments that engage in court-focused intergovernmental dialogue usually provide reasons in their submissions to the court to support their claim as to constitutionality.

involved, and be provided by particular individuals, who may or may not agree, raising questions about whether they speak for their governments, not to mention all of the parties concerned.³²⁵ As a result, it is often difficult to point to a definitive statement of the constitutional rationale relied upon. The courts, in contrast, are generally expected to provide reasons for their decisions, reasons that will usually address the relevant jurisdictional issues, even if only briefly. And, even if there is more than one set of reasons, one set of reasons usually ‘speaks’ for ‘the court’ institutionally. The courts do, of course, dodge the merits of a claim in some cases, and they may also be less than “candid in expressing the reasons for their decisions”.³²⁶ There are also longstanding debates about whether the (division of powers) reasons provided afford much, if any, guidance. But, comparatively speaking, the courts do appear to provide reasons more consistently, and in a more targeted manner, than the intergovernmental process. If the reasons provided are imagined to provide guidance in future cases, and if this is thought to be important, this may provide a reason for caution.³²⁷ If the

³²⁵ For example, intergovernmental bodies, like ministerial councils, issue ‘Communiqués’ explaining intergovernmental agreements, but they are often very brief – typically no more than a page or two. Federal or provincial officials also may offer explanations of, and justifications for, intergovernmental agreements after-the-fact, but their comments are often brief, and the explanations and justifications provided may differ.

³²⁶ Siegel, note 315, above, 1173.

³²⁷ Stone (2010), note 181, above, 131 (arguing “because they provide reasons for their decisions, courts have particular strengths in resolving constitutional conflicts that develop rules and principles in a manner that guides the resolution of future similar disputes”).

courts were to defer to intergovernmental dialogue, then the volume and value of the reasons available to provide guidance in the future may be diminished, especially if deference was understood to excuse the courts from providing their own take on the division of powers issues raised.³²⁸

Second, related concerns arise about the role of precedent. The intergovernmental process lacks an established system of precedent. Governments are not required to respect their existing intergovernmental agreements (although they certainly may), and there are “many examples” of situations where governments have reneged on their intergovernmental

³²⁸ The courts could demand that reasons be provided in the course of hearing a case, and articulate those reasons in deciding the case; or they could provide reasons of their own. For example, Erin Ryan, who argues for deference in the U.S. context, would have courts provide reasons to support *their* decisions to defer: see, note 20, above, 367.

If the courts chose the first option, questions would arise about whether, and, if so, how, the courts should review the reasons provided, an issue that continues to generate controversy in the administrative law context: see G. Huscroft, “From Natural Justice to Fairness”, in C. Flood and L. Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2013), 179 (noting “much requires clarification in future cases”, despite two recent decisions by the Court on the issue). For example, would the courts assess whether the reasons provided were invented after the fact, by requiring evidence that they were actually considered at the time? Does this matter? In addition, questions would arise about what the courts would do if, as seems possible, the different orders of government provided conflicting reasons for a particular instance of intergovernmental dialogue. Which reasons would be accepted? After all, governments might agree to a particular instance of intergovernmental dialogue, without agreeing about the underlying reasons for doing so.

If the courts chose the second option, the question that would arise is whether the courts would attempt to ascertain the reasons on which the political branches relied, or only provide reasons to support *their* decision to defer. If the courts took the former route, we might question their practical capacity to reconstruct these decisions; if the courts took the latter route, they might avoid this difficulty, but they would still encounter the sorts of hard, controversial choices emphasized in this part: see, in particular, Part III(D). And with either route, there is a danger that the whole exercise would become self-defeating, collapsing into the courts providing the sort of analysis deference seeks to avoid in the first place.

agreements, particularly where a change in government has occurred.³²⁹ Moreover, in negotiating new intergovernmental agreements, governments are not required to take previous intergovernmental agreements into account (although again, they certainly may). The courts, in contrast, have a system of precedent, which, at least in theory, requires them to respect the prior decisions of courts that have the authority to bind them. There are debates, of course, about how much the courts are actually constrained by precedent, as well as how much predictability and guidance these precedents provide to governments and private parties about the division of powers. Certainly the courts do overrule their own division of powers decisions in some cases,

³²⁹ H. Bakvis et al., *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Oxford: Oxford University Press, 2009), 49 (and more generally, ch. 5).

Intergovernmental agreements can give rise to legally binding obligations: see, e.g., *Moses*, note 50, paras. 85-86; see also *Que. v. Can.* [2011] 1 S.C.R. 368. However, it is far from obvious that this possibility plays any significant role in encouraging governments to respect their intergovernmental agreements. Although the courts now seem more inclined to hold governments to their agreements than they once were (see, e.g., *Wells v. Nfld* [1999] 3 S.C.R. 199), the conventional view among federalism scholars is that *intergovernmental* agreements remain “weakly” enforceable at best: Gerald Baier, for example, recently suggested that “intergovernmental agreements have long been notorious for their weak degree of legal enforceability”, and that their enforcement “tends to lie in the political, rather than the legal, arena”: note 100, above, 86 (citing Swinton, note 9, above, 140); see similarly Simeon & Nugent, note 97, above, 65-66; and Bakvis et al., this note, 49, 89, 99. Even more optimistic assessments concede that the “vast majority” of intergovernmental agreements fall into a legal “grey zone”: see Poirier, note 109, above, 431-32. In addition, research suggests that most politicians and senior (but *not* lower level) civil servants *view* intergovernmental agreements as non-binding: see Poirier, note 109, above, 431, 442. Finally, even if an intergovernmental agreement is legally binding, the decision of the Court in the *CAP Reference* (note 79, above) makes it clear that parliamentary sovereignty trumps intergovernmental agreements; as a result, governments (which typically control their legislatures) are always *legally* free to pursue legislation that abrogates or amends them, making them “fragile from a legal perspective”: Poirier, note 109, above, 431. Decisions about whether to respect intergovernmental decisions typically seem to turn on political calculations, not legal obligations: see Bakvis et al., this note, 99.

and use common law tools, like distinguishing, to work around others. But, comparatively, precedent seems to play a bigger role in the courts than the intergovernmental process. If judicial precedents do provide at least some predictability and guidance, and this is thought to be important, these differences may also provide a reason for caution. If the courts were to defer to intergovernmental dialogue, either policy-focused or court-focused, then, given these differences, the stability and predictability that precedent might provide may be diminished. Governments might develop a system of precedent, and respect intergovernmental dialogue, at least in some cases, and the courts could police a backstop that would prevent the political branches from upsetting the balance of power too radically. But, as it stands, the courts may have the edge in assuring the benefits of precedent.

Third, related concerns also arise about the potential effect of judicial decisions. If the courts openly deferred to intergovernmental dialogue, questions would arise about how much leeway the courts would give the political branches to depart from existing or future judicial precedents that set the limits of federal and provincial jurisdiction. This might sow confusion for governments and those they govern, which, if stability and predictability are taken to be important, might be thought to weigh against the idea of courts deferring to intergovernmental dialogue.

If the courts deferred to intergovernmental dialogue, questions

would also arise about the effect that the decisions involving deference would have on the *same* government in the future.³³⁰ At present, if a court finds that an initiative engages a division of powers issue (or not), that decision binds future courts that may be called upon to consider the same (or a sufficiently similar) initiative by the government concerned (unless it is overruled), with present and future implications for the jurisdiction of that government to pursue the same (or sufficiently similar) initiatives.³³¹ The Supreme Court rejected arguments that would have impeded governments from unilaterally repudiating their intergovernmental agreements in the *CAP Reference* (1990), emphasizing the doctrine of parliamentary sovereignty and concerns about the improper fettering of legislative power.³³² If the courts decided to defer to intergovernmental dialogue, and treated their decisions doing so as binding, this would effectively tie governments to intergovernmental dialogue (at least in the courts), a result that would be hard to square with the *CAP Reference*, and the concerns that

³³⁰ The issues discussed in the next two paragraphs are distinct from the possible precedential impact of the doctrine that the courts might develop in determining the ‘when’ and ‘who’ of deference. The courts might treat this as binding in future cases. The extent to which this would provide clarity for governments and private parties is unclear, and would depend, in part, on how much, if at all, the courts tried to justify deference in their reasons.

³³¹ I assume in the next two paragraphs that the decisions at issue are binding on the future court, vertically and horizontally, under the doctrine of *stare decisis*; otherwise the precedent is persuasive. Only the Court’s decisions might have this effect in many cases.

³³² Note 79, above. See also note 329; and Hogg, note 30, above, sec. 12.3.

animated it.³³³ However, if the courts treated their decisions deferring to intergovernmental dialogue as non-binding, the effect would be to create two different classes of decisions: non-binding decisions involving intergovernmental dialogue, and binding decisions not involving intergovernmental dialogue. The creation of two classes of decisions, and the likelihood of different allocations of jurisdiction emerging within governments on similar issues, depending on whether intergovernmental dialogue was involved, might sow confusion, for other courts, governments, and litigants, raising yet more concerns about stability and predictability.³³⁴

If the courts deferred to intergovernmental dialogue, questions would also arise about the effect that the decisions involving deference would have on *other* governments horizontally in the future. At present, if the courts find that a provincial initiative engages a division of powers issue (or not), that finding binds future courts that may be called upon to consider the same (or a sufficiently similar) initiative in other provinces (unless it is overruled), with present and future implications for the jurisdiction of the

³³³ Ironically, this might also act as a disincentive to intergovernmental dialogue, perhaps making governments wary of it, for fear of being bound by or to it later on.

³³⁴ It might raise additional concerns as well. For example, if similarly situated individuals and groups in the same jurisdiction were treated differently, because instances of intergovernmental dialogue led to different de jure and de facto allocations of jurisdiction, rule of law-related concerns, about equal treatment under the law, might arise. In addition, the existence of two classes of decision, and the likelihood of different allocations of jurisdiction emerging, might make it harder for the electorate to hold their public officials accountable, complicating even more the ways in which a federal system that already has messy, overlapping allocations of jurisdiction makes accountability difficult for them.

other provinces to pursue the same (or sufficiently similar) initiatives. If the courts decided to defer to intergovernmental dialogue, and treated their decisions as binding in future cases involving other provinces, difficult questions would arise about how many, and which, provinces would need to agree to an instance of intergovernmental dialogue for deference to be warranted. I consider those questions below.³³⁵ If, however, the courts did not treat their decisions doing so as binding, the effect, yet again, would be to create two classes of decisions: binding and non-binding decisions. Again, the creation of two classes of decisions, and the likelihood of different allocations of jurisdiction emerging, within and between governments, depending on whether intergovernmental dialogue was involved, might sow confusion, with stability and predictability concerns.³³⁶

Finally, and related to the previous two points, questions would also arise about the role that the courts would play in the absence of intergovernmental dialogue. If the courts dealt with such cases without

³³⁵ See Part III(D)(b), below.

³³⁶ It might raise additional concerns as well, beyond those referred to in note 334, above. For example, if only some provinces negotiated an allocation of jurisdiction that allowed them to set a (stricter) legal standard that touched upon federal jurisdiction, multi-province actors could decide to adopt that standard nationally, for efficiency reasons, even if they were not required to do so legally. This might raise accountability concerns for the electorates of the provincial holdouts, who, if they were interested in opposing it, might lack strong representation in the federal governing party, and in any case would only have the federal government to hold to account, unlike their counterparts in the other provinces.

deference, even in some cases,³³⁷ there is a distinct possibility that the division of powers that might emerge from the courts would differ from the division of powers that might emerge from intergovernmental dialogue in at least some cases. The potential for different allocations of jurisdiction to coexist – allocations of jurisdiction that might fluctuate, as new instances of intergovernmental dialogue were worked out over time – might also sow confusion, raising additional concerns about stability and predictability.³³⁸

The extent to which these issues will be thought to be a concern will turn, in part, on the views that are taken about the relative performance of the courts and the intergovernmental process as agents of settlement/stability and change/flexibility, as well as where the balance between them should be struck. The first question is more empirical, the second more normative. Further research would help shed more light on the empirical claims made here about the relative performance of the courts and the intergovernmental process.³³⁹ But, on the whole, it does seem that, while intergovernmental dialogue may act as agents of settlement and stability in

³³⁷ Recent decisions suggest the Court is inclined to do so in some cases: see Part I(B).

³³⁸ The courts could try to insist that the political branches respect their precedents, but would this apply retrospectively or only prospectively? If retrospectively, one form of confusion might be replaced by another, as an attempt was made to work out the impact of new decisions on previous cases involving deference and intergovernmental dialogue.

³³⁹ For example, a judicial decision may be shaped by subsequent laws that, slowly and incrementally, chip away at it over time, by finding ways to test the limits of the decision. If this occurs often enough, we might question the relative stability of judicial decisions.

some cases, the courts are likely better equipped to do so, for institutional reasons. Thus, if settlement and stability are thought to be important, then, barring changes to the intergovernmental process, the issues discussed here would also weigh against judicial deference to intergovernmental dialogue.

D. Defining the Contours of Deference

The idea that the courts should defer to intergovernmental dialogue begs two questions: defer when, and to whom? This part identifies some of the difficult issues that emerge when an attempt is made to answer these two questions. It argues that any attempt to answer them, and thus to define the contours of the idea that the courts should defer to intergovernmental dialogue, would raise a host of difficult questions for the courts, and run up against the same concerns that the idea might be thought to mitigate.

The Court has largely failed to address the issues discussed in this section. Some of the issues discussed have been raised in the legal scholarship in Canada, but one of the most detailed discussions to date has been provided by Erin Ryan, an American legal scholar who has argued that courts in the United States should defer to ‘negotiated federalism’.³⁴⁰ I refer to the scholarship – including Erin Ryan’s work – in discussing these issues.

The discussion in this section resonates with a criticism that is regularly aimed at process-based approaches to judicial review of

³⁴⁰ See note 20, above.

constitutional issues. As here, under process-based approaches to judicial review, the focus of a constitutional analysis is on some aspect of the process that is used in reaching a challenged decision, as opposed to the actual substance of the decision itself. One of the key criticisms of process-based approaches is that they are not – and cannot be – substance-neutral, and inevitably make (often controversial) substantive choices in reviewing the process used in reaching a decision, if not explicitly, then implicitly.³⁴¹

a. Defer When?

This section highlights some of the difficult issues that the courts would encounter in deciding when to defer to intergovernmental dialogue.

i. Faithful Representation

The responsibility for policy-focused intergovernmental dialogue and court-focused intergovernmental dialogue generally falls, as noted, to elected and unelected federal and provincial officials, rather than the federal and provincial electorates that they represent, or on whose behalf they act. This allocation of decision-making responsibility raises classic principal-agent concerns. One concern is that the federal and provincial ‘agents’ responsible for a particular instance of intergovernmental dialogue may misread the interests of their ‘principals’. Another concern is that they may

³⁴¹ See, e.g., L. Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories” (1980) 89 Yale L.J. 1063; and Dorf (2003), note 43, above, 897.

have interests that do not align with the interests of their principals, and that, in some cases, this misalignment in interests may lead them to ‘collude’, by agreeing to instances of intergovernmental dialogue that further their own interests, rather than the interests of their electorates.³⁴² This is a concern, at least if we accept that individuals, and not just governments, have an interest in the division of powers,³⁴³ since it suggests that governments may agree to allocations of jurisdiction the federal and provincial electorates might oppose, if informed and given the chance.³⁴⁴

³⁴² Scholars in Canada have noted the potential misalignment of interests, but have generally taken the view that this misalignment leads to competition, not collusion: see, e.g., A.C. Cairns, “The Governments and Societies of Canadian Federalism” (1977) 10 C.J.P.S. 695, 703-5; but see A. Breton, “Towards a Theory of Competitive Federalism” (1987) 3 Eur. J. Pol. Ec. 263, 274. The potential for collusion has been highlighted in the United States, by the courts and scholars: see, e.g., *New York v. United States*, 505 U.S. 144, 182-83 (1992); J.O. McGinnis & I. Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System” (2004) 99 Nw. U. L. Rev. 89, 90; and M. Greve, *The Upside-Down Constitution* (Cambridge, MA.: Harvard University Press, 2012).

³⁴³ I am inclined to think that the division of powers confers regulatory authority on federal and provincial institutions, *but for the benefit of the people*, as both federal and provincial peoples, and in a collective, rather than an individual sense: accord Monahan (1984), note 25, above, 94-5. The Court has made comments that might be understood to suggest sympathy for an individual-oriented view of the division of powers: see, e.g., *Kitkatla*, note 76, above, para. 72 (citing *OPSEU*, note 73, above, 19-20). However, this is difficult to square with its support for ‘cooperative federalism’, which, at least in practice, allocates individuals an indirect role in the federal system at best. I acknowledge that my view may be hard to square with the division of powers as it was originally conceived: see D. Smith, *Federalism and the Constitution of Canada* (Toronto: U.T. Press, 2010) (suggesting the division of powers was originally conceived in a government-centric way).

For discussions of this issue in the United States, see *New York*, previous note, 182-3; *Bond v. United States*, 131 S.Ct. 2355, 2364-5 (2011); Ryan, note 20, above, ch. 7.

³⁴⁴ We might think, as some imagine, that the electorate would oppose the allocation of jurisdiction because it cares about the division of powers, and would, if informed and given the opportunity, come to its defense: see McGinnis & Somin, note 342, above; compare N. Devin, “Judicial Safeguards of Federalism” (2004) 99 Nw. U. L. Rev. 131. Or, we might think that the electorate’s opposition, if any, is more likely to result from its opposition to the substance of the instance of intergovernmental dialogue, or partisan concerns.

Erin Ryan has addressed this point at some length.³⁴⁵ She argues that that “the danger of federalism collusion is least pressing when the medium of exchange is the sovereign authority at the heart of all federalism bargaining”, echoing the claim, discussed earlier, that government officials are generally anxious to guard their government’s jurisdiction,³⁴⁶ but that the danger is real enough that, before deferring to intergovernmental dialogue, the courts must be “confident that the agents involved ... are faithfully representing the interests of the principals on whose behalf they are negotiating, rather than contrary personal interests”.³⁴⁷ Ryan, as noted, was addressing courts in the United States, not Canada, but courts in Canada might face similar calls to police intergovernmental dialogue for concerns about faithful representation. The courts would have to decide whether faithful representation is enough of a danger that the courts should take it into account before deferring to intergovernmental dialogue, and, if so, how the courts should go about assessing the danger of it in individual cases. In the process, the courts would likely run up against precisely the same sorts of concerns that deference might be thought to mitigate.

Consider first the issues that might arise as the courts went about

³⁴⁵ Ryan, note 20, above, 235-237, 343, 345-346.

³⁴⁶ See Part III(A), above.

³⁴⁷ Ryan, note 20, above, 343, 345.

determining whether faithful representation is actually enough of a concern that it should be taken into account before deferring to intergovernmental dialogue – issues Ryan leaves largely unaddressed.³⁴⁸ There may well be something to the concern about faithful representation, but the extent of the concern is unclear, at least on the available evidence.³⁴⁹ Earlier, I questioned the claim that government officials are necessarily inclined to guard the jurisdiction of their governments carefully, and outlined the reasons that the federal and provincial electorates might be hindered from holding their governments accountable for their intergovernmental decision-making.³⁵⁰ As that account shows, in order to determine whether the concern about faithful representation is serious enough that it should be taken into account by the courts, the courts would have to make a variety of complex empirical determinations, about who makes the relevant decisions and what motivates them, and the capacity and ability of the federal and provincial electorates to hold them accountable – determinations that may be very hard, if not

³⁴⁸ We might be inclined to think that the courts could avoid this line of analysis, on the basis that, since we do not vet judicial decisions for faithful representation, we should not vet intergovernmental dialogue for faithful representation. However, we *expect* the courts to act independently of the electorate, as much as possible, and we do not expect the same of the federal and provincial governments. In addition, and relatedly, this argument sits uncomfortably with one of the main arguments for deference, namely, that intergovernmental dialogue has a stronger democratic pedigree; it also sits uncomfortably with my view that the division of powers is a collective benefit or good, exercised on behalf of, and for the benefit of, the people, not their governments: see note 343, above.

³⁴⁹ Interestingly, surveys and research often show that Canadians have “an instinct toward [federal-provincial] collaboration”: see Wright, note 99, above, Part III(C)(e).

³⁵⁰ See Parts III(A) & III(B), above.

impossible, to make on the evidence. There is little reason to believe that courts in Canada would be anxious to make these determinations, and thus might reject any call to police for faithful representation,³⁵¹ but this is a choice that the courts would be expected to justify – and if faithful representation was truly a concern, even in some cases, a decision by the courts to defer without policing for it might allow it to go unaddressed.

Consider second the issues that might arise if the courts decided to police for faithful representation – issues that, again, Ryan leaves largely unaddressed.³⁵² The courts have no established institutional mechanism to take the pulse of the electorate, to determine their support for an instance of intergovernmental dialogue.³⁵³ This is hardly surprising, since this sort of enquiry is generally considered improper for a court. The courts might rely on the parties involved in a particular case to do the work for them, by requiring some sort of direct evidence to this effect, but questions would then arise about what evidence the courts should expect, and accept, as well

³⁵¹ See, e.g., *Opitz v. Wrzesnewskyj* [2012] 3 S.C.R. 76 (setting a high bar that must be met before the courts will overturn election results due to electoral irregularities).

³⁵² Ryan suggests, in another context, that, before deferring, the courts would need to determine whether an instance of ‘federalism bargaining’ “was sufficiently transparent, produced an adequately reviewable record, followed any established protocols, maximized opportunities for public participation, and meaningfully involved affected stakeholders”: note 20, above, 352. Ryan provides little clarity about how the courts would, and should, perform this role, and she seems largely unfazed by what she is asking of the courts.

³⁵³ This is not to suggest that the courts ignore public opinion; only that the courts lack a formal institutional mechanism that they might use to take the pulse of the electorate.

as the competence of the courts to synthesize and interpret it. Even if the courts could figure out a good way to take the pulse of the electorate, they might find that much of the electorate lacks the information and knowledge necessary to form an opinion about intergovernmental dialogue, and that those who do form an opinion disagree extensively, not only across, but within provinces, and might value their policy preferences more than the division of powers.³⁵⁴ In addition, the courts would need to figure out how to weight the differences in opinion that might exist vertically, between federal and provincial majorities, and horizontally, between different provincial majorities, since these sorts of differences of opinion might be thought to reflect “the value of regional diversity that underlies the federal system”.³⁵⁵ Finally, the courts would also need to figure out whether, and how, to weight the opinions of those that might be indirectly, rather than directly, impacted by an instance of intergovernmental dialogue.³⁵⁶

The courts would likely engage the concerns identified earlier, about

³⁵⁴ Swinton, note 26, above, 207-8; and Wright, note 99, above, Part III(C)(e).

³⁵⁵ Swinton, note 26, above, 207-8. These differences in opinion might emerge because the electorates in different provinces have different policy preferences, or, as in Quebec, because they embody electorates that have distinctive, meaningful identities of their own.

³⁵⁶ This would arise where an instance of federal-provincial or interprovincial intergovernmental dialogue does not involve all of the provinces. The concern might be especially acute in situations involving interprovincial intergovernmental dialogue, since the electorate in the uninvolved provinces might be impacted by it, but would lack direct political representation. However, it might also be a concern in situations involving federal-provincial intergovernmental dialogue, since a provincial electorate may lack a strong federal voice, due to province-specific imbalances in the government’s electoral makeup.

reasonable pluralism, democratic legitimacy, and institutional competence, in trying to make these sorts of determinations – weakening claims that the idea of deferring to intergovernmental dialogue may actually mitigate these concerns. For example, in determining whether the courts should make faithful representation a precondition to deference to intergovernmental dialogue, the courts would encounter longstanding debates about whether elected officials are primarily public-regarding or self-regarding, and whether, and how much, elected officials are tethered to their electorates – debates that raise difficult empirical issues, engaging concerns about institutional competence. Or, in determining how to weight the differences in opinion that might exist vertically and horizontally, the courts might have to decide whether to give more, or the same, weight to public opinion in Quebec, engaging concerns about reasonable pluralism, and the debates, discussed earlier, about whether all of the provinces should be treated equally. The courts might attempt to address these concerns about faithful representation by refusing to defer to instances of intergovernmental dialogue that lack historical provenance.³⁵⁷ Concerns about faithful representation might be thought to dissipate the longer an instance of intergovernmental dialogue has been in place, since time would give the electorate, and new governments, the chance to weigh in. However, difficult

³⁵⁷ Bradley and Morrison, note 145, above, 448-455.

questions would then emerge for the courts about how much time is enough.

ii. Coercion

I noted earlier that there is a risk that (particularly policy-focused) intergovernmental dialogue may be tainted by coercion in some situations.³⁵⁸ The courts could address this concern by making deference to intergovernmental dialogue contingent on a lack of coercion. Erin Ryan’s proposal, mentioned earlier, is subject to a coercion-based inquiry. Courts, she argues, should determine “the extent to which individual facts stress the assumptions of bargaining autonomy”, due to “unequal bargaining power”; the less one order of government has “a genuine opportunity to walk away from the bargaining table”, the less the courts should be inclined to defer.³⁵⁹

However, determining whether a particular instance of intergovernmental dialogue was tainted by coercion would raise complex and disputed normative questions. As Gillian Metzger has noted, in the context of a discussion of the federal spending power in the United States, “[c]oercion is notoriously difficult to identify, in large part because no agreement exists on the proper baseline against which to assess [it]”.³⁶⁰

³⁵⁸ See Part III(A), above.

³⁵⁹ Ryan, note 20, above, 343-45.

³⁶⁰ Metzger, note 145, above, 99. See also K.M. Sullivan, “Unconstitutional Conditions” (1989) 102 Harv. L. Rev. 1413, 1442-54 (arguing accounts of coercion are inherently normative); compare M.N. Berman, “Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions” (2001) 90 Geo. L.J. 1, 15-18 (agreeing accounts of coercion are normative, but arguing that the proper baseline can be defined).

Ryan implies that courts should adopt the high bar that courts apply in the ordinary contract law context, a bar that distinguishes between “strong leverage and true coercion”, but provides little justification for this high bar, and its transposition to the federalism context.³⁶¹ The controversy that exists about the constitutionality of conditional grants under the federal spending power provides a glimpse into the controversy that this sort of enquiry might engender. There are ongoing debates about whether conditional grants are coercive, and thus constitutionally suspect, debates that turn, at least in part, on how coercion is defined,³⁶² and, possibly, differences of opinion about the proper balance of power.³⁶³ If the courts were to make deference to intergovernmental dialogue contingent on a lack of coercion, these sorts of normative questions would take centre stage. The courts, faced with these sorts of normative questions, might find it difficult to formulate reasonably clear principles that could be applied in future cases, creating uncertainty for the courts, governments, and potential litigants.³⁶⁴

³⁶¹ Ryan, note 20, above, 344.

³⁶² Compare Hogg, note 30, above, sec. 6.8(a) (likening conditional grants to gifts, which the provinces are free to refuse); with H. Kong, “The Spending Power, Constitutional Interpretation and Legal Pragmatism” (2008-09) 34 *Queen’s L.J.* 305, 317-24 (challenging the view that conditional grants are gifts the provinces can always refuse).

³⁶³ See F. Rocher, “The Quebec-Canada Dynamic or the Negation of the Ideal of Federalism”, in A.-G. Gagnon, ed., *Contemporary Canadian Federalism* (Toronto: U.T. Press, 2009), 81 (“even the least attentive observer would note that the interpretation of the evolution of Canadian federalism differs greatly depending on the origin of the author”).

³⁶⁴ For the difficulties that this has raised in the United States, see note 369, below.

Determining whether a particular instance of intergovernmental dialogue was tainted by coercion would also raise difficult empirical issues for the courts. I have discussed elsewhere the sorts of factors that influence the bargaining power of governments in the intergovernmental context.³⁶⁵ The courts might find it difficult, not to mention time-consuming, to try to unpack the bargaining power of the governments responsible for an instance of intergovernmental dialogue, since each instance of intergovernmental dialogue “generates its own constellation of supporters and opponents, takes place in a particular political, cultural, social and economic context, and is driven by complex factors that may be difficult ... to discern”.³⁶⁶ Even if the courts could unpack the bargaining power of the governments responsible for a particular instance of intergovernmental dialogue, they may be reluctant to try, since, in doing so, they might need to make findings about things like a government’s spending needs and priorities, and the relative support of the electorate for their federal and provincial governments generally, or on a specific issue.³⁶⁷ These are the sorts of issues that courts are usually reluctant to consider,³⁶⁸ at least in Canada.³⁶⁹

³⁶⁵ Wright, note 99, above, Part III(C).

³⁶⁶ Nugent, note 240, above, 217.

³⁶⁷ For further discussion, see Wright, note 99, above, Part III.

³⁶⁸ See, e.g., *Eldridge v. B.C.* [1997] 3 S.C.R. 624, para. 85 (“governments must be afforded wide latitude to determine the proper distribution of resources in society”).

Justice Cardozo, writing for the United States Supreme Court, long ago warned that the law would be “plung[ed] ... in[to] endless difficulties” if the courts tried to police the line between “pressure” and “compulsion” in the intergovernmental context.³⁷⁰ This concern seems apt here as well.

c. The Many Forms of Intergovernmental Dialogue

Policy-focused intergovernmental dialogue may take many forms.³⁷¹

For example, it may result from direct intergovernmental negotiations, or

³⁶⁹ The situation in the United States with respect to conditional grants under the federal spending power is instructive here. The United States Supreme Court suggested that conditional grants under the federal spending power might be unconstitutional if they were “coercive” in *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987), and in 2012, the Court held, for the first time, by a 7-2 majority, that a provision of the *Patient Protection and Affordable Care Act* (“Obamacare”) that conditioned an offer of existing and new federal Medicaid funds on an expansion of Medicaid coverage by the states was coercive, and thus unconstitutional: see *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). Four members of the Court’s conservative wing – writing in ‘joint dissent’, but not on the coercion issue – emphasized the amount of money a state stood to lose if it refused to expand Medicaid, delving into the size of federal Medicaid funds as a percentage of state budgets and expenditures, while Roberts C.J., joined by Breyer and Kagan JJ., emphasized the funds the states stood to lose and the lack of foreseeability of the change.

Justice Ginsburg wrote a strongly worded dissent, with the support of Sotomayor J., criticizing her colleagues’ failure – or inability? – to “fix the outermost line” at which “persuasion gives way to coercion”, and pointing to the many ways a coercion analysis requires “political judgments that defy judicial calculation”: *id.*, 2640-42. (However, she concurred with Roberts C.J. that the provision could be salvaged by limiting the sanction to the loss of new Medicaid funding, a solution the joint dissent rejected.) Various other legal scholars have expressed similar concerns about the Court’s coercion analysis: see, e.g., Metzger, note 145, above, 99-102; N. Huberfeld et al., “Plunging into Endless Difficulties: Medicaid and Coercion in *National Federation of Independent Business v. Sebelius*” (2013) 93 B.U. L. Rev. 1; and A.B. Coan, “Judicial Capacity and the Conditional Spending Paradox” (2013) Wis L. Rev. 339, 365. But see M. Berman, “Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions” (2013) 91 Tex. L. Rev. 1283 (critiquing the reasoning used in the case, but not the result reached).

The Canadian cases dealing with the federal spending power have not adopted, or adverted to, a similar coercion analysis for Canada: see Hogg, note 30, above, sec. 6.8(a).

³⁷⁰ *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

³⁷¹ For further discussion, see Poirier, note 109, above; and Parts I(C)(a), III(C), above.

more subtle iterative processes, in which an order of government appears somehow to accede to, or least not to oppose, an initiative pursued by the other order of government. It may take the form of a written, formal agreement, or an unwritten, informal agreement, which may be explicit or constructive (meaning inferred from the circumstances). It may be detailed and specific, or broad and abstract, and be fleshed out in bilateral or multi-lateral sub-agreements. It may focus on one or more stages of the policy process – planning, formation, implementation, and enforcement. It may be attributable to unelected bureaucrats or the responsible cabinet ministers, or it may be ‘approved’ by the appropriate cabinets, and even the appropriate legislatures, in resolutions or implementing legislation. It may establish a dispute resolution process that tries to take the place of the courts, partially or even entirely. It may foreclose or contemplate unilateral amendments or terminations, in whole or in part, and explicitly or implicitly. It may have a long historical provenance, and be fairly consistently respected by the responsible governments, or it may be of recent lineage, and be readily and consistently ignored by them. And it may (or may not) be legally binding, on the responsible parties and their governments, as well as third parties.

Court-focused intergovernmental dialogue has to date been more uniform in nature; it has, as noted, tended to consist of interventions supporting the constitutionality of another order of government’s initiative.

However, court-focused intergovernmental dialogue might also take new forms in the future. For example, while it has tended to be explicit to this point, it might also be inferred in the circumstances, where an order of government fails to intervene to defend its jurisdiction in a challenge initiated by a private party to the other order of government's initiative.³⁷²

The courts would have to decide the forms of intergovernmental dialogue to which they would defer, if they decided to run with, and to unequivocally embrace, the idea of deferring to intergovernmental dialogue. In making these sorts of decisions, the courts would invariably have to determine the factors to emphasize, and how much. The courts might liken intergovernmental dialogue to ordinary contracts, and import the principles courts apply in interpreting and enforcing them into their analysis;³⁷³ but, as scholars have shown, these principles are hardly neutral.³⁷⁴ Or, the courts might decide, for example, to treat intergovernmental dialogue as *sui generis*, and emphasize other factors, like, for example, respect for the division of powers, democratic accountability, efficiency and workability, or some combination of the three. Either way, the decisions that the courts make might be susceptible to the same sorts of concerns that have been

³⁷² See note 76, above, considering this issue, with case references.

³⁷³ Erin Ryan imports contract principles into her analysis: see note 20, above.

³⁷⁴ See, e.g., C. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 *Yale L.J.* 997 (unpacking the underlying values served by contract doctrine).

raised about conventional judicial review of the division of powers – again, undermining claims that deference may actually mitigate these concerns.

For example, if the courts decided to emphasize, explicitly or implicitly, efficiency and workability, this might lead them to defer readily to intergovernmental dialogue, on the assumption that both are likely key concerns for governments that work out allocations of jurisdiction in the intergovernmental context.³⁷⁵ If the courts decided to emphasize respect for the division of powers, they might be less inclined to defer to instances of intergovernmental dialogue that lacked historical provenance, unless there was direct evidence that the division of powers was taken seriously, in order to lessen the chance of political opportunism by the elected leaders of those governments.³⁷⁶ Or, if the courts decided to emphasize democratic accountability, they might be inclined to eschew instances of intergovernmental dialogue that both orders of government did not agree to unequivocally, and that were not approved by the cabinets or legislatures concerned. Disagreements would no doubt arise about which factors should

³⁷⁵ For concerns that English Canadians, and Canadian courts, focus too much on efficiency, see, e.g., J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2002-03) 28 *Queen’s L.J.* 411.

³⁷⁶ See Bradley & Morrison, note 145, above, 455 (arguing, with respect to the separation of powers in the U.S., that, to avoid opportunism, there should be a reluctance to treat “individual concessions by particular administrations as constitutionally decisive”).

be emphasized, and what they entail³⁷⁷ - disagreements that would not be inconsequential, since actual results may often turn on their resolution.

b. Defer To Whom?

The previous subpart highlighted some of the many difficult questions that the courts would need to address in attempting to define when the courts should defer. A related question that would arise is to whom the courts should defer? This question, like the when question, is also implicit in calls for deference to intergovernmental dialogue.³⁷⁸ The answer would reveal itself in individual decisions to defer, if not explicitly, then implicitly. As with the ‘when’ issues referred to in the previous section, this question would also raise difficult normative and empirical questions for the courts, with implications for the claim that the idea of deferring to intergovernmental dialogue resolves the concerns referred to earlier, about

³⁷⁷ For example, participatory democracy proponents might favour deference to forms of intergovernmental dialogue that allowed for direct public participation, while cabinet or legislative approval might be deemed sufficient by representative democracy proponents.

³⁷⁸ There are two contexts in which this question could arise. First, it could arise directly, when the courts determined whether or not to defer. Second, it could arise indirectly, as a question of standing. If the courts granted standing only to the federal and provincial governments to challenge intergovernmental dialogue, this would effectively prevent all other individuals, groups, and institutions (like municipalities) from raising ‘to whom’ questions in the courts. The courts would not need to provide the same answer in both contexts. For example, they could focus on *federal-provincial* intergovernmental dialogue, but allow others the standing to challenge whether deference is actually warranted. Paul Weiler’s proposal, mentioned earlier, was framed in terms of standing: see notes 25 and 90, above. Erin Ryan defended the implications her proposal, also mentioned earlier, had for individuals, but avoided issues of standing (see note 20, above, 367), and many of the other questions highlighted here. I focus here on the direct ‘to whom’ question.

reasonable pluralism, democratic legitimacy, and institutional competence.

The Supreme Court's decision in *British Columbia (Attorney General) v. Lafarge Canada* (2007) is illustrative.³⁷⁹ At issue in that case was a proposal by Lafarge to build an integrated ship offloading and concrete batching facility on land owned by the Vancouver Port Authority (the "VPA"), but situated within the City of Vancouver. The VPA, which was established and regulated by the federal government, was authorized by federal statute to regulate land use on any port lands it managed or owned; the City also had a zoning and development by-law regulating land use within city limits. Both the VPA and the City approved the facility in principle, but a group of local ratepayers, who were opposed to the construction of the facility in their neighbourhood, challenged the City's decision not to require a formal development permit. The Court held that a development permit was not required, since the City's zoning and development by-law was rendered inoperative, due to a conflict between the federal and municipal land-use requirements. As I have argued elsewhere, this decision seemed quite inconsistent with the posture of restraint articulated in the Court's previous decisions, as well as *Canadian Western Bank*, which the Court released concurrently with it.³⁸⁰ The result can

³⁷⁹ Note 80, above. Binnie and LeBel JJ. wrote for a six judge majority; Bastarache J. wrote a concurring opinion, concurring in the result reached but not the reasoning used.

³⁸⁰ Wright, note 4, above, 679-681.

probably best be explained by the Court's desire to facilitate intergovernmental dialogue. The Court praised the "cooperative framework" worked out by the VPA and the City, which it described as the "most closely concerned" with the facility, and it suggested that the "courts should not be astute to find ways to frustrate rather than facilitate cooperation where it exists if this can be done within the rules laid down by the Constitution".³⁸¹ This effectively cast the ratepayers, and the province, which supported their position, as insufficiently concerned to matter.

The Court's discussion reveals a number of key decisions, explicitly or implicitly, about whose "cooperation" it believes it should "not be astute to find ways to frustrate". First, it reveals that the cooperation that matters to the Court, and warrants its solicitude, is that of the VPA and the City.³⁸² Second, it reveals that the opposition of the ratepayers, both individually and collectively, is insufficient to justify the Court's interference. This captures a key implication of the idea that the courts should defer to intergovernmental dialogue – that individuals should look to the political process, not the courts, to resolve division of powers disputes, at least if their governments agree about an allocation of jurisdiction. This assumption sits uncomfortably with the Court's previous claims that "[t]he distribution

³⁸¹ *Lafarge*, note 80, above, paras. 86-88.

³⁸² *Id.*, para. 87 ("Here the VPA and the City worked out a cooperative framework"); and para. 90 ("where the VPA and the City [disagree] the courts will have to resolve [it]").

of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments”, but “set boundaries that are of interest to, and can be relied upon by, all Canadians”.³⁸³ Finally, it reveals that, in this context at least, the opposition of the province was also not a serious concern for the Court. It comes as a surprise to see the opposition of the province downplayed in this way, since we might imagine that (at least) the agreement of the province would be deemed important³⁸⁴ – especially since municipalities, like Vancouver, are ‘creatures’ of the provinces, and fall (primarily) within their jurisdiction.³⁸⁵

The decisions courts would make to defer (or not) to intergovernmental dialogue would require, and reveal, these sorts of decisions about whose “cooperation” they should “not be astute to find ways to frustrate”. The courts would doubtless be called upon to clarify the position of individuals, the provinces, and municipalities, along with other groups and institutions that were not discussed in *Lafarge*, including the

³⁸³ *Kitkatla*, note 76, above, para. 72 (citing *OPSEU*, note 73, above, 19-20).

³⁸⁴ The Court might have taken the view – which it did not articulate – that it was fair to downplay the province’s disagreement, since it was open to it to overrule the City by invoking its jurisdiction over municipalities. But, this would seem to justify sidelining provincial disagreement in any cases involving federal-municipal agreement. Incidentally, it would also seem to justify sidelining the federal government where the federal paramountcy doctrine could be engaged, since the doctrine allows it to trigger a conflict.

³⁸⁵ See *Constitution Act, 1867*, ss. 92(8), (10).

territories, and Canada's First Nations³⁸⁶ – and to explain and justify their decisions, something that the Court did not really try to do in *Lafarge*. Questions about who is and is not, and who should and should not be, part of the intergovernmental process in Canada are highly controversial, and remain unresolved.³⁸⁷ They engage hard normative and empirical decisions about the nature of Canada's democratic and federal systems, and the place of minority groups within them. The courts would encounter these questions and decisions in deciding to whom to defer, and trying to justify and explain their decisions. I discuss the example of the provinces below, to provide a flavour of the questions and decisions the courts would have to confront.³⁸⁸

The courts would have to confront a variety of questions about how many, and which, provinces would need to support a particular instance of intergovernmental dialogue if they ran with the idea of deferring to intergovernmental dialogue. The provinces do not always, or even often,

³⁸⁶ The federal government has regularly passed laws relating to “Indians and lands reserved for Indians”, under s. 91(24) of the *Constitution Act, 1867*, without the consent of the First Nations affected, but several scholars have questioned the constitutionality of the practice: see, e.g., P. Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382, 414-18, 423-25; and Ryder, note 22, above, 320. The duty to consult cases may lend further support to this argument, but the Court has put off deciding whether the duty is triggered by “legislative action”: see *Rio Tinto Alcan v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650, para. 44.

³⁸⁷ See, e.g., Bakvis & Skogstad, note 97, above, chs. 15-17 (exploring the intergovernmental position of Canada's Aboriginal peoples, municipalities, and NGAs).

³⁸⁸ If the courts did decide to weigh in, there is also a very real danger that the courts' decisions would ossify, or least stall, the organic, incremental, largely political process that is playing out in relation to these questions and decisions – a process that may provide a more lasting resolution than the courts might be able to provide, if one is possible at all.

agree with each other about public policy. Indeed, it is implicit in the notion of a federal system, and the sorts of rationales offered in support of a federal system (like promoting provincial ‘laboratories of experimentation’ and preserving cultural diversity) that the provinces will disagree, and that this ability to disagree should be protected in certain areas, to some extent.³⁸⁹ The question that would arise, therefore, if the courts were to run with the idea, is how many, and which, provinces would need to support an instance of intergovernmental dialogue, in order to protect this ability to disagree. Otherwise, some provinces might agree to instances of intergovernmental dialogue that might undermine this ability of other provinces to disagree.

Assume that the courts treated their decisions deferring to particular instances of intergovernmental dialogue as binding on all provinces. This, in effect, would seem to tie the division of powers in a particular context to the action of the governments that supported the first instance of intergovernmental dialogue to which the courts were asked, and decided, to defer. The courts would seem to have two choices. They could choose to ignore the fact that provinces that did not support, or opposed, particular instances of intergovernmental dialogue would be bound to respect the allocations of jurisdiction that resulted. But, this would result in all provinces being bound by the first instances of intergovernmental dialogue

³⁸⁹ See Hogg and Wright, note 23, above, 343-45.

to reach the courts, which seems hard to justify, and ironically, might encourage a race to the courts, a result that deference seems designed, at least in part, to avoid.³⁹⁰ It would, as noted, be difficult to square with the notion of, and the rationales for, a federal system. And it would introduce a democratic deficit between the electorates of the provinces that did and did not support an instance of intergovernmental dialogue, since the latter, unlike the former, would lack representation in the supporting provinces.

Alternatively, the courts could try to address the fact that some provinces may not support particular instances of intergovernmental dialogue, by trying to address how many, and which, provinces would need to support it as a precondition to deference. But, consider the questions that would arise. How many provinces would be enough? Would all provinces be treated equally, or would some provinces be treated differently, and if so, which ones? Would Quebec be given more weight, even a veto, due to its unique role in protecting cultural diversity?³⁹¹ Would provinces with larger populations, or with unique regulatory interests in the case, be given more weight? Those that emphasize democratic legitimacy might be inclined to give provinces with larger populations more weight, over the objection of

³⁹⁰ It might be argued that the same is true of judicial review, but in that context, it is the court's decision, not intergovernmental dialogue, that is determinative.

³⁹¹ There is, of course, precedent against this claim: see *Quebec Veto Reference* [1982] 2 S.C.R. 793 (holding there was no convention giving Quebec a veto over amendments).

the smaller provinces. Those that adopt a provincial equality view of Canada might be inclined to think that the support of a supermajority, or even all, of the provinces should be required, while those that adopt a two nations view might be inclined to think that Quebec should have a veto in some or all cases. The answers that the courts would provide would engage the sorts of concerns about reasonable pluralism, democratic legitimacy, and institutional competence discussed earlier, with implications for the claim that deference to intergovernmental dialogue mitigates them.³⁹²

The longstanding debate in Canada about the domestic constitutional amending formula is illustrative of the controversy, and difficult choices, that these sorts of decisions would engage.³⁹³ The original *Constitution Act, 1867* did not include a domestic amending formula; Canada was still a British colony, the Act was an act of the imperial Parliament, and the assumption of the framers was that it would amend the Act, if and as the need arose. Work on a domestic amending formula began

³⁹² The courts may, of course, refrain from articulating a general rule that applies in all cases, and adopt a contextual, case-specific analysis. However, as the *Lafarge* case shows, even cases that do not address these ‘to whom’ questions openly (let alone decisively) will often end up answering them implicitly, and, in a common law system, the decisions that are made may (be taken to) crystallize into a doctrinal rule(s): see, D.O. Brink, “Legal Interpretation, Objectivity, and Morality”, in B. Leiter, ed., *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), 12 (“The pattern of decided cases [in a common law system] crystallizes in doctrines that both exemplify and justify the underlying pattern”). The decisions the courts make in individual cases may also have very real, and perhaps in some cases significant, effects on the federal system – for example, by helping legitimize and delegitimize particular views about the nature of the federal system.

³⁹³ For further discussion, see P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3d ed. (Toronto: University of Toronto Press, 2004).

in 1927, as part of Canada's push for independence, but 'agreement' remained elusive until 1982 – and even then, the issue was far from resolved. The domestic amending formula that was adopted in 1982, along with a larger package of amendments, including a *Charter of Rights*, was adopted without Quebec's approval.³⁹⁴ Quebec opposed the package of amendments for a variety of reasons; in the case of the domestic amending formula, its chief complaint was that it was not granted a veto over any constitutional amendments that impacted it. The failure to secure Quebec's approval fostered a profound source of grievance in Quebec, something that two additional failed constitutional 'accords', the Meech Lake Accord (1987) and the Charlottetown Accord (1992), did little to alleviate. The domestic amending formula has since been supplemented by a federal statute that requires the approval of Quebec and various other 'regions' before federal ministers submit proposed amendments to Parliament, but the change is statutory, and applies only to future constitutional amendments.³⁹⁵ The controversy about the domestic amending remains unresolved, and although it now occupies less public space than it once did, it can still bubble to the surface – as it did recently, with the federal government's proposal to alter the method of selecting senators unilaterally. The reasons

³⁹⁴ And the approval of Canada's First Nations.

³⁹⁵ *An Act Respecting Constitutional Amendments* S.C. 1996, c. 1.

for this are complicated, but chief among them are the fact that the issue implicates deep, unresolved questions about the nature of Canada's federal and democratic systems, and the treatment of minority groups with them – questions, as the prior paragraph shows, the courts might confront if they decided to run with the idea of deferring to intergovernmental dialogue.

Now assume that the courts decided to treat their decisions as non-binding, at least on and in the provinces that did not support a particular instance of intergovernmental dialogue. Similar concerns would arise. The reason for this is that instances of intergovernmental dialogue would often – perhaps always – have at least some sort of an impact, if not legally, then in practice, in and on the provinces that did not support (and perhaps outright opposed) them.³⁹⁶ Provincial governments may support instances of intergovernmental dialogue that contemplate federal intervention, against the wishes of one or more of the other provinces, for any number of reasons. For example, some provinces might want to shirk responsibility for an issue that is, or may be, controversial in their province; they might want to deal with extraprovincial externalities by imposing a federal solution that applies uniformly across the country; or they might disagree with the policy preferences of other provinces on some issue, and support (even seek out) a nationwide solution in response. Instances of intergovernmental dialogue

³⁹⁶ I draw here on Solomine, note 90, above, 385-89; Wright, note 99, above, Part III.

that contemplate federal intervention would obviously impact provincial holdouts if they applied nationally, but they might do so even if they did not; partial federal interventions might have an obvious spill-over effect on or in the holdout provinces (for example, if the federal government is tasked with regulating pollution in certain provinces, but does so poorly), or its impact may be more subtle (for example, if the federal government enforces a benchmark rule or standard agreed to by certain provinces that exercises a regulatory pull that the provincial holdouts find it difficult to resist).

Similarly, the federal government may support instances of intergovernmental dialogue that contemplate provincial intervention, against the wishes of one or more or more provinces, for any number of reasons. For example, the federal government might also want to shirk responsibility for an issue; it might think it lacks the resources, or expertise, to address that issue; or it might think that the issue should be addressed at the provincial level, for ideological or constitutional reasons. Here again, there may be an impact on the provincial holdouts. The policies pursued by the federal government's provincial partners might have an obvious spill-over effect on or in the provincial holdouts, as with the earlier pollution example, or the impact might be less obvious, by, say, fostering

interprovincial competition that creates a race to the bottom, or to the top.³⁹⁷

It would fall to the courts to determine whether some or all of the provincial holdouts were impacted enough by a particular instance of intergovernmental dialogue to refuse to defer to it. However, it may be difficult, even impossible, to sort out the extraprovincial effect of any particular instance of intergovernmental dialogue. There is an active debate, for example, about whether, and how much, particular provincial policies may foster a race to the bottom, or to the top – a debate that involves identifying, and weighting, the various political, social, and economic factors that may encourage and discourage any such race.³⁹⁸ In addition, even if the facts were knowable, interpreting them would not be a neutral exercise; one person's healthy interprovincial competition may be another person's harmful race to the bottom.³⁹⁹ In determining whether or not to defer to any instance of intergovernmental dialogue, the courts would have to decide how much of an effect that intergovernmental dialogue must have on the holdout provinces, but the answer provided would turn, at least in part, on how much weight was placed on the interests of the provincial

³⁹⁷ For example, provinces may have laxer labour laws that have spillover effects in provinces that have stricter labour laws, by giving the former a competitive advantage with employers, and creating downward pressure for the latter to loosen their labour laws.

³⁹⁸ See, for a series of articles that take an initial stab at gathering the evidence, and finding limited evidence of races to the bottom, K. Harrison, ed., *Racing to the Bottom?: Provincial Interdependence in the Canadian Federation* (Vancouver: U.B.C. Press, 2006).

³⁹⁹ Solomine, note 90, above, 388-89 (making a similar point, in the U.S. context).

holdouts, as opposed to the interests of the federal and provincial allies – bringing us full circle to the sorts of issues discussed in the previous few paragraphs. In addition, since the extraprovincial effect may vary between the provincial holdouts, the courts would have to decide whether, and how, to respond to these provincial variations. The difficult questions the courts would face would engage the concerns described earlier about reasonable pluralism and institutional competence, with implications, once again, for the claim that deference to intergovernmental dialogue may mitigate them.

c. Degrees of Deference

There are, of course, different degrees of deference. As noted, the Court appears reluctant to treat intergovernmental dialogue as a conclusive reason to defer, at least openly. The Court appears to treat it as a persuasive reason to defer, but the precise role that it plays in the Court's decision-making, including the weight the Court actually gives it, is far from clear.⁴⁰⁰

The force of some of the criticisms addressed in this Part might be limited if intergovernmental dialogue was not treated as a conclusive, but rather a persuasive, reason for the courts to defer. However, they would continue to have some force, depending, in part, on the role that intergovernmental dialogue played in the courts' decision-making, and the weight the courts attached to it. For example, the sorts of 'to whom'

⁴⁰⁰ See Part I(C)(b), above.

questions discussed in the previous section would remain, even if intergovernmental dialogue was not treated as a conclusive reason to defer; after all, the courts would still be treating cases that did involve intergovernmental dialogue more favourably than cases that did not, and thus would still have to consider whether or not a particular instance of intergovernmental dialogue had the support necessary to justify this result.

In addition, an intergovernmental-dialogue-as-persuasive approach would raise new questions of its own. Most obviously, as hinted at earlier, the courts would have to consider how much weight to give intergovernmental dialogue, and whether the weight given might vary, depending on the circumstances. This might raise difficult questions of its own, as the Court's experience attempting to articulate, and apply, different standards of review in the administrative law context in recent years might suggest.⁴⁰¹ And certainly, since intergovernmental dialogue would only be given weight, the courts would have to determine what else they would take into account in determining whether an initiative respects the division of powers – potentially bringing us full circle to the concerns that have been raised about a 'court as umpire' or 'arbiter' approach to judicial review.⁴⁰²

⁴⁰¹ See, for a recent overview, A. Macklem, "Standard of Review: Back to the Future?", in Flood and Sossin, note 328, above, ch. 9; and S. Wildeman, "Pas de Deux: Deference and Non-Deference in Action", in Flood and Sossin, note 328, above, ch. 10.

⁴⁰² See Part II, above.

CONCLUSION (AND GOING FORWARD)

The courts in Canada have often been cast as umpires or arbiters of the division of powers, with the exclusive, or at least decisive, role in clarifying and enforcing, and resolving disputes about, the scope or limits of federal and provincial jurisdiction. The Supreme Court's recent division of powers decisions have cast the courts in a new role: as a facilitator of 'cooperative federalism', or what I have called intergovernmental dialogue. In its role as facilitator, the Court attempts to encourage, accommodate, and reward mutually acceptable allocations of jurisdiction that are worked out by the federal and provincial governments on their own, without judicial intervention, limiting its role in imposing particular substantive outcomes. One of the primary, and most obvious, ways that this facilitative role has manifested in the Court's recent division of powers decisions is in the idea that courts should defer to these instances of intergovernmental dialogue – an idea that the Court has embraced in various decisions, albeit cautiously.

This article has provided a detailed, and critical, examination of the idea that the courts should defer to intergovernmental dialogue. It highlights the arguments that seem to weigh in favour of the idea. It argues that these arguments do not hold up when subjected to closer scrutiny, identifying a variety of reasons that the courts should be hesitant to embrace the idea.⁴⁰³

⁴⁰³ It follows that I am skeptical about scholarly proposals embracing the idea.

First, it argues, it is far from obvious that the idea addresses the argument that judicial review is necessary to safeguard jurisdiction, since federal and provincial actors are not necessarily consistently inclined to safeguard the jurisdiction of their governments, or adequately equipped to do so. Second, it argues, the extent to which the idea addresses, or mitigates, the criticism from democracy is open to question, since various democratic concerns have been, or can be, raised about intergovernmental dialogue as well. For all their faults, including time and cost, the courts may be one of the only forums available to particular individuals and groups (including marginalized minority groups, like Canada's Aboriginal peoples) to challenge intergovernmental decision-making,⁴⁰⁴ by deferring to intergovernmental dialogue, the courts might, in effect, close off, or significantly limit the usefulness of, this forum to them. Third, it argues, it is far from obvious that the idea addresses, or even mitigates, the criticism from reasonable pluralism and institutional competence, since the courts would have to decide when, to whom, and how much to defer, implicating precisely the sorts of contentious and difficult empirical and normative choices that underlie these criticisms. Finally, it argues, the idea raises a variety of additional concerns, including about stability and predictability.

These concerns notwithstanding, it might still be argued that the

⁴⁰⁴ Baier, note 100, above, 92-93 (making this point).

courts should defer to intergovernmental dialogue, because the alternatives – conventional judicial review, or no judicial review – are worse. After all, a decision to defer to intergovernmental dialogue is not a decision on the merits, at least if intergovernmental dialogue is treated as conclusive, and so the *impact* of the sorts of decisions that *the courts* would be required to make might seem to be minimized. But, this assumes that these are in fact the only two alternatives, a claim I question below. In addition, the *scope* of the issues that the courts would need to confront would likely increase fairly dramatically, offsetting the benefits – if any – of a reduction in impact. And some of these issues (like intergovernmental coercion) would take the courts in Canada into largely uncharted – and likely unwelcome – territory.

This begs the question, where should the courts go from here? Should the courts simply defer to the political branches, as some, like Paul Weiler, have argued? Should the courts revert to their conventional role as umpires or arbiters of the division of powers? Or is there merit in the sort of facilitative role adopted by the Court in its recent decisions? I conclude with a few general comments about these questions, but I do not try to provide a definitive answer to them. My goal, rather, is to frame a research agenda.

First, I am inclined to think that there are good reasons to be cautious about the facilitative role embraced by the Court as a whole, at least as it has manifested in the Court's decisions. For one thing, it is not

obvious that this approach will actually facilitate intergovernmental dialogue about particular allocations of jurisdiction, at least in any consistent way – particularly if, as I have argued they should, the courts eschew deference to specific instances of intergovernmental dialogue. Apart from deference to specific instances of intergovernmental dialogue, the primary strategy that the Court has adopted to facilitate intergovernmental dialogue is deference more generally.⁴⁰⁵ This sees the Court de-emphasizing hard limits on federal and provincial jurisdiction (although not entirely, as noted), and tolerating (even celebrating) de facto overlap in jurisdiction. This approach may facilitate intergovernmental dialogue in some cases; governments, seeking to avoid regulatory overlap and to ensure regulatory uniformity and predictability, may decide to eschew unilateralism and work together, perhaps due to political pressures, or a desire to regulate more efficiently and effectively.⁴⁰⁶ However, as others have noted, if both orders of government have the jurisdiction to regulate an issue, they can also act unilaterally.⁴⁰⁷ And where they do so, it is the *existence*, not absence, of jurisdictional limits that may best ‘facilitate’ intergovernmental dialogue, by

⁴⁰⁵ See Wright, note 4, above, Parts I & II.

⁴⁰⁶ *Id.*, 647-48.

⁴⁰⁷ R. Elliot, “Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters – Again” (2008) 43 S.C.L.R. (2d) 433, 489; and J. Leclair, “‘Please, Draw Me a Field of Jurisdiction’: Regulating Securities, Securing Federalism” (2010) 51 S.C.L.R. (2d) 555, 578-79.

making cooperation a useful vehicle to avoid these jurisdictional limits.⁴⁰⁸

In addition, the facilitative role embraced by the Court is, at best, incomplete. The Court's recent decisions, imposing limits on both federal and provincial jurisdiction, expose this shortcoming. These decisions, as noted earlier, all involved a measure of intergovernmental *disagreement*, and to that extent, seem not inconsistent with a facilitative role that privileges intergovernmental *dialogue*.⁴⁰⁹ However, major disagreements emerged among the members of the Court about whether and where these jurisdictional limits should be imposed, and, while the different decisions all reaffirmed (or at least did not reject) this facilitative role, they disagreed strongly about what it entailed. The reason for this seems plain. The facilitative role embraced by the Court suggests that intergovernmental dialogue should be privileged; that much is clear. But, it provides very little guidance to the courts beyond that. For example, it provides little guidance to the courts about the role that they should play where there is intergovernmental disagreement – or indeed, as this article has shown, about when, how, and how much to privilege intergovernmental dialogue

⁴⁰⁸ Interestingly, in the *Securities Reference*, the Court's decision, finding the proposed securities regime unconstitutional, seemed to be motivated, at least in part, by a desire to limit federal unilateralism, and to encourage, even require, cooperation: see note 6, above.

⁴⁰⁹ For discussion, see Part I(B)(b), above.

where it is involved.⁴¹⁰ The guidance that is needed would seem to rest in an underlying theory of constitutional interpretation and federalism – which is precisely what the Court seems to hope to avoid by adopting this role.⁴¹¹

Finally, even if these two issues could be adequately addressed, it is not obvious that the Court should be quite so inclined to facilitate intergovernmental dialogue, or what it calls “cooperative federalism”, at least in all cases. The Court’s decisions have elevated cooperative federalism to a privileged position, in the process, neglecting to address the active debate in the federalism literature about its benefits and costs. Intergovernmental cooperation may yield benefits in some cases.⁴¹² For example, it can allow governments to accomplish goals that they might not be able to attain on their own. It can resolve intergovernmental disputes

⁴¹⁰ Robert Schertzer’s work, which defends this sort of a facilitative role, is also short on specifics. For example, where “a facilitative role is not possible”, which he suggests will not be “uncommon”, he encourages the courts to act as “fair arbiters”, by adopting “an inclusive understanding of the federation” that “draw[s] from, and reinforce[s] the legitimacy of, multiple federal models”: see, e.g., note 8, above, 17-18, 87-88. This provides little, if any, guidance as to the actual *results* that a ‘fair arbiter’ should reach.

⁴¹¹ For a similar claim, see, e.g., Ryder, note 26, above, 350. This criticism resonates with a criticism of minimalist approaches to judicial review, which encourage courts to issue ‘narrow’ and ‘shallow’ decisions – that such approaches to judicial review fail to provide clear guidance about when minimalist decision-making is appropriate, and understate the role that value choices play in the resolution of constitutional cases: see, e.g., N.S. Siegel, “A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar” (2005) 103 Mich. L. Rev. 1951, Part III; and Kong, note 8, above, 365, 387-9. It also resonates with a similar criticism of process-based approaches, which encourage courts to police the process used rather than the results reached: see, e.g., note 341, above.

⁴¹² For a good overview of the benefits and costs of intergovernmental cooperation, see D. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Montreal: McGill-Queen’s University Press, 2002), 62-69.

about the proper allocation of jurisdiction, reducing the potential for conflicts that might undermine the federalism system. It can lead to policy harmonization, helping to ensure that governments do not adopt policies that work at cross-purposes or overlap unnecessarily, needlessly increasing compliance costs and legal uncertainty. And it can eliminate, or reduce, destructive forms of intergovernmental competition, or “races to the bottom”.⁴¹³ However, intergovernmental cooperation may also come with costs, at least in some cases. For example, it can blur the lines of accountability, making it harder for voters to know which government to hold to account. It can limit the scope for policy experimentation, reducing learning opportunities.⁴¹⁴ It can lead to the suppression of diverse policy outcomes, decreasing the opportunity for regulatory redundancy – and with it, the possibility for regulatory redress, voter input, innovation, and error correction.⁴¹⁵ It can lead to “joint decision traps”, if consensus proves difficult, increasing the time needed for and the cost of political decision-

⁴¹³ On races to the bottom (and top) in Canada, see Harrison, note 398, above.

⁴¹⁴ *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 per Brandeis J. (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”); and Hogg, note 30, above, sec. 5.2.

⁴¹⁵ For early accounts of the virtues of redundancy, see, e.g., R.M. Cover & T.A. Aleinikoff, “Dialectical Federalism: Habeas Corpus and the Court” (1977) 86 Yale L.J. 1035; and R.M. Cover, “The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation” (1981) 22 Wm. & Mary L. Rev. 639. More recently, see, e.g., Schapiro, note 311, above, 98-104; and P.S. Berman, “Federalism and International Law Through The Lens of Legal Pluralism” (2008) 73 Mo. L. Rev. 1149 – both containing further references.

making, and possibly producing lowest common denominator results, also a form of ‘race to the bottom’.⁴¹⁶ And it can suppress desirable forms of intergovernmental competition, which can help expose “competing ideas to public deliberation”,⁴¹⁷ and perhaps make the system more responsive to the needs and wants of voters.⁴¹⁸ The Court’s facilitative approach seems to reflect a blanket preference for intergovernmental cooperation.⁴¹⁹ However, it is far from clear that this sort of blanket preference is warranted. In the least, it is a preference that should be explored and justified, not assumed.

These three issues, taken together, provide strong reasons to be cautious about a facilitative role that casts courts as facilitators of intergovernmental dialogue. In the least, for those that might be inclined to argue that caution is unwarranted, these are issues that would need to be addressed, even if only to demonstrate why they are not concerns after all.

And yet, with this said, I am inclined to think that it may be premature to reject any sort of facilitative role for the courts in division of powers cases. This may come as something of a surprise, in light of my

⁴¹⁶ See further, F. Scharpf, “The Joint Decision Trap: Lessons from German Federalism and European Integration” (1988) 66 *Public Administration* 238.

⁴¹⁷ H. Lazar, “Managing Interdependencies in the Canadian Federation: Lessons from the Social Union Framework Agreement” (Kingston: I.I.G.R./I.R.P.P., 2003).

⁴¹⁸ Royal Commission on the Economic Union and Development Prospects for Canada, Report (Ottawa, 1985), Supp. Statement by Albert Breton, Vol. 3, 486-526 (defending ‘competitive federalism’).

⁴¹⁹ Leclair, note 407, above, 582-84 (criticizing the Court’s emphasis on cooperation).

discussion in this article to this point. However, it may well be that the central problem with the Court's approach is the target of its facilitative efforts: intergovernmental dialogue. For example, Hoi Kong has argued that the Canadian courts should design "constitutional doctrine in a way that facilitates democratic deliberation about what federalism requires of governments and that prevents serious violations of federalism values".⁴²⁰ I have identified various problems with a facilitative role that focuses on intergovernmental dialogue, but it would be premature to dismiss out of hand the possibility that a different facilitative role could be designed that capitalizes on the democratic and other benefits identified in Part II of this article, and also addresses, or at least sufficiently mitigates, these problems.

The Court's decisions manifest what might be called a weak-form facilitative role, focused on facilitating intergovernmental dialogue. As noted in Part I, under this instantiation of the role, the Court has encouraged the political branches to take the lead in setting the division of powers, by working out their own mutually acceptable allocations of jurisdiction, and rewarding them where they do so. The Court has not entirely abandoned the role that it conventionally played as umpire or arbiter of the division of powers, but this role has been downplayed and circumscribed. The courts could explore an alternative *strong*-form facilitative role that couples this

⁴²⁰ Kong, note 8, above, 357-58.

deferential approach to hard limits with soft limits that the courts would apply in areas of de facto jurisdictional overlap. Soft limits, unlike hard limits, are limits on jurisdiction that can be reversed by the order of government to which they apply, unilaterally and without a formal constitutional amendment, provided that government satisfies certain federalism-oriented requirements – requirements that vary depending on the type of soft limit involved.⁴²¹ These soft limits could be used to facilitate ‘democratic deliberation about what federalism requires of governments’, rather than intergovernmental dialogue,⁴²² and to reinforce and enhance the ability of *the political branches* to safeguard the division of powers.⁴²³

This sort of an approach might facilitate deliberation about the division of powers, by emphasizing soft limits that provide notice, and the opportunity for deliberation, within and between governments, about the division of powers implications of particular initiatives. By emphasizing politically-reversible soft limits, it might minimize the force of the

⁴²¹ For one possibility, see the text accompanying notes 425 to 433, below.

⁴²² See note 8, above, 357-58. The “democratic deliberation” facilitated might be intergovernmental, as with an approach that takes as its focus intergovernmental dialogue, but it might also be *intragovernmental* – for example, facilitating deliberation by the federal government itself about the federalism implications of new or existing initiatives. The key point is that the focus would be on facilitating deliberation about the division of powers implications of allocations or exercises of jurisdiction, within and between governments, not intergovernmental dialogue – a subtle but key difference, since in some cases the latter may not take these division of powers implications seriously (enough).

⁴²³ Ernest Young, among others, has developed an approach along these lines for the United States: see note 20, above; and “Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments” (2005) 46 Wm. & Mary Law Rev. 1733.

criticisms from reasonable pluralism and institutional competence, in effect by lowering the stakes of judicial decision-making. It might minimize concerns about democratic accountability, by permitting and to some extent encouraging federalism-related decision-making to occur in forums (like elected legislatures) that are accountable to the federal and provincial electorates – and, at least where soft limits are used, leaving the final word to the political branches rather than the courts. By shifting the focus away from intergovernmental dialogue, it might address some of the problems, identified earlier, that the Court’s present facilitative approach raises. And, by coupling soft limits on jurisdiction with (admittedly) deferential hard limits on jurisdiction, it might address, or in the least mitigate, any concerns that might arise about the protection of (particularly provincial) jurisdiction.

To be sure, this sort of approach is unlikely to find favour with those who believe that the courts should enforce hard limits that protect significant areas of *exclusive* federal or provincial jurisdiction. It would also not answer the criticisms from reasonable pluralism, democratic legitimacy, and institutional competence *conclusively*, criticisms that scholars like Paul Weiler and Patrick Monahan have emphasized in building their case against judicial review of the division of powers. After all, the courts would still continue to play a role in policing both hard and soft limits, requiring decisions about where, and how, both types of limits should be imposed.

However, as I have argued elsewhere, the federal and provincial governments have a greater ability to protect their own jurisdiction, without judicial intervention, than many seem to imagine – an ability that they can, and do, use at times to limit, or block, perceived encroachments.⁴²⁴ The courts would not abandon the political branches to their own devices altogether, but would impose soft limits, backed up by deferential hard limits. And, by emphasizing soft limits over hard limits, this approach would arguably mitigate these criticisms, even if it did not eliminate them.

One form of soft limit that might be considered is federalism-based clear statement rules.⁴²⁵ Federalism-based clear statement rules would require a federal or provincial government to speak clearly when it pursued initiatives with certain division of powers implications. These sorts of rules would not preclude a government from pursuing a particular initiative altogether; rather, they would require it to speak with sufficient clarity in order to do so. Where an initiative was held by a court to speak with insufficient clarity, the initiative would not be absolutely off limits to the

⁴²⁴ Wright, note 99, above, Part III.

⁴²⁵ There is a large body of scholarship in the United States exploring clear statement rules, in the federalism context and more generally – much too large to cite here. On federalism-based clear statement rules, see, e.g., Young, notes 20 and 423, above; and G. Metzger, “Administrative Law as the New Federalism” (2008) 57 *Duke L.J.* 2023, 2091-2101. More generally, see, e.g., Coenen, note 217, above. For criticism, see, e.g., J.F. Manning, “Clear Statement Rules and the Constitution” (2010) 110 *Colum. L. Rev.* 399; and D. Coenen, “The Pros and Cons of Politically Reversible ‘Semisubstantive’ Constitutional Rules” (2009) 77 *Fordham L. Rev.* 2835 (discussing, and responding to, the key criticisms).

relevant government; on the contrary, it would remain open to that government to pursue the initiative, if it was so inclined, by ensuring that any response spoke with sufficient clarity, signalling that it was aware of, and willing to accept, the division of powers implications identified. These sorts of rules could be applied in a variety of different contexts, including in considering the interjurisdictional immunity doctrine, Crown immunity from statute in the intergovernmental context, and the federal paramountcy doctrine.⁴²⁶ There is precedent for these sorts of rules in Canada, including in the division of powers context,⁴²⁷ although they have not been adopted and applied in the cases in any systematic and consistent manner.⁴²⁸

Federalism-based clear statement rules seem tailor made for the

⁴²⁶ For discussion of the interjurisdictional immunity and paramountcy doctrines, see Wright, note 99, above; on Crown immunity in the federalism context, see P.W. Hogg, P. Monahan, and W.K. Wright, *Liability of the Crown* (Toronto: Carswell, 2011), ch. 17.

⁴²⁷ See, e.g., *Rothmans*, note 77, above, para. 21 (suggesting the courts should not “impute to Parliament ... an intention to ‘occup[y] the field’ in the absence of very clear statutory language to that effect”); *Canadian Western Bank*, note 34, above, para. 75 (referencing the “fundamental rule of constitutional interpretation that, ‘[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes’” (citing *Can. v. L.S.B.C.* [1982] 2 S.C.R. 307, 356)); and *Ryan Estate*, note 54, above, para. 69 (citing *Canadian Western Bank*, this note, para. 75). But see *COPA*, note 50, above, para. 53 (rejecting an approach to the interjurisdictional immunity doctrine that would “narrow Parliament’s legislative options”, by requiring it to legislate to override a provincial law); and *Lacombe*, note 50, above, para. 66 (same).

⁴²⁸ Robin Elliot has argued that a “federal intention to cover the field” should be a “necessary but not a sufficient condition for the application of the paramountcy doctrine”: “Safeguarding Provincial Autonomy from the Supreme Court’s New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?” (2007) 39 S.C.L.R. (2d) 629, 660. This is a federalism-based clear statement rule. Other scholars have made similar suggestions, but without the same detail: see, e.g., Kong, note 8, above, 400.

strong-form facilitative role just described.⁴²⁹ They might facilitate deliberation about the division of powers, by providing notice that an initiative has division of powers implications, as well as the opportunity for debate and compromise, within and between governments, about the initiative and its division of powers implications. They might minimize concerns about democratic legitimacy, by giving the political branches, rather than the courts, the final word, and making space for, and encouraging, democratically accountable deliberation about the division of powers. They might mitigate concerns about the division of powers, by providing governments notice of, and the chance to voice concerns about, initiatives that engage their jurisdiction, and increasing the (re-) enactment costs required to pursue them.⁴³⁰ They might minimize concerns about reasonable pluralism and institutional competence, by reducing the impact, and thus the importance, of judicial line drawing. And, since statutory interpretation is an ordinary judicial role, they might avoid some of the concerns that arise with deference to intergovernmental dialogue, which focuses the attention of the courts on intergovernmental decision-making.

⁴²⁹ I draw in the next few paragraphs on the resources listed in note 425, above.

⁴³⁰ For example, where an initiative is found to speak with insufficient clarity, governments would need to revisit the initiative, and figure out how to respond with sufficient clarity to secure judicial approval; this entails time and effort, both of which have enactment costs, since other initiatives may be delayed, or sacrificed. In addition, responding would provide an opportunity for opponents to try to delay, or obstruct, the initiative. See M. Stephenson, “The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs” (2008) 118 *Yale L.J.* 2, 41-2.

True, federalism-based clear statement rules might pose real obstacles for the political branches, given the difficulties that might arise in re-enacting initiatives.⁴³¹ Concerns about the under-enforcement of the division of powers might linger, since the option of (re-) enactment would remain. So too might concerns about reasonable pluralism and institutional competence, since the courts would still have to make a variety of hard choices, about where federalism-based clear statement rules would apply, and how clearly the political branches would have to speak. But, the impact of federalism-based clear statement rules would be “less restrictive” than ‘hard’ judicial invalidation, since the option of (re-) enactment would remain.⁴³² The protection of the division of powers might be enhanced, since courts might be less reluctant to enforce the division of powers when doing so did not entail ‘hard’ invalidation. And the extent to which concerns about reasonable pluralism and institutional competence might remain would turn on how these rules were applied, including the circumstances in which they were held to be engaged, the clarity the courts required from the political branches, and the “transparency and care” with which they

⁴³¹ This has been a hotly contested issue in the *Charter* context: see note 18, above. I am inclined to think that this is a likely a bigger issue in the United States than it is in Canada, since Canada lacks the system of divided government that can make it quite difficult in the United States, at the federal and state levels, to re-enact particular initiatives.

⁴³² Metzger, note 425, above, 2094.

“specified why [federalism] concerns were implicated”.⁴³³ If we want the courts to play a role, this may be the best that we can reasonably expect.

Finally, I am inclined to think that greater thought should be given to the potential role of soft limits in Canada’s federal system, even if scepticism remains that it might be possible to develop an attractive facilitative approach to judicial review. Legal scholarship about the division of powers in Canada has largely been preoccupied with debating whether and where judicially enforced hard limits on jurisdiction should be drawn. It would be useful if some of the attention now shifted to discussing the role that judicially enforced soft limits on jurisdiction might play in safeguarding Canada’s federal system. It seems unlikely that the courts in Canada will, or could, revert to imposing hard limits that protect significant areas of exclusive jurisdiction – even if they were so inclined, which they do not seem to be, recent cases notwithstanding. Since overlap is now prevalent, this might put a vast number of existing initiatives at risk of judicial invalidation. In addition, there are now significant social, economic, and political pressures pushing in the direction of more, not less, jurisdictional overlap, and even where jurisdictional limits remain, both orders of governments often have regulatory options available to them to

⁴³³ *Ibid.*

achieve their goals.⁴³⁴ We should not expect from the courts something that they do not, *and likely cannot*, provide. But courts that are hesitant to impose hard limits might be more attracted to soft limits, which, as noted, can be reversed by the order of government to which they are applied.

Independent, exclusive areas of jurisdiction are now the exception, and interdependent, overlapping areas of jurisdiction the rule; and “the task of maintaining the balance [of] powers falls primarily to governments”, not the courts.⁴³⁵ The Court’s recent division of powers decisions highlight the place, and the need, for new thinking about how to safeguard the federal system under these circumstances – circumstances that are hard to reconcile with the role the courts are typically expected to play as umpires or arbiters.

⁴³⁴ See further Part I(A), above.

⁴³⁵ *Employment Insurance Reference*, note 170, above, para. 10.

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