

Courts, Commerce and Competitive Federalism in Canada and the United States

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"It is the fashion now to enlarge on the defects of the constitution of the United States, but I am not one of those who look upon it as a failure."

--John A. MacDonald, Legislative Assembly, 1865.¹

This paper will introduce several interrelated claims about the jurisprudence of federalism in Canada, claims that might allow us view to comparative development of Canadian and American federalism in an unfamiliar light. My goal is to raise some doubts about the standard narrative of North American federalism, a narrative which runs something as follows: the United States Constitution placed great emphasis upon the limits of national power and the relative autonomy or even sovereignty of the states²; the flaws of this model were revealed by the Civil War, if not earlier, and the creators of the British North America Act took pains to avoid a similar result in their newly minted federal society, creating instead a strong central government with broader legislative powers and greater ability to constrain the power of its constituent units³. Subsequently, according to this standard narrative, Canadian and American federalism moved in different directions, with the USA becoming increasingly centralized⁴, while Canadian constitutionalism became increasingly deferential to the interests of the provinces⁵ (whether as a consequence of the ideological dispositions of the Judicial Committee of the Privy Council⁶, or the decentralized character of Canadian society⁷, or some combination of the two.) This standard narrative of Canadian and American federalism can be summarized in a single line: different foundations, divergent developments.

I want to propose a contrasting narrative: while the constitutional means may have differed, the ends of Canadian and American federalism are quite similar; the British North

¹ Quote from Ajzenstat, et al., editors. *Canada's Founding Debates*. Toronto: University of Toronto Press, 2003. p. 281

² Gerald Baier, *Courts and Federalism*. Vancouver and Toronto: University of British Columbia Press, 2006. p. 32

³ Jennifer Smith, "Canadian Confederation and the Influence of American Federalism." *Canadian Journal of Political Science* Vol. 21, No. 3 (Sep., 1988), p.43; see also F.R. Scott, *Essays on the Constitution*. Toronto: University of Toronto Press, 1977 pp 25-26, 41; for a basic summary of the nationalist narrative of Canadian federalism, see Paul Romney, *Getting it Wrong*. Toronto: University of Toronto Press, 1999 p. 5

⁴ William N. Eskridge, Jr. and John Ferejohn, "The Elastic Commerce Clause: A Political Theory of American Federalism." *Vand L Rev* 1355, 1356 (1994)

⁵e.g. Garth Stevenson, *Unfulfilled Union*. Toronto: Gage Publishing, 1988. pp 45-57

⁶ e.g. David Schneiderman, "A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century." *Law and History Review*, Vol. 16, No. 3 (Autumn, 1998), pp. 495-52

⁷ e.g. Alan Cairns, "The Judicial Committee and Its Critics." *Canadian Journal of Political Science*. Vol. 4 No. 3 (September, 1971), pp 319-327

America Act and the Constitution of 1787 both aimed to create competitive federalism, a national economy within a federal structure in which the constituent political units could not engage in the rent-seeking and economic protectionism that so often undermines trade between nations. The development of Canadian and American federalism also led to a similar end-- the eclipse of competitive federalism and the rise of "cartel" federalism, the latter federalism being characterized by inter-state (and inter-provincial) obstacles to trade, discrimination against out of state/province businesses and individuals, and the rise of inter-governmental fiscal transfers.⁸ In both societies, the ability of the federal government (including, most importantly, the ability of federal courts) to maintain the structures of competitive federalism declined in similar ways, and while the path was paved by courts and judicial doctrine, the transformation of North American federalism cannot be fully explained by political ideology or political preferences of judges. At the very least, the task is more difficult than it first appears, once we see the dubiousness of equating "decentralization" or "states' rights" with "conservative" or "laissez-faire." My ultimate goal, then, is to raise suspicions about three different sets of things: our understanding of the foundation of Canadian and American federalism, the development of Canadian and American federalism, and the relationship between doctrines of federalism and political ideology. In the context of a short paper, I only aspire to introduce my claims, and provide a few small pieces evidence to illustrative why this new narrative might be plausible. If I can also show that this narrative interesting and politically relevant (if true!), then so much the better.

In terms of the existing literature on the role of courts in federal systems, the claims that I will present here should be seen as a variant on Gerald Baier's argument in *Courts and Federalism*. Baier's central claim is that, in regards to federalism, judicial doctrine plays a crucial role in constraining judicial decision making-- contrary to the most extreme claims of the "attitudinalist" and "rational choice" schools of judicial behavior.⁹ Baier's argument is neutral about the validity of the preference-constraining doctrines that he analyzes; he states in his conclusion that "the comparative evidence does not indicate that there is a core of universal federalism values or principles that motivate courts." In contrast, I want to present the thesis that both Canadian and American federalism were based upon the principles of competitive federalism, and that both systems evolved in ways that limited the ability of federal courts to prevent the defection of sub-national governments from the competitive federal order initiated by both the British North America Act and the Constitution of 1787.¹⁰ The comparative

⁸ For a discussion of the distinction between competitive and cartel federalism (sometimes referred to as "consociational" federalism) see Michael Greve, *The Upside Down Constitution*. Cambridge, Mass.: Harvard University Press, 2012. pp 4-5. Greve's key claim is that American constitutional scholars have misconceived the development of American federalism, because they have assumed that the most important trend has been the increased "centralization" of government power. I think that Greve is correct to portray the development of American federalism in terms of the dynamics of competitive vs. cartel federalism (as opposed to "centralized" vs. "de-centralized" federalism), and my goal in this paper is to consider whether a similar dynamic is at work in Canadian federalism.

⁹ Gerald Baier, *Courts and Federalism*. Vancouver: UBC Press, 2005. pp 9-30

¹⁰ For a recent discussion of the barriers to inter-provincial commerce, see Loleen Berdahl, "(Sub) National Economic Union: Institutions, Ideas, and Internal Trade Policy in Canada." *Publius: The Journal of Federalism*. Volume 43, number 2, (August, 2012) pp. 275-296; for a discussion of cartel federalism in the USA, see Michael Greve, *The Upside Down Constitution*, pp 259-327 Though I will be emphasizing the neglected similarities

evidence might not suggest that there are universal principles of federalism, but the origin and development of Canadian and American federalism suggest that there are recurring dynamics in the development of the jurisprudence of federalism. Though it is not the main purpose of this paper, I would argue that the disadvantages of cartel federalism are so manifest that it makes sense to speak of competitive federalism as "real federalism;" cartel federalism, however attractive it might be from the perspective of sub-national governments, it does not serve the interests of citizens.

In this first section, I will attempt to explain a neglected similarity between the constitutions of Canada and the United States: while these countries differ in terms of culture, geography, economy, and political institutions, and while the federal division of powers created by their respective constitutions differ in crucial ways, the federal structure of both nations aimed to create a nation-wide economic order. Furthermore, the founders of both countries gave the national government the power to defend practices essential to competitive federalism, such as internal free trade or and non-discriminatory regulation. At the same time, the power of the national government to defend competitive federalism was a constant source of controversy; in both Canada and the United States, economic nationalism would find opponents amongst sub-government officials and amongst the judiciary. Despite the differences in the text of the British North America Act and the Constitution of 1787, these constitutions are rooted in a similar theories regarding the purpose or goal of federal political arrangements. Though the institutional means differ in some ways, both constitutions aim to create competitive federalism. The problem is that, in both nations, key political actors have opposed competitive federalism, and often for very similar reasons: the desire to maintain regional and cultural autonomy, and the desire of sub-government elites to enact rent-seeking policies at the expense of other states and/or provinces.

These similarities are easy to overlook if we confine ourselves to the main themes of the standard narrative of North American federalism; in particular, we are likely to overlook some of the most significant aspects of American federalism-- we are likely to miss some of the most significant aspects the power of the American national government-- if we only focus on the legislative powers assigned to Congress in Article One. For instance, consider Gerald Baier's summary of the American founding and American federalism: the American national government is one of limited and enumerated powers, "un-enumerated" or "residual" powers belong to the states, and the American national government's power under the commerce clause has expanded over time as a consequence of generous judicial interpretation.¹¹ The problem with Baier's summary is that it assumes that the main question of federalism is the relative balance of power between state and national governments, understood in terms of the powers of the legislative branches of government. But the American constitution contains more

between the development of Canadian and American federalism in this essay, it is important to note that there are institutional differences that continue to differentiate them; for instance, the structure of the Canadian judicial system has probably prevented Canada from experiencing the debilitating consequences of the American litigation explosion. See Peter H. Russell, "The Unrealized Benefits of Canada's Unfederal Judicial System." in Dimitry Anaastakis and P.E. Bryden, ed., *Framing Canadian Federalism*. Toronto: University of Toronto Press, 2009. pp255-271

¹¹ Baier, *Courts and Federalism*. pp 32-33

than the enumeration of legislative powers in Article One, Section 8; it also contains all of the necessary pre-conditions for judicially managed competitive federalism.¹²

Once we take the role of the federal judiciary into account, the nineteenth century American national state is revealed to be more powerful than it might first appear. In particular, the Constitution enabled federal courts to place significant restraints upon the states, in order to prevent the states from pursuing the protectionist, beggar-thy-neighbour policies that had spurred the creation of the Constitution in the first place.¹³ Sources of national judicial power in relation to federalism can be found in the Supremacy Clause, the commerce clause, the privileges and immunities clause, and the inter-state compact clause, to name only some of the most prominent examples; the interpretation and construction of these clauses were the most significant cites of judicial power in the first century of American political development, and one could even argue that the development of the "common law of federalism" was one of the most significant faces of American national power during the nineteenth century. The presence of these clauses can help us to understand why nationalists such Alexander Hamilton and James Madison could endorse the Constitution of 1787, despite its many concessions to state government: nationalists had reason to hope that courts had been given everything they needed to limit the inter-state conflicts that had plagued the United States under the Articles of Confederation, and to a great degree these hopes would be fulfilled.¹⁴

For instance, relying on both the Supremacy clause and the commerce clause, American courts constructed¹⁵ the dormant commerce clause doctrine, which prevented states from interfering with inter-state commerce even in the absence of Congressional legislation. The dormant commerce clause is based upon the idea that Congress' power to regulate "commerce amongst the states" excludes state regulation of inter-state commerce, even in the absence of congressional law; the decision of Congress to let its power lie "dormant" is as significant as an

¹² My account of American federalism is based in large part upon Michael Greve's *The Upside Down Constitution*; while I do not have the time to explore the issue in this paper, Greve's analysis of American federalism could help bolster Baier's attempt in *Courts and Federalism* to explain the contemporary American Supreme Court's approach to federalism in terms of doctrine (as opposed to political preferences.) Greve's key claim is that federalism doctrines associated with contemporary conservative jurisprudence--in particular, textualism, support for state sovereignty, opposition to the dormant commerce clause-- not only depart from the "original understanding" of federalism, but actually fail to support conservative policy preferences. For Greve's critique of judicial originalism as currently practiced, see *The Upside Down Constitution*, pp. 390-393.

¹³ David Brian Robertson, *The Constitution and America's Destiny*. Cambridge: Cambridge University Press, 2005. pp 37-62

¹⁴ David Robertson, "Madison's Opponents and Constitutional Design." *American Political Science Review*. Vol. 99 No. 2 (May, 2005), pp 225-243.

¹⁵ The notion that courts constructed the doctrines of federalism should be distinguished from Keith Whittington's concept of "constitutional construction" which he uses to describe the development of constitutional meaning by political (that is, non-judicial) actors. (see Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge: Harvard University Press, 1990. p. 1) I think the concept of constitutional construction can be usefully applied to judicial actors as well, as it allows us to avoid thinking of judicial power in either formalistic legal terms or as purely pragmatic, policy-oriented decision-making.

active use of its power. Like the power of judicial review itself, the dormant commerce doctrine was not explicitly mentioned in the constitution; yet the power itself was a necessary implication of the constitutional structure, as well as a power well suited to prevent states from engaging in the trade warfare that had bedeviled post-revolutionary America under the Articles of Confederation. In addition to being an "implied power" of the federal courts, the dormant commerce clause doctrine was of necessity an evolutionary or living doctrine, because as the character of commerce developed, so too did state attempts to interfere with it. Given the complex hurdles of the national legislative process-- including the direct representation of state interests through the Senate-- the judiciary was the institution best suited to prevent state defections from competitive federalism through the development of federalism doctrines that were valid inferences from the underlying purposes of the constitutional order. Twentieth century American judges who questioned aspects of the old Constitutional legal order (such as, most importantly, substantive due process) continued to regard the dormant commerce clause as not only valid but actually essential to the operation of federalism, despite the fact that the doctrine is not articulated in the text of the Constitution.¹⁶ The question is whether this aspect of American national power-- judicial federalism, and the development of what Michael Greve calls "constitutional common law" in service of competitive federalism-- was relevant to the Canadian constitutional experiment.

We know that Canadian courts did not develop a lasting version of the dormant commerce clause doctrine¹⁷-- but there is no reason to think that this was inevitable, and there are several reasons to think that at least some political and legal elites thought that some version of the doctrine was essential to the Canadian constitutional experiment. To begin with, the text of the British North America Act, while reflecting different political circumstances, is widely recognized as a nationalizing instrument; the example of the commerce and dormant commerce clause jurisprudence, the most nationalizing aspect of American constitutionalism, was not rejected but was instead improved upon the British North America Act, in that the latter provided an even firmer basis for national protection of competitive federalism. Many of the conundrums of the division of powers in the British North America Act can be clarified if we assume that the drafters of BNA Act adopted American (or rather, Hamiltonian-Madisonian) assumptions about the purpose of federalism, but wished to improve upon the constitutional framework for competitive federalism in light of American experience.

Consider the familiar disputes over the reach of federal power over "Trade and Commerce" and provincial power over property rights and civil rights. That these powers could easily come into conflict is obvious to any schoolchild, and there is no answer within the text of the BNA Act that could dictate how these respective powers could be reconciled. As in the case of the American constitutional order, the BNA Act could not operate without some antecedent notion of the purpose of these provisions, or even the purpose of federalism itself. The purpose of Canadian federalism is neither to "centralize policy making" nor, conversely, to protect "provincial autonomy," as neither of these abstract goals are compatible with the text as

¹⁶ Greve, *The Upside Down Constitution*. pp 94-95

¹⁷ See the discussion in Chelsea A. Snead, "Awakening Canada's Dormant Commerce Clause." 20 *Loy. L.A. Int'l & Comp. L.J.* 193 1997-1998

written.¹⁸ Understood as an improvement of the American constitutional order, however, the division of powers makes some rough sense. The more expansive formulation of "trade and commerce" (in contrast with "commerce amongst the states" found in the American constitution) was meant to correct for the problems that American courts had encountered in articulating the development of competitive federalism, in particular, the impossibility of strictly separating "inter-state" and "intra-state" trade. However, if we assume that the Canadian founders were guided by the American experience, the purpose of this power was not necessarily to centralize policy-making, but rather, to prevent provincial policy making from recapitulating the inter-state battles that bedeviled the USA even after the adoption the constitution.¹⁹ National power over trade and commerce cannot be interpreted as "national power to regulate anything related to economic activity" without making hash of explicit constitutional provisions in the British North America Act; if interpreted in light of the political theory of competitive federalism, however, the trade and commerce power can be seen as an instrument of national power that exists in order to prevent inter-provincial discrimination, a national power that exists in order to permit the creation of a national economy while still allowing provinces to regulate (in a non-discriminatory way) in light of local circumstances.

A "nationalist-competitive federalism" interpretation of the BNA Act might make more sense of the written text than either a "nationalist-centralist" or "provincial autonomy" interpretation. Yet there is additional evidence that the Framers of the British North America Act wanted to adopt, in some form, the court-supervised competitive federalism that was the most significant aspect of the American national state in the 19th century. Consider s. 121 of the BNA Act: "All Articles of the Growth, Produce, or Manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces." This is a fairly strong declaration in support of free trade, though as it turns out, this provision would be eviscerated by judicial construction. Particularly important here is the direct constitutional provision of a right to free trade (as opposed to the mere power to regulate trade and commerce), as this indicates that the drafters of the British North America wanted, in this instance, to provide stronger protections for competitive federalism than the ones found in the American Constitution. The power to regulate "commerce amongst the states" can be used by the American national legislature to inhibit or restrain trade; the American framers had to hope that the institutional structure of the American constitution would inhibit the creation laws in restraint of trade at the national level, leaving courts free to prevent state interference with trade through the development of constitutional common law, (e.g. the doctrine of the

¹⁸ The conflict between the advocates of the "nationalist" and the "compact theory" of Canadian confederation have a long and interminable history, and the battle still continues (consider, for instance, the vast differences between Frederick Vaughan, *The Canadian Federalist Experiment* Montreal and Kingston: McGill-Queen's University Press, 2003 and Paul Romney, *Getting it Wrong*. Toronto: University of Toronto Press, 1999. The argument that I am trying to develop here is that the twin poles of Canadian constitutional ideology can be synthesized if we take into account the influence of American federalism-- an influence that was deflected by the jurisprudence of the JCPC. The American example, rather than simply being simply negative (a crucial part of the "standard narrative" of Confederation) provided instead an example of how national power could be made compatible with the continued existence and significance of sub-national governments.

¹⁹ In other words, there is no reason to think that the framers of the BNA Act adopted a post-New Deal understanding of "commerce" as "anything that affects the economy."

"dormant" commerce clause.)²⁰ The logic of section 121 is derived from the parliamentary character of the Canadian national government-- you cannot rely on institutional checks and balances to restrain internal protectionism, and thus complete federal power over trade must itself be restrained by a free trade proviso, thereby preventing Parliament from becoming the overseer of an inter-provincial protectionist cartel.²¹

In addition, section 121 improves upon the protections for competitive federalism found in the American constitution by addressing both regulatory and taxation based protectionism. In addition to granting the national government the power to regulate "commerce amongst the states," the American constitution contains numerous specific provisions that aim to prevent inter-state protectionism, such as the prohibition of import duties found in Article I, section 10.²² The dormant commerce clause *doctrine* had to be developed by American courts, for the simple reason that any moderately skilled lawyer could craft a protectionist law without violating the specific textual prohibitions of Article II; as Michael Greve argues, anyone who rejects the need for the dormant commerce clause doctrine would have to assume "state side brain death;" a strict construction or literalist interpretation of the Constitution creates a massive opening for states to escape the logic of competitive federalism.²³ American courts had to build the dormant commerce clause on the basis of the implications of the Constitutional structure and the background theory of federalism that articulated the purpose of a national union. Section 121 of the British North America Act, by way of contrast, provides an even more explicit justification for courts to act against inter-provincial protectionism, regardless of whether the protectionist policies emanate from the provinces or from Parliament.

Thus there is some evidence that the text of BNA Act contains the elements of competitive federalism, roughly analogous to similar features found in the American constitution. I turn now to the question of whether there is any additional evidence to suggest that the American model of federalism as it had developed in the nineteenth century-- a competitive federalism baseline, supervised by courts empowered by specific constitutional provisions as well as implied constitutional doctrines (such as the dormant commerce)-- was a model for Canadian federalism. The evidence that I will provide here is only a starting point; I merely want to establish that further research into the issue might be worthwhile. Consider, for instance, John A. MacDonald's observation that, in creating the British North America Act, the drafters "have avoided all conflict of jurisdiction and authority."²⁴ Given the subsequent development of Canadian constitutionalism, this statement seems absurd, and we might

²⁰ Greve, *The Upside Down Constitution*, p. 79-80

²¹ see the discussion of S. 121 in Ian A. Blue, "Long Overdue: A Re-Appraisal of Section 121 of the Constitution Act, 1867." *Dalhousie Law Journal*, 2010

²² Though note that Article Two, section 10 permits such prohibitions to be enacted by Congress; s. 121 of the BNA Act does not afford Parliament the power to enact such laws, thereby providing an even firmer basis for competitive federalism, assuming that courts do not adopt a "strict construction" of the s. 121 prohibitions. Of course, that is just what the courts did do, thereby allowing the purpose of s. 121 to be evaded with only a minimal amount of creativity on the part of lawmakers.

²³ Greve, *The Upside Down Constitution*. p. 95

²⁴ Legislative Assembly, February 6th, 1865 (Ajzenstat, *Canada's Founding Debates*, p. 283)

tempted to regard the statement as deceptive rhetoric.²⁵ Macdonald's statement only makes some sense (though, admittedly, not perfect sense) if we assume that the vague terms of s. 91 and 92 were meant to be understood in light of the purposes of federalism. Did Macdonald think the purposes of federalism would be the same in Canada as in the United States? Not exactly-- Macdonald wanted the Federalism of Hamilton, Madison, the Federalist Party, the Marshall Court, and the emerging Republican party, not the federalism of Brutus, Thomas Jefferson, and John Calhoun. Given that the text of the BNA Act was obviously imprecise in itself, MacDonald's claim that conflicts of jurisdiction had been avoided only makes sense if he was arguing that the purpose or theory of the federal division of powers provided the basis for distinguishing the powers of the federal and provincial legislatures.

In addition, Macdonald's awareness of the problems and possibilities of American federalism might help to explain why he and other Fathers of Confederation thought that a federal union was necessary to advance the economic interests of the British North American colonies. While many of the justifications for Confederation seem very dubious now²⁶, the connection between the economic interests of the colonies and political unification are far more plausible, despite the claims of some revisionists. The historian Ged Martin, as part of his general argument that Confederation was neither inevitable nor a logical response to the problems facing Britain's North American colonies, suggests that the economic rationale for Confederation was bogus, as the creation of a "free trade zone" could have achieved trade liberalization without the need for political union.²⁷ Yet even a passing familiarity with the American historical experience, whether under the Articles of Confederation or under the Constitution during the nineteenth century, illustrates that trade is rarely free if the conditions of trade are left up to the discretion of independent sovereigns. Trade warfare between the states under the Articles of Confederation was one of the motivating factors which led to the creation of the American constitution²⁸, and even under the Constitution of 1787, states pursued protectionist policies in an attempt to insulate local interests from the effects of competition. While the connection between federal union and free trade was not a matter of logical necessity, historical experience in the United States had shown that it was politically expedient: while independent colonies might agree to some kind of trade arrangement, the

²⁵ The usual explanation is that MacDonald thought that conflicts over jurisdiction would be avoided due to the "weight of power" on the national government's side, along with the "subordinate status" of the provinces. Jennifer Smith. "Canadian Confederation and the Influence of American Federalism." *Canadian Journal of Political Science.*, Vol. 21, No. 3. (Sep., 1988.) p. 451 Yet as Paul Romney has demonstrated in *Getting it Wrong*, there is little evidence that suggests the provinces were meant to have the status of municipal corporations; had that been the guiding purpose of Confederation, the BNA Act would not have been accepted by the people of either Ontario or Quebec. Romney's interpretation suffers from going too far in denigrating the aspects of national power that are contained in the BNA Act; the interpretation that I am trying to articulate here could, if accurate, explain both the "nationalizing" and "provincial autonomy" aspects of the British North America Act.

²⁶ See, for instance, Ged Martin's discussion of the supposed threat posed by the infamous Fenian raids, as well as the question of whether railroads could have improved Canada's military situation regarding this non-existential threat. Ged Martin, *Britain and the Origins of Canadian Confederation, 1837-67*. Basingstoke: MacMillan, 1995. pp 34-35

²⁷ Ged Martin, *Britain and the Origins of Canadian Confederation*, pp 58-60; see also the discussion by Andrew Smith, *British Businessmen and Canadian Confederation*, Montreal: McGill-Queen's University Press, 2008. pp 6-7.

²⁸ For a discussion of trade warfare under the Articles of Confederation, see David Robertson, *The Constitution and America's Destiny*. pp. 52-62

American experience illustrated that those independent governments would continue to have incentives to circumvent the spirit and letter of any trade agreement. What the American experience had also illustrated was that independent courts were the most efficient means for constraining rent-seeking sub-governments; in the absence of such an institutional mechanism to constrain protectionist, any free trade agreement would be a nearly worthless parchment barrier. It may be true that Canadian politicians such as Macdonald did not endorse the free trade absolutism of Adam Smith and John Stuart Mill, but this is not because they rejected the benefits of trade; much like Alexander Hamilton, Macdonald appreciated the difficulties of maintaining genuine free trade amongst self-serving sovereigns that lacked a common and neutral arbiter. Federal union was a requirement for economic development in the British Colonies precisely because of those difficulties, for in its absence, trade was likely to be free in name only.

We can make better sense of the text of the BNA Act, the statements that John A. Macdonald made in support of it, and the underlying arguments used to justify federal union (as opposed to the mere creation of a "free trade zone") if we assume that the creators of the Canadian constitutional order followed the American lead in regards to the purpose of a federal political system, however much they might have differed regarding other aspects of constitutional structure. If we turn to early constitutional decisions by Canadian courts, we see that, for some of the first generation of jurists operating under the British North America Act, it was not unusual to treat American federalism jurisprudence as a guide. This provides further support for the claim that Canadian federalism was, in terms of its general aims and in terms of the role of courts, modelled on the American experience, though we should note that, as in the United States, the opponents of competitive federalism were as prominent as its supporters.

Early decisions by the Canadian Supreme Court routinely referred to American decisions, in particular, the decisions of one of the great architects of the common law of American federalism, Chief Justice John Marshall. American jurisprudence provided guidance-- at least for some judges, and despite the textual differences between the Canadian and American constitutions-- because from the perspective of nationalists in both nations, the purpose of federalism-- the creation of a national economy-- was similar. The case of *Severn vs. The Queen*, for instance, shows that the problems of Canadian federalism would not be precisely identical to problems of American federalism.²⁹ In the 19th century USA, the typical federalism problem involved rent-seeking businesses and the sub-national politicians who, lacking institutional incentive to concern themselves with the interests of the citizens as a whole, were eager to raise barriers to inter-state competition. *Severn v. The Queen* dealt with commerce that was entirely within one province, yet the Canadian Supreme Court's decision nevertheless reflected aspects of early American federalism jurisprudence, such as the Court's recognition of the need to separate the lines of jurisdiction in a way that was consistent with the constitutional text, as well as the Court's recognition that this could only be done if the underlying purpose of the federal union was taken into account. American jurisprudence could serve as a useful guide, because it provided examples of the kinds of strategies that sub-national governments would use to frustrate national objectives. As in the United States, the

²⁹ *Severn v. R.* (1878) 2 S.C.R. 70

court's majority saw that federalism could not operate based upon a narrow textualism; the constitutional text had to be interpreted in light of its purpose, in particular, the goal of preventing debilitating economic conflict between the provinces of the new nation, and conflict between federal and provincial jurisdiction.

In the *Severn* case, the Supreme Court of Canada ruled that the government of Ontario could not require a brewer already licensed by the government of Canada to obtain an Ontario license for wholesale liquors sales. The Attorney General for Ontario argued that the powers granted to the province by the text of the British North America encompassed a licensing power of this kind; after all, Section 91.(9) appeared to grant the provinces the provinces a broad power to require licenses for the purposes of raising provincial revenue. The court rejected this opinion on the grounds that it was inconsistent with the broader purpose of the BNA Act , and in supporting its judgment, the Court made frequent references to the political experience of the USA and, even more importantly, the Court was willing to follow the jurisprudential style of its American counterparts.

Chief Justice Richards introduced his opinion by observing that the British North America Act was framed in the light of the American example; its ends were not fundamentally different, but rather, the British North America Act was intended to achieve those ends more effectively.³⁰ Textual ambiguities within the BNA Act could not be resolved through close reading alone, but rather had to be resolved in light of the broader purposes of federalism.³¹ The power of the national government to regulate trade and commerce was incompatible with an unlimited provincial licensing power, because a broad reading of the provincial licensing could easily to be used to place restraints on trade between the provinces.³² Richards construction of the boundaries between federal power over "trade and commerce" and provincial licensing power was similar to the attempts by American courts to balance the

³⁰ "The framers of the Statute knew the difficulties which had arisen in the great Federal Republic, and no doubt wished to avoid them in the new government which it was intended to create under that Statute. They knew that the question of State rights as opposed to the authority of the General Government under their constitution was frequently raised, aggravating, if not causing, the difficulties arising out of their system of government, and they evidently wished to avoid these evils, under the new state of things about to be created here by the Confederation of the Provinces." Richards, *Severn v. R.*

³¹ "I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament in matters of trade and commerce and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the British North America Act, that I cannot come to the conclusion that it is conferred by the language cited as giving that power." Richards, *Severn v. R.*

³² "I should be very much surprised to learn that any gentleman concerned in preparing or revising the British North America Act ever supposed that under the term "and other licenses" it was intended to confer on the Local Legislatures the power of interfering with every Statute passed by the Dominion Parliament for regulating trade and commerce, or for raising money under customs and excise laws. If it be decided that the words used confer the power in the broad sense contended for, there can hardly be an occupation or a business carried on which may not need a license from the Local Legislature, and if they have the right to impose that kind of taxation why should they be restricted from doing so?" Richards, *Severn v. R.*

national governments commerce power and the "police power" of the American states; in both nations, courts would have to look to the substance of the legislation and the purpose of the Constitution, in order to insure that licensing provisions or laws aimed at "public health, safety, and morality" were not used as pretexts for economic protectionism and favouritism.³³

Richards also addressed, albeit briefly, why judicial construction of an American-style "common law of federalism" was preferable to other mechanisms for reconciling federal and provincial differences. It might be argued that courts should refrain from declaring provincial legislation ultra vires, on the grounds that the power of disallowance permits the national government to police the boundaries of federal-provincial jurisdiction. Yet Richards notes that the power of disallowance "will always be considered a harsh exercise of power, except in cases of great and manifest necessity." As Paul Romney has argued, even nationalists such as John A. MacDonald did not think that the power of disallowance should be used for narrow political purposes; though he did not always follow this in practice, MacDonald's stated principle was that the power of disallowance should only be used when provincial laws went beyond the division of powers outlined in the BNA Act, when provincial and federal laws were in conflict, or when the interests of the Dominion as a whole were at stake.³⁴ But why wouldn't this be sufficient as a defense of federalism? Why couldn't the unavoidable ambiguities of federalism be worked out through the political process, albeit a political process heavily weighted in favour of the national government? There are several reasons to think that judicial review was preferable to disallowance as a mechanism for resolving federal and provincial disputes. To begin with, it would not be surprising if federal politicians came to see political benefits from enabling or ignoring provincial protectionism-- ties of partisanship and region might overcome constitutional scruples, thereby undermining the protections that the division of powers creates for competitive federalism. As in the United States, it thus made sense for courts to play a role in policing the boundaries of federalism, despite the existence of the power of disallowance. In addition, s.121 of the BNA Act placed direct restraints on the national government's commerce power, thereby establishing a basis for judicial intervention; this in contrast to the commerce power of the American national government, which is not constrained by any explicit, pro-competitive measures. Secondly, judicial review allowed individuals--such as Severn-- to take advantage of the protections afforded by the division of powers; courts were more accessible than cabinet meetings, then as now. Finally, as Paul Romney has argued, the power of disallowance was not ideal as a mechanism for resolving

³³ The following statement illustrates that Richards rejected narrow textualism or "strict construction," in favour of originalism (that is, constitutional interpretation must be guided by the intentions of the framers, or the broader theory of the purpose of federal union): "By the interpretation I give to the words, limiting them to the "other licenses" which are of a local and municipal character, and giving full force to the words "shop, saloon, tavern and auctioneer licenses," I think I carry out the intention of the British North America Act, and make all the powers harmonise. Those of the Dominion Parliament to regulate trade and commerce and to exercise the power of indirect taxation, except the shop, tavern, saloon and auctioneer licenses, and those of a purely local and municipal character; and the Local Legislature has the powers so excepted out of the exclusive powers of the Dominion Parliament, together with the right of direct taxation." Richards, *Severn v. R.*

³⁴ Romney, *Getting it Wrong*, p. 113

federalism, because provincial leaders regarded it as an anachronism that placed the provinces in a sub-ordinate relationship with the national government; provincial politicians regarded national disallowance as akin to imperial disallowance, that is, they saw it as a power that should be extremely limited in scope, a power fundamentally incompatible with popular sovereignty, a power that should not be seen as an ordinary instrument of national power.³⁵ Richards' statement about the limits of disallowance as a mechanism for resolving disputes over federalism indicates the influence of American constitutionalism on Canadian federalism: in Canada, as in the USA, federal courts might be institutionally more capable of maintaining a proper division powers, as judges (unlike national politicians) would have fewer incentives to defer to sub-government aggrandizement, and greater potential to respond to claims of individuals arising from the division of powers.

The influence of American jurisprudence and the logic of competitive federalism is even more apparent in the opinion of Justice Fournier. While the power afforded to the Canadian parliament to regulate trade and commerce was broader than the Congressional power to regulate "commerce amongst the states," Fournier nevertheless argued that American cases dealing with inter-state commerce could provide helpful insight into disputes over the division of powers in Canada.³⁶ The American case law provided important illustrations of the tendency for states to try to evade explicit prohibitions against inter-state trade warfare through licensing provisions-- for instance, licensing requirements for importers could provide a functional equivalent to trade barriers, even if they did not run afoul of the specific language found in the Constitution. John Marshall ruled that the exclusive federal power to regulate inter-state commerce rendered these laws invalid, even in the absence of explicit Congressional law. Fournier argued that the design of the British North America Act was similar. The main distinction was that the scope of Parliament's power of trade and commerce was not qualified, thereby allowing Canadian courts to avoid Talmudic disputes over the meaning of "commerce amongst the states," "inter-state commerce," "commerce that is entirely internal to the state," and so on.

The *Severn* case also indicates that the subsequent development of the "provincial rights" or "provincial autonomy" interpretation of the British North America did not cause the Canadian constitutional order to converge with the American model; on the contrary, the provincial rights argument was premised upon a rejection of the American model, while the advocates of national power took their inspiration from American constitutionalism, not the advocates of de-centralization. Speaking in his role as Attorney General, Oliver Mowatt argued that "The relations of the Provinces here is different from that which the States bear to the

³⁵ Romney, *Getting it Wrong*, pp. 94-98

³⁶ "We should not, therefore, look to the numerous decisions rendered on the laws relating to the interior commerce as precedents applicable to the present case, but rather to the decisions given on laws passed by the State Legislatures which happened to come in conflict with the power of Congress to deal with exterior commerce." Fournier, *Severn v.R.*

United States. There Courts alone have power to declare when the States have usurped the higher powers of Congress, whilst here ample power is given to the Dominion Parliament of protecting itself."³⁷ In other words, the supporters of provincial power argued that, unlike in the USA, where the limits placed upon state power were rooted in court-enforced constitutional law, the Canadian Parliament possessed the power and responsibility of supervising the divisions between provincial and federal power. Similarly, Justice Ritchie wrote, in his dissenting decision which upheld an expansive interpretation of provincial licensing power, that "we are not, in my opinion, to look to the state of the law at the time of Confederation in the adjoining Republic, or the difficulties there experienced, as affording any guide to the construction of the British North America Act"³⁸, though unlike Oliver Mowatt, Justice Ritchie did not even offer a weak explanation of why American jurisprudence offered no help and no guidance in addressing the problems of federalism. The problem with the position of Justice Ritchie and the other dissenting justices in the case is that, in rejecting the American example, they also seem to have rejected the distinction between constitutional and statutory decision making that was essential to the evolution of federalism jurisprudence in the United States. Justice Strong advocated a strong form of "textualism" in his opinion, stating that "it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it." What made sense as an approach to statutory interpretation made little sense when applied to the interpretation of constitutions, however; the American experience had shown that, one way or another, the meaning of particular constitutional phrases had to be interpolated in light of some broader theory about constitutional purposes.

The *Severn* case illustrates that Canadian judges were influenced by American federalism jurisprudence, precisely because it was this aspect of the American constitutional experiment that was most "nationalist" in character. Why did the Canadian constitutional order fail to adapt the most "nationalist" elements of American federalism jurisprudence, if leading figures of Canadian confederation aimed to create a federal system that would improve upon the American example by avoiding excessive decentralization? What were the consequences? Here, I can only provide some brief suggestions, suggestions that are often at odds with the common understanding of the development of Canadian federalism. The Judicial Committee of the Privy Council is a key component of any story of Canadian federalism, but rather than following American jurisprudence, the JCPC would instead follow the pattern laid out by the dissenting judges in the *Severn* case. While the role of the JCPC is one of the most analyzed aspects of Canadian political history, the familiar narratives that either celebrate or denounce the JCPC's decisions, have not, I think, captured what the JCPC actually accomplished through its decisions. Did the JCPC shift "centralized" Canadian federalism in a more "de-centralized" and American direction?³⁹ This claim only makes sense if we fail to notice that the JCPC, in

³⁷ Oliver Mowatt, oral argument in *R. v. Severn*.

³⁸ Justice Ritchie, *R. v. Severn*.

³⁹ Consider, for instance, William Riker's claim that the JCPC "systematically curtailed the authority of the central government, modelling the Canadian federation after the United States rather than after the indigenous plans as

rejecting the American approach to the constitutional law, also rejected one of the most significant instruments of national power. Was the ever-shifting body of law lords motivated by an oligarchical disposition for limited government and laissez-faire?⁴⁰ This may have been true in some instances, but in terms of the development of the JCPC's jurisprudence, "de-centralized" federalism may have done more to enable the expansion of the rent-seeking state than a jurisprudence based upon, say, a Canadian version of the dormant commerce clause. Did the JCPC and its influence on Canadian federalism nevertheless reflect both the intentions of key political leaders and the sociological character of Canadian society? Perhaps, but this was also accompanied by constitutional stupidities that undermined the entire point of federal political arrangements.

There are reasons, then, to investigate the development of the jurisprudence of Canadian federalism in light of Michael Greve's revisionist analysis of American federalism in *The Upside Down Constitution*. In contrast with usual narratives about the differences between Canadian and American federalism, I think that such an investigation could reveal the similarities between the original aims and the development of the law of federalism in the two nations. In particular, I think that federalism in both nations exhibit a similar evolutionary pattern: in both cases, the original purpose of competitive federalism is replaced by cartel federalism, and in both instances, this is largely a consequence of the failure of courts to maintain (in the USA) or to develop (in Canada) the necessary doctrinal defenses of competitive federalism. I do not claim to have proven the main thesis about the relationship between Canadian and American federalism; I only claim to have explained why the initial starting point of my argument is plausible. I now want to consider why, if true, the thesis might be significant. If Michael Greve's nationalist, court-centered understanding of American federalism is correct, it can help us to better understand how the Canadian founding could have drawn inspiration from Lockean or classical liberalism, while at the same time producing a powerful national government.⁴¹ Power does not necessarily mean the same thing as centralization, and de-centralized federalism does not necessarily put limits on the power of state. In addition, a proper appreciation of the influence of American federalism on the Canadian founding might lead us to reconsider the contemporary debate over competitive federalism, and allow us to see it not as an alien "neo-liberal project" but rather part of the Canadian federal experiment.⁴² Moreover, reflection on the American experience with competitive federalism can help us to understand the interminable conflicts over inter-provincial economic relations in Canada, and even more importantly, the American example can help us to understand the difficulties that competitive federalism faces if entrusted to the care of sub-national governments. Alexander Hamilton described the body of the American constitution as a "bill of rights," in part because

expressed in the British North America." (William Riker, *Federalism: Origin, Operation, Significance*. Boston and Toronto: Little, Brown, and Co., 1964. p. 117)

⁴⁰ J.R. Mallory, *Social Credit and the Federal Power in Canada*. Toronto: University of Toronto Press, 1954. pp 47-56

⁴¹ Janet Ajzenstat argues that the Canadian founding was rooted in the principles of classical liberalism, but she does not explain how Canadian federalism fits into this overall picture. (Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament*. Montreal and Kingston: McGill-Queen's University Press, 2007.)

⁴² See the discussion in Adam Harmes, "The Political Economy of Open Federalism." *Canadian Journal of Political Science*. Vol. 40, No. 2 (Jun., 2007), pp. 417-437.

it allowed federal courts to prevent state governments from obstructing commerce at the expense of citizens and the national economy as a whole. The Canadian experience suggests that, in the absence of stronger judicial protection for genuine economic integration, sub-governments will find it difficult to resist the temptations of protectionism and parochialism.⁴³

⁴³ Loleen Berdahl argues that provincial governments are moving towards economic integration in the absence of federal guidance or serious interest group pressure, thereby illustrating "the power of ideas" to influence policy-making. ("(Sub) National Economic Union: Institutions, Ideas, and Internal Trade Policy in Canada." *Publius: The Journal of Federalism*. Volume 43, number 2, (August, 2012) pp. 275-296. We shall see. The provinces seem to be always on the way towards national integration, without ever actually reaching their goal-- the interests of sub-national governments are likely, in the long run, to be responsive to the economic interests that benefit from balkanization, which is precisely why, in response to the economic crises under the Articles of Confederation, the American founders created a constitution that "judicialized" federalism.