

Who Speaks for Canada? Review of David E Smith's *Federalism and the Constitution of Canada*

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Federalism and the Constitution of Canada by David E Smith (University of Toronto Press, 2010), 225 pp.

Federalism, like equality and freedom, is a concept almost universally applauded yet nowhere commonly understood. Its elusive meaning resists formal categorization because its purpose and practice are always in play—by its very nature, the concept encourages negotiation, adjustment, accommodation, change. By contrast, a constitution (under the traditional view) aims to settle debate—its written words lend themselves to judicial interpretation and clarification, while its unwritten customs reflect the result of negotiations that are concluded, complete, closed.¹ David Smith's succinct new book *Federalism and the Constitution of Canada* (162 pages without notes) investigates this tension in Canadian government. Smith does not attempt to prescribe any solutions or reason his way to a grand unified theory of federalism. He approaches the subject as a professional political scientist—drily, without rhetoric, and with reams of facts. The result is a book of positivist plenty, thick with historical detail (sorely lacking from judicial glosses on the subject) substantiating how politicians, inquiries, task forces, and civil society actors have shaped the practice and understanding of Canadian federalism. With this textured social science research, he polishes his overhandled topic, providing a clearer view into not only the question of how federalism works in Canada but also into the question of how “Canada” has come to be defined by and even synonymous with federalism.

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1 The view that constitutions contain unambiguous operating instructions that judges follow in a mechanistic manner according to the terms of their textual provisions is, of course, outdated. See e.g. Brian Z Tamahana, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2009) (providing an explanation of (and revisionist response to) the realist critique of judicial formalism). Nevertheless, it can still be validly said that constitutions “constitute” a state by fixing default rules, procedures, and boundaries for political decision-making.

This review begins with an explanation of Smith's central concepts: vertical and horizontal federalism. It then surveys the six main chapters of the book, in which Smith considers how social and political actors have wrestled with how these federalisms operate within the constitution of Canada in various institutional settings (social science research, constitutional amendment and change, Parliament, national unity, the courts, and local issues). The review concludes with a discussion of various questions raised (or hinted at) by Smith's book but that are left unanswered.

There are two reasons, Smith explains, for choosing a federal system of government: "one outward in ambition—to expand; and one inward—to recognize difference".² In addition, there are two classes of federalism. First, there is horizontal or territorial federalism. This is the classical expression of the term, as embodied in the heads of powers in the *Constitution Act, 1867* and KC Wheare's *Federal Government* textbook definition—"the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent".³ It is the type of federalism that the Supreme Court of Canada is tasked with adjudicating in cases such as the reference on whether Parliament has authority under its power to regulate "trade and commerce" (section 91(2) of the *Constitution Act, 1867*) to create a national securities regulator, or whether this power is reserved exclusively to each of the provinces under their authority to make laws regarding "property and civil rights" (section 92(13) of the *Constitution Act, 1867*).⁴

Second, there is vertical or cultural federalism. This is the more contemporary expression, as embodied in democratic pluralism and minority rights (such as the *Canadian Charter of Rights and Freedoms* ("Charter")).⁵ It is the type of federalism that the Supreme Court of Canada is tasked with adjudicating in cases such as *Ford v Quebec*,⁶ wherein the court struck down a Quebec law requiring that public signs be in French only as a violation of the freedom of expression guaranteed in section 2(b) of the *Charter*.

Smith describes horizontal federalism as mechanical, formalist, and impersonal. It is a legacy of the neo-classical political theory of the Enlightenment,

2 David E Smith, *Federalism and the Constitution of Canada* (University of Toronto Press, 2010) [Smith] at 117.

3 KC Wheare, *Federal Government*, 4th ed (London: Oxford University Press, 1967) at 10.

4 *In the Matter of a Reference by Governor in Council concerning the proposed Canadian Securities Act, as set out in Order in Council PC 2010-667, dated May 26, 2010*, 2011 SCC 66.

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

6 *Ford v Quebec (AG)*, [1988] 2 SCR 712.

the best sustained articulation of which probably remains in *The Federalist Papers*, published pseudonymously by James Madison, Alexander Hamilton, and John Jay in favour of US federation under the Constitution of 1789. In distinction, vertical federalism is organic, improvisational, individualist. It is a legacy of the Romantic individualism of the 19th century (for example, the abolitionist struggle against slavery) and, more directly, post-World War II human rights politics. The latter is ascendant today; as Smith remarks pithily: “Geometry has given way to poetry”.⁷

Most federal states are marked by one (territorial in the US) or the other (cultural in Belgium) but not both as in Canada, where sometimes they even overlap (Quebec). The May 2011 federal election aptly illustrates what happens when the two intersect. When the Conservatives led by Stephen Harper won a majority of seats in the House of Commons as a result of the Liberals’ implosion, that was an illustration of territorial federalism.⁸ When the New Democratic Party led by the late Jack Layton swept Quebec and earned the status of official opposition due in large part to Layton’s franco-philic charm, that was an illustration of cultural federalism. When the Bloc Québécois collapsed due to its success in forcing the federalist parties to woo Quebec voters to win a majority government, that was an illustration of both territorial (allocation of seats among provinces) and vertical (Quebec is a “nation united within Canada”) federalism.

Smith is interested in how this dual federalism interacts with Canada’s constitution. That constitution has multiple aspects as well, acting as both a founding instrument (as in creating the Dominion of Canada), a compositional scheme (as in Canada being composed of four provinces and providing for the introduction of new provinces and centralized federal powers to create a trans-continental empire), and a vital élan (as in united during World War II and weak following the failure of the mega-constitutional accords of the 1990s).

The book examines the question of how Canada’s different types of federalism shape and are shaped by its constitution in six short chapters that each take a different angle. One chapter, “The Measure of Federalism,” explores the methodological analysis of federalism—in other words, when we talk about federalism “What is measured? Who measures? And when and

7 Smith, *supra* note 2 at 37.

8 It was also an illustration of democratic-majoritarian nationalism, as Harper had campaigned in 2011 and successfully obtained prorogation of Parliament in 2008 based on fears of minority coalition governments abetted by separatists.

where do they measure?” On “What is Measured,” Smith surveys the diverse character of the Canadian geopolitical landscape, which spans a continent and ranges from tiny pastoral islands to a heavily populated and industrial-metropolitan interior. On “Who measures?” Smith is laconic: “Academics and bureaucrats—but not the general public—study federalism. Perhaps this is to be expected”.⁹ The timing of studies of federalism is of no little significance, either: “Canadian federalism meant one thing—division of powers—before the [Quiet Revolution]; it meant considerably more—language and culture—after that”.¹⁰ And finally the location of the study of federalism has shifted—from Royal Commissions to the people and the courts.

In other chapters, Smith explains the patchwork, contradictory nature of the Canadian constitution. In the chapter titled “A Constitution in Some Respects Novel,” a phrase coined by Governor General Monck in the first Speech from the Throne (1868), Smith explores the peculiarities of the Canadian constitution. It was the world’s first parliamentary federation, yet few of its provisions dealt with the fundamental principles of parliamentary supremacy, such as the privileges and responsibilities of the government and opposition, the rules determining who forms a government, and the relationship between the Crown and the government. The Preamble to the *British North America Act* merely provides that Canada shall have “a Constitution similar in Principle to that of the United Kingdom”. If there is a theme to this chapter, it is unsettled expectations. The Fathers of Confederation intended to create a highly centralized federation but today, as a result of judicial decisions protective of provincial powers, Canada is described by some scholars as among “the world’s most decentralized federation”.¹¹ They also intended to create a durable, self-governing union of British North America, but famously failed to include a domestic amending formula. They recognized the dual nature of the union of Upper and Lower Canada in 1841, but provided no mechanism for how vertical federalism (e.g., language and denominational schooling rights) would be applied in the context of the admission and self-government of new provinces (e.g., the *Manitoba Schools Act’s* (1890) abolition of French as an official language and defunding of Roman Catholic schools).

“Parliamentary Federalism” considers how the Crown, Senate, and House of Commons have met the expectations of the Fathers since confederation. The Senate was designed to protect the interests of the provinces but is impo-

9 Smith, *supra* note 2 at 25.

10 *Ibid* at 30.

11 *Ibid* at 42.

tent because it is unrepresentative. The House was designed to facilitate majoritarian democracy, yet certain provinces are assured a minimum number of seats. The Crown was replicated in the Canadian constitution as an “integral element of a British-styled monarchical form of government”¹² yet today is exposed to the “vicissitudes of Canadian federalism”¹³ due to a succession of minority governments that required the exercise of political power by the Governor General. For these and other reasons, Smith concludes:

The Canadian constitution is a world of illusion and allusion. It establishes a monarchy that in practice is a parliamentary democracy. It claims to be a constitution like that of the United Kingdom, but it does not specify what that means—an intriguing omission since Canada is a federation and the United Kingdom is not. It creates a highly centralized federal government, but in practice the Canadian federation is said to be one of the world’s most decentralized.¹⁴

In “The Practice of Federalism,” Smith opens with a common final exam question, “Canadian federalism is incomplete because the Canadian constitution is inadequate: Discuss,” then seeks to demonstrate that “the point at which federalism and the constitution intersect in Canada is not quite the wasteland this depiction of unfulfilled expectations might lead some to conclude”.¹⁵ Although the constitution has limited the provinces’ ability to engage with the central government through Parliament, they have adapted by way of conducting federal-provincial inter-governmental diplomacy on key issues affecting federation (today, medicare funding). Likewise, despite the centralizing tendency of the constitution with respect to banking, currency, and trade, a substantial amount of early Canadian economic development occurred at the provincial level through trust companies and the development of the credit union. When labour relations achieved prominence in the 1920s and 1930s, the federal government was stymied in its attempt to regulate strikes by the Judicial Committee of the Privy Council (“JCPC”) which struck down the federal *Industrial Disputes Investigation Act* (1907) in *Toronto Electric Commissioners v Snider*,¹⁶ yet the provinces on their own developed strong minimum wage and collective bargaining statutes. More recently, because “[r]egional disparities are a threat to national unity,” the central government has assumed the responsibility (potentially antithetical to federalist principles) of ensuring equalization of social services across the provinces, impelled by

12 *Ibid* at 70.

13 *Ibid* at 73.

14 *Ibid* at 67.

15 *Ibid* at 92.

16 *Industrial Disputes Investigation Act* (1907) in *Toronto Electric Commissioners v Snider*, [1925] AC 396.

the belief “that people matter more than their provincial governments—a sentiment the Charter solidifies and promotes”.¹⁷ Smith concludes optimistically:

[I]n the everyday practical world, Canadian federalism is far from paralysed. It performs, and to the degree that it does, it demonstrates that what matters is what governments choose to do rather than what the division of powers they inherit says they may do.¹⁸

In the only sustained examination of judicial review in the book, “Courts and Charter: Constitution and Federalism,” Smith details the institutional role of the courts in defining the constitutional limits of federalism. He ably marshals historical sources such as contemporary academic articles and Royal Commission reports to tease out the implications of the federalist stance taken by the JCPC from the mid-1880s through the 1930s. In the 1930s, it provoked a nationalist backlash by the Anglo-Canadian establishment which saw the foreign judiciary as trying to arrest Canada’s development out of colonial dependency. In the 1950s, it attracted commendation as “authentic federalism” from Quebec commentators, who saw centralization as a tool of Anglo-Canadian hegemony.¹⁹ The criss-cross dynamics of horizontal and vertical federalism are especially apparent in the selection and composition of the Supreme Court of Canada. All the Justices are federally appointed. Three of its Justices must be trained in civil law and come from Quebec, and (by convention) three from Ontario, two from the four western provinces and one from the Maritimes. Smith ultimately concludes that the courts tend to side with the establishment in “equat[ing] efficiency with centralism ... Standards, in short, are antithetical to federalism”.²⁰ Nevertheless, the courts’ role in defining federalism may be less salient today as they “have moved from being, predominantly, arbiters of federalism to becoming guarantors of Charter rights”.²¹

Finally, in “The Habit of Federalism,” Smith identifies the modern issues that concern us and how those are expressed politically. The context is pluralistic:

Federalism as a matter of governments—federal and provincial; federalism as a matter of the two official languages; federalism as a matter of one government (the feder-

17 Smith, *supra* note 2 at 109-10.

18 *Ibid* at 111.

19 *Ibid* at 115 (citing Quebec, *Report of the Royal Commission of Inquiry on Constitutional Problems*, 4 vols in 5 (Quebec: Province of Quebec, 1956) at vol 2, 165 & 171).

20 *Ibid* at 132.

21 *Ibid*.

al) promoting the identity and interests of selected (for instance, minority language) groups of Canadians for national purposes; or federalism as a matter of the provinces, together or singly, and their residents seeking better terms, new or improved of different policies from the federal government—all of these interchanges or exchanges provide context for the habit of federalism to evolve.²²

One key question is how federalism will operate now that “Canada’s great national projects are confided to the past: the end of Empire, the end of western settlement, the end of wartime mobilization, and the end of postwar economic and social innovation”.²³ The cultural revolution of the 1960s shifted the centre of gravity to the individual and local communities. “Outward federalism,” where the habit of federalism is “from neighbourhood to nation, from congregation and club to Commons,” is on the rise.²⁴ There is a new “federalism of the small things” involving school, work, medicine, and recreation—in the author’s own words:

Federalism is about more than theories, or governments and politics, or courts and jurisdictions. For every Canadian citizen who resides in a province, it is about myriad concerns: school curricula, licensing and insuring a motor vehicle, achieving some recognized level of certification for employment, enforcing maintenance orders, securing a provincial health card, and much, much more.²⁵

Throughout the book, the reader is prompted to question the effect of these alternating currents of fragmentation and control on the political health of the nation. Political scientist Carolyn Tuohy diagnoses Canada as presenting “institutionalized ambivalence,” a “system [that] legitimizes competing principles: it combines an unwritten with a written constitution, a Westminster model of centralized cabinet government with a decentralized federation, and, since 1982, parliamentary supremacy with a constitutional charter of rights”.²⁶ One might easily add to the list: a bicameral federal legislature, with unicameral provincial legislatures; provincial power over “property and civil rights,” with ultimate interpretive authority in the federal Supreme Court; provincial power over administration of justice and the courts, with federal power over appointments and criminal law; and *Charter* rights guaranteed to all Canadian citizens, with the possibility of variation by province through the invocation of the notwithstanding clause. These internal contradictions (or, if you will, qualifications steeped on concessions) are consequential. Take the

22 *Ibid* at 152-53.

23 *Ibid* at 135.

24 *Ibid* at 147.

25 *Ibid* at 153.

26 *Ibid* at 128.

amending formula with its six different procedures. As Smith explains, “its most significant characteristics [are] extreme complexity, extreme rigidity and the absence of any provisions for popular ... involvement”.²⁷

One question left unanswered is how federalism will adapt to the “hemi-demi-semi-separatism”²⁸ of contemporary politics. Are we risking a hyphenated Canada built on a teetering foundation of unprincipled, unworkable constitutional compromises? It is hard to draw such a conclusion, and Smith himself resists it—recognizing that “stronger regional sentiment in all parts of the country” may be counterbalanced by the unifying effect of the *Charter*.²⁹ If the enterprise of the constitution from the founding to World War II was the building of a transcontinental, self-governing nation, its project since then has been protecting individuals and minorities. To the extent this impinges on local self-determination, the notwithstanding clause³⁰ (a quintessentially Canadian constitutional compromise) provides a safety valve to allow provincial legislatures an opportunity to at least temporarily resist the implementation of *Charter* judgments.

Few (if any) flaws mar the book, but a wish list readily comes to mind for any subsequent editions. Stylistically, the author has probably denied himself a wider audience of the general reading public through his well-starched prose. An example will suffice. About the measurement of the provinces, Smith writes:

The provinces of the Canadian federation—their number, size, and boundaries—remembering that two of them are actual islands, while another (British Columbia) is isolated from the rest of the country by the Rocky Mountains, and that a fourth (Quebec) is culturally distinct and was created to preserve and acknowledge that character—are less the units of measurement of federalism than the activities they contain, whether we view them demographically, in terms of ethnicity, language, or religion; or fiscally, as sources of taxation or transfers between levels of government. It is these features that deepen the otherwise flat jurisdictional or physical dimensions of federalism.³¹

27 *Ibid* at 126.

28 *Ibid* at 161.

29 *Ibid* at 162.

30 *Constitution Act, 1982*, s 33(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15”).

31 Smith, *supra* note 2 at 25.

This excerpt is not unrepresentative of Smith's prose throughout. Read aloud, the Jamesian sentences have a logically organized yet fluid and discursive elegance. Scanned on page, they can appear convoluted and precariously overbuilt, dependent clauses at elbows with appositional phrases and other grammatical colourings. The excerpt above is as topographically challenging as its subject matter, with what appears to be double embedded em-dashes and a sentence that runs down the page like the Rockies across the spine of the West.

Substantively, the book would have benefitted from a deeper exploration of theory. The book is dense with factual observations but, without the compass of theoretical analysis, the reader ends the journey, if not quite adrift, at least a number of waystations from her final destination. At well under 200 pages, the author (or a co-author specializing in political philosophy or constitutional theory) would have had ample room to ruminate on the implications of his observations. It is the very richness and originality of the author's empirical perspective that suggests such a lost opportunity.

Consider, for example, the central insight of the book—the tension between horizontal and vertical federalism and constitutionalism. Is there any possibility that horizontal federalism itself functions to safeguard vertical federalism? That a proper division of powers between provinces and the central government can serve as a check to government overreach? This is the well-known theory expounded by Madison in the Federalist No. 51, in which he posits that separation of powers between the executive, legislative, and judicial functions and division of power between the state and national governments will so contrive “the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places”. It is a theory the US Supreme Court endorsed unanimously as recently as June 2011.³²

Additionally, does vertical federalism (i.e., individual rights and cultural pluralism) have anything to say about the substantive content of horizontal federalism? We can in most cases determine historically or intuitively why the Canadian founders allocated certain heads of power to the provinces and others to the central government, but do those allocations still make sense today in light of technology or a renewed emphasis on individual rights rather than local self-government? On the one hand, and as Smith notes, the need

32 See *Bond v United States*, 131 S. Ct. 2355 (2011) at 2364 (“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”) [Internal quotations and citations omitted].

for expertise, uniform standards, and economies of scale has tipped the balance in favour of more federal powers (especially regarding science, education, and even cultural promotion of the idea of “Canada”). On the other hand, the principle of subsidiarity (allowing those closest to a problem to be responsible for solving it) resonates in an age of information management and globalization.³³ The Supreme Court of Canada is itself unsure of how to strike the balance, as illustrated by the divided 4-4-1 opinion in *Reference re Assisted Human Reproduction Act*,³⁴ in which, as a result of Justice Cromwell’s tie-breaker vote, the Court struck down most of the provisions of the federal law regulating fertility technology as beyond the purview of Parliament’s criminal law power and intrusive of the provinces’ power to regulate health care.

In a related question, how does the vertical federalist valence of an issue colour a court’s analysis of horizontal federalist issues? Some scholarship suggests that, pre-*Charter*, the courts were enforcing a crypto-bill-of-rights by striking down provincial laws impinging freedom of expression (on the pretextual federalist ground that speech was a “national” issue within the exclusive power of the federal government).³⁵ The introduction of the *Charter* removes such an incentive for conceptual misdirection, but do individual rights values still unconsciously affect judges’ analysis of horizontal issues? The question is not merely hypothetical, given the British Columbia Court of Appeal’s ruling in *PHS Community Services Society v Canada (Attorney General)*,³⁶ declaring (on the basis of the federalist doctrine of interjurisdictional immunity) the federal *Controlled Drugs and Substances Act* inoperative vis-à-vis British Columbia’s supervised drug injection clinics. Significantly, the Supreme Court of Canada affirmed the result but on the basis of drug users’ right to “life, liberty and security of the person” protected by section 7 of the *Charter* rather than federalism.³⁷

If the species of federalism are perpetually in flux, what does that imply about the practicality of embedding horizontal federalism in written constitutions? In certain specific instances, such as the entrusting of banking, copyright, patents, and currency to the central government, the founders’ initial judgment remains sound. But, with respect to new technologies and circum-

33 See e.g. *114957 Canada v Hudson*, [2001] 2 SCR 241 (L’Heureux-Dube J: “matters of governance are often examined through the lens of subsidiarity”, a “proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs” at para 3).

34 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

35 PC Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23 UTLJ 307 at 342.

36 *PHS Community Services Society v Canada (AG)*, 2010 BCCA 15.

37 *Canada (AG) v PHS Community Services*, 2011 SCC 44.

stances that require the creation of new categories, how can political, civil society and judicial actors interpret ambiguous catch-all categories such as “trade and commerce” and “property and civil rights”?

Finally, given Canada’s relative success as a society, is it possible that Canada’s governing institutions succeed because of cultural (and not political) conditions? Do political philosophers overemphasize the importance of constitutions and related concepts such as federalism at the expense of “soft” cultural factors such as trust, entrepreneurship, religion, etc.? Smith seems to implicitly endorse this thesis when he concludes: “the test of Canadian federalism lies not in federal theory but in the life of Canadians”.³⁸ The evidence is favourable. Comparing Canada only to its nearest southern neighbour,³⁹ Canada’s long-term federal budget does not face an impending entitlement crisis; it has achieved universal, effective health care coverage without bankrupting its citizens or businesses; its legal system is soundly placed with limited use of juries, effective cost shifting, and a (relatively) non-partisan Supreme Court appointment process; its financial system is well-regulated against systemic volatility; and its cities are exemplars of a successful pro-business and family-oriented immigration policy that preserve multiculturalism while achieving assimilation. It has also avoided decades of intra-state ethnic terrorism, as Great Britain suffered in Northern Ireland, Spain in the Basque country, or the United States with the Ku Klux Klan in the South after the Civil War. As a matter of rational planning, historical chance, colonial disadvantage, and overweening neighbours, Canada has no right to its achievements. Yet, there they are. Perhaps it is irrelevant whether the constitution and federalism should work as a theoretical proposition—the people they have created have been making it work on their own for quite some time now.

Other readers will of course find their own points of departure. Any book that prompts so many questions, even if it defers from answering them itself, deserves the close attention of anyone (citizen, lawyer, or academic) concerned with the challenge of Canadian government in the 21st century.

38 Smith, *supra* note 2 at 162.

39 See also Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (Routledge, 1990).