

# BALANCING AND ITS ALTERNATIVES: JURISPRUDENTIAL CHOICE, FEDERAL SECURITIES LEGISLATION AND THE TRADE AND COMMERCE POWER

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## I. INTRODUCTION

Much of the constitutional discourse in relation to national securities legislation focuses, in substance, on two questions. The first is whether a unitary approach to capital markets regulation and enforcement is sound policy — whether it would be more efficient than the existing decentralized approach.<sup>1</sup> The second is whether the criteria formulated by the Supreme Court in *General Motors*<sup>2</sup> attach sufficient importance to diversity, as an intrinsic value potentially weighing against a unitary approach to securities regulation even if the latter would be more efficient.<sup>3</sup>

Within this discourse reside a number of implicit assumptions that I wish to question in this paper. One assumption is that in answering the question whether Parliament has jurisdiction to enact securities legislation, the question of securities regulatory policy is pivotal. Another is that the *GM* decision is the constitutional yardstick

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1. See, e.g., J. MacIntosh, “The feds’ weak case,” *The Financial Post*, June 1, 2010 (questioning the claim that “the provinces are constitutionally incapable of creating an effective regulatory regime”).
2. *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.
3. N. Karazivan and J.F. Gaudreault-DesBiens, “On Polyphony and Paradoxes in the Regulation of Securities within the Canadian Federation” (2010), 49 C.B.L.J. 1, echoing a criticism made by Jean Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003), 28 Queen’s L.J. 411.

against which national laws enacted in reliance on the trade and commerce power should be measured.<sup>4</sup> In particular, in light of the fourth and fifth criteria formulated in that decision,<sup>5</sup> it is believed that the answer to the question whether a national securities regulator would be more effective essentially determines the answer to the question whether it is within Parliament's authority to establish it. Still another assumption is that, to the extent that the criteria in *GM* do not embrace all of the relevant values, the solution is for the Supreme Court to make appropriate amendments to the criteria.

In my view, each of these assumptions is questionable. It is a mistake to place too much emphasis on the *GM* opinion as supplying the "legal rule" that controls the constitutionality of national securities legislation. In addition, legal questions about the division of powers should not be collapsed into first-order policy questions, such as the question whether unitary or decentralized regulation would be more efficient, or would strike a better balance between efficiency and diversity. I do not believe that either *GM* or sound constitutional policy so requires. Finally, I believe that there are better alternatives to a constitutional jurisprudence in which a significant role is played by tests announced and modified as needed by the Supreme Court of Canada.

It is perhaps useful to state at the outset that I do not dissent from the prevailing view that the Parliament of Canada possesses authority under s. 91(2) of The Constitution Act, 1867<sup>6</sup> to enact securities regulatory legislation, and that the proposed federal Securities Act in particular is probably valid. That is not, however, because I am necessarily persuaded by the policy arguments in support of a uniform approach.<sup>7</sup> I instead favour the view that Parliament's authority should not depend on satisfying a court that a unitary regulatory approach is desirable as a policy matter.<sup>8</sup>

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4. To be more precise, the assumption is that *GM* supplies the yardstick for the application of the so-called "general regulation of trade" doctrine under the trade and commerce power. The latter power also includes the power to enact laws the dominant characteristic of is the regulation of interprovincial and international trade; *GM* is not normally considered relevant to the assessment of the validity of such laws.

5. See text accompanying *infra*, footnote 32.

6. (U.K.), 30 & 31 Vict., c. 3.

7. I discuss the policy arguments in Appendix A, *infra*.

8. By the same token, provincial legislative authority should not depend upon the province's satisfying a court that a decentralized approach is preferable as a policy matter.

The structure of this paper is as follows. Part II summarizes the proposed Act. Part III describes the role played by the *GM* decision in most analyses of the constitutionality of national securities legislation, and explains why the decision does not bear the analytical weight that many commentators seek to place upon it. Part IV identifies an important jurisprudential question raised by the dispute about securities regulatory jurisdiction, as to the respective roles of categorical analysis and direct balancing in the delimitation of federal power under s. 91(2). It tends to be assumed that direct balancing should play a pivotal role. This paper will articulate reasons for doubting the desirability of such an approach. Part V discusses implications for the constitutionality of federal securities legislation. Part VI concludes.

## II. THE PROPOSED FEDERAL SECURITIES ACT

On May 26, 2010, the Minister of Finance released a proposed federal Securities Act and simultaneously referred the proposed Act to the Supreme Court of Canada for an opinion as to its constitutionality.<sup>9</sup>

The proposed Act adopts for itself the conventional objectives of securities regulatory legislation:<sup>10</sup> “[T]o provide protection to investors from unfair, improper or fraudulent practices; [and] to foster fair, efficient and competitive capital markets in which the public has confidence.” To these standard purposes, the Act adds that it seeks to “contribute, as part of the Canadian financial regulatory framework, to the integrity and stability of the financial system.”

The proposed Act employs the usual mechanisms for securing these objectives: It imposes disclosure requirements on issuers and underwriters in primary offerings;<sup>11</sup> imposes periodic disclosure requirements on issuers;<sup>12</sup> regulates the conduct of tender offers;<sup>13</sup> establishes conduct rules for secondary markets (such as

9. Minister of Finance, Proposed Canadian Securities Act (Ottawa, Department of Finance Canada, 2010), online: Department of Finance <<http://www.fin.gc.ca/drleg-apl/csa-lvm-eng.asp>>. The question referred to the Supreme Court is: “Is the annexed Proposed Canadian Securities Act within the legislative authority of the Parliament of Canada?” Department of Finance, News Release 10-051, “Fact Sheet on Reference to the Supreme Court of Canada on the Proposed Canadian Securities Act” (Ottawa, Department of Finance Canada, 2010), online: Department of Finance <[http://www.fin.gc.ca/n10/data/10-051\\_3-eng.asp](http://www.fin.gc.ca/n10/data/10-051_3-eng.asp)>.

10. Minister of Finance, *ibid.*, at s. 9.

11. *Ibid.*, at Part 6.

12. *Ibid.*, at Part 8, Div. 1.

13. *Ibid.*, at Part 9.

prohibitions against misrepresentations and insider trading);<sup>14</sup> and imposes registration requirements and conduct regulation for certain market intermediaries, such as broker-dealers.<sup>15</sup> Generally speaking, the Act lays down principles and prohibitions and vests a new federal agency, the Canadian Securities Regulatory Authority, with broad authority to establish specific requirements by regulation.<sup>16</sup>

Compliance with the Act's requirements is enforced by way of orders and administrative penalties imposed by a new Canadian Securities Tribunal;<sup>17</sup> civil liability;<sup>18</sup> penal liability for general violations of the Act;<sup>19</sup> and a series of criminal offences for more serious conduct, such as fraud and insider trading.<sup>20</sup>

The proposed Act is the federal government's response to the recommendations of the Expert Panel on Securities Regulation, which submitted its report and accompanying draft legislation in 2009.<sup>21</sup> The proposed Act differs from the Expert Panel's draft in an important respect: the regulatory provisions of the proposed Act will apply only in those provinces that, via their executive branch, have signalled their consent to its application.<sup>22</sup> This feature renders moot the paramountcy question much discussed by commentators: one assumes that no province will consent to the application of a new federal securities act unless it intends to repeal its own legislation.

I assume that it is uncontroversial that the criminal offences, which will apply throughout Canada and are not subject to the provincial opt-in feature, could stand alone and are within Parliament's criminal law power under s. 91(27) of The Constitution Act, 1867. I assume, too, that the civil liability provisions are valid provided that the remainder of the proposed Act is valid, under the "necessarily incidental" doctrine. It seems safe to proceed on the basis that the live constitutional question is whether the purpose and principal mechanisms of the Act come

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14. *Ibid.*, at Part 10.

15. *Ibid.*, at Part 5.

16. *Ibid.*, at s. 227.

17. *Ibid.*, at ss. 139 and 140.

18. *Ibid.*, at Parts 12 and 13.

19. *Ibid.*, at Part 11, Div. 5.

20. *Ibid.*, at Part 11, Div. 6.

21. Expert Panel on Securities Regulation, *Creating an Advantage in Global Capital Markets: Final Report and Recommendations* (Ottawa, Department of Finance, January 2009), online: Expert Panel on Securities Regulation <<http://www.expertpanel.ca/eng/reports/index.html>>.

22. Proposed Canadian Securities Act, *supra*, footnote 9, at s. 250.

within Parliament's power to regulate trade and commerce under s. 91(2) of The Constitution Act, 1867.<sup>23</sup>

### III. THE *GM* DECISION

It is understandable that the decision of the Supreme Court in *General Motors* looms large in any discussion of the constitutionality of federal securities legislation. For nearly a century prior to that ruling, s. 91(2) had lived up to its billing by Idington J. as "the old forlorn hope, so many times tried, unsuccessfully."<sup>24</sup> In *GM*, s. 91(2) obtained a new lease on life as a source of domestic regulatory authority<sup>25</sup> when the Supreme Court ruled that the federal Combines Investigation Act came within that head of power, and announced a set of five criteria on the basis of which future federal legislative initiatives might also qualify as exercises of the trade and commerce power. It is natural to believe that if federal securities legislation can be enacted under s. 91(2), it is by passing through the window opened by *GM*. The first three criteria are as follows:

First, the impugned legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry.<sup>26</sup>

These criteria have their source in the extensive collection of "unsuccessful tries" to which Idington J. referred, and correspond, in essence, to two ways in which a law might fail to come within the concept of "regulation of trade and commerce": It may not be

23. Some analysts have suggested that other heads of power might support federal securities legislation, especially the federal general power (also known as the *POGG* power) and the power to regulate works declared to be for the general advantage of Canada (The Constitution Act, 1867, s. 92(10)(c)). To keep the scope of this paper manageable, I do not propose to discuss these alternatives. See Robert Leckey and Eric Ward, "Taking Stock: Securities Markets and the Division of Powers" (1999), 22 Dal. L.J. 250; P. Anisman and P.W. Hogg, "Constitutional Aspects of Federal Securities Legislation" in Philip Anisman, et. al., eds., *Proposals for a Securities Market Law for Canada*, vol. 3 (Ottawa, Consumer and Corporate Affairs Canada, 1979).

24. *Re Board of Commerce Act and Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456 at p. 488, 54 D.L.R. 354 at p. 377, affd 60 D.L.R. 513, [1922] A.C. 191 (P.C.).

25. It was always understood that the trade and commerce power authorized Parliament to regulate international and interprovincial transactions. What was uncertain was the extent to which, if at all, it empowered Parliament to regulate intraprovincial transactions.

26. *General Motors of Canada Ltd.*, *supra*, footnote 2, at p. 661.

“regulation” or it may regulate particular industries rather than “trade” as a whole. If, rather than establishing a regulatory scheme, one indication of which is provision for agency oversight, the law merely creates legal duties and corresponding private causes of action, it is more appropriately classified as a law in relation to “civil rights”<sup>27</sup> rather than a law in relation to the “*regulation* of trade and commerce.”<sup>28</sup> If it regulates particular industries, the law will run afoul of a well-entrenched rule in Canadian constitutional doctrine, namely that “the regulation of trade and commerce” does not encompass the regulation of “particular trades.”<sup>29</sup>

The fourth and fifth criteria are new elements introduced by the Supreme Court in *GM* itself:<sup>30</sup>

[Fourth,] the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and [fifth,] the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.<sup>31</sup>

These criteria, which I shall call the “provincial incapacity” and “extra-provincial consequences” criteria, respectively, are not a model of clarity. It does not help that the nine paragraphs in which the court explains why they are satisfied by the impugned legislation are unstructured and do not distinguish between the two criteria.<sup>32</sup> Nor does it help that most of the analytical content of these same paragraphs consists of long quotations from two secondary sources;<sup>33</sup> these quotations appear to be directed at the question whether competition in product and services markets is more effectively regulated on a national basis than on a provincial basis. The result is to create the impression that the two criteria are in fact one: the relative effectiveness of national as opposed to provincial regulation.

For this reason, many commentators have viewed the debate about whether Parliament possesses the power to enact national

27. The Constitution Act, 1867, at s. 92(13).

28. *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1.

29. *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, [1881-5] All E.R. Rep. 1179 (H.L.).

30. The court adopts a minority opinion by Dickson J. in *Canada (Attorney General) v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16.

31. *General Motors of Canada Ltd.*, *supra*, footnote 2, at p. 662.

32. *Ibid.*, at pp. 678-683.

33. The sources are P. Hogg and W. Grover, “The Constitutionality of the Competition Bill” (1976), 1 C.B.L.J. 197; and A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa, Information Canada, 1974).

securities regulatory legislation as determined by the question whether national regulation would be more effective than the existing decentralized system.<sup>34</sup> It is a debate about whether the current system is broken; and, if so, how broken.

But there is another perspective on the relationship between the provincial incapacity and extra-provincial consequences criteria that becomes apparent if one considers the rationale offered by the court for the former criterion: the imperative of avoiding gaps in the distribution of powers.<sup>35</sup> The syllogism is this:

- (1) there cannot be gaps in the distribution of legislative powers;
- (2) the impugned law relates to a subject matter with respect to which it lies beyond the powers of the provinces to legislate;
- (3) therefore, it lies within the powers of Parliament.

If the operation of this criterion is true to its rationale, it does not go to the question of relative effectiveness, or whether inaction by one province entails consequences for the others, but to a different question: whether the legislative scheme relates to a subject matter with respect to which it would be within the power of the provinces to legislate.

The possible distinction between the two new criteria might have been immaterial in the context of competition legislation — perhaps for this reason it was glossed over in *GM* — but it is of great significance in the context of national securities legislation. The policy rationale for national securities legislation rests on various diseconomies that are said to be associated with divergent provincial securities laws. The evidence of these diseconomies might be relevant to the extraprovincial consequences criterion but, so far as provincial incapacity is concerned, there is a problem: the provinces have actually exercised legislative jurisdiction over securities regulation. Furthermore, the provincial laws are substantially identical, in both their objectives and the types of measures employed, to what it is proposed that Parliament enact. In consequence, the absence of federal legislative jurisdiction in

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34. Obviously, securities regulatory legislation would meet the first two criteria; it likely also meets the criterion of being concerned with “trade as a whole” rather than particular industries. See Part V.

35. *General Motors of Canada Ltd.*, *supra*, footnote 2, at p. 683, the court quotes this passage from Hogg and Grover:

If there is no federal power to enact a competition policy, then Canada cannot have a competition policy. The consequence of a denial of federal constitutional power is therefore, in practical effect, a gap in the distribution of legislative powers.

See also *Canadian National Transportation*, *supra*, footnote 30, at p. 278, Dickson J. concurring.

relation to securities regulation does not imply any gap in the distribution of legislative powers.<sup>36</sup> To adapt Lederman's metaphor, even if it can be shown that Parliament is the better securities law physician, that is simply not the same thing as demonstrating that securities law exceeds the provincial physician's capacities.<sup>37</sup>

In summary, there is a significant latent ambiguity within *GM*.<sup>38</sup> The decision can be read either as introducing a single, new functional criterion of relative effectiveness, or as introducing two new criteria, one of which is based on the avoidance of gaps in the distribution of powers. Assuming that one is persuaded by the policy arguments for centralized securities regulatory authority, the first reading is helpful to the proponents of federal jurisdiction, and the second is helpful to opponents. Both readings are supported by the language of the decision; the choice between them is therefore, by definition, not dictated by the *GM* decision itself.

In light of this ambiguity, two fault lines separate the proponents and the opponents of federal authority to enact securities legislation. There is, to be sure, a debate about securities regulatory policy: would a unitary securities regulatory structure be more effective, or otherwise preferable? I make a few observations regarding this debate in Appendix A.<sup>39</sup> But there is also a live jurisprudential choice as to the extent to which the question of Parliament's legal authority should depend upon the securities regulatory policy question. It is to this choice that I now turn.

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36. Admittedly, the *GM* decision refers not only to "constitutional incapacity," but also to "practical incapacity." However, so long as one remains faithful to the rationale for the criterion — the avoidance of gaps in the distribution of powers, a "practical" gloss on incapacity does not alter the conclusion. It may be that, in relation to some problem, provincial powers are so inadequate to the task of dealing with it that legislating about it, as a practical matter, lies beyond provincial powers. But, by all indications, the existing Canadian securities law regime is more accurately described as "leaving room for improvement" rather than as being so dysfunctional that Canada in effect, lacks securities regulation.

37. W.R. Lederman, "Thoughts on the Reform of the Supreme Court of Canada" (1970), 8 *Alta. L. Rev.* 1, at p. 4.

38. The fact that the *GM* decision is ambiguous is not a ground for criticizing it or the justices who endorsed it. When judges articulate new principles in terms that might be interpreted in more than one way, it is a means of preserving flexibility and therefore a form of judicial restraint. On the other hand, the court's skeletal, and even muddled, explanation as to why the Combines Investigation Act satisfied the criteria is more deserving of criticism.

39. See Appendix A, *infra*.

#### IV. THE JURISPRUDENTIAL QUESTION

Legal theorists distinguish between two styles of analysis: categorization and balancing.<sup>40</sup> On the one hand, an analyst may treat legal questions as residing in a determination of the category to which a given set of facts belongs. For instance, in answering the question, “Do restrictions on picketing violate the freedom of expression?” a categorical analyst might begin by asking, “is picketing ‘expression?’” On the other hand, she may treat legal questions as calling for the weighing of competing considerations of policy and principle. In the picketing example, an analyst might ask whether the restrictions strike an appropriate balance between the interests underlying the freedom of expression, on the one hand, and other societal interests.

As a generalization, one may say that categorization prevailed in Canadian constitutional jurisprudence in the late 19th century through the 1930s, whereas balancing has been on the ascendancy ever since.<sup>41</sup> Although some descriptions of this evolution focus on judicial practice, it is more accurately described as a jurisprudential shift, encompassing not only changes in judicial reasoning but also a transformation of the expectations of other members of the legal community, especially academics and legislative drafters. For example, the shift can be observed in the language and structure of our constitutional documents. The 1867 Act instructs judges to categorize laws — that is, to assign them to “classes of subjects” within the exclusive jurisdiction of one or the other level of government. By contrast, the 1982 Act speaks of “reasonable limits,” “fundamental justice,” and “where numbers warrant.”

Some proponents of balancing have even described contemporary jurisprudence in terms suggestive of the end of history. For instance, Patrick Monahan wrote in 1984 that “Canadian constitutional law and theory lingers at the dusk of legal formalism.”<sup>42</sup> His assertion was descriptive and predictive: categorical analysis is on the way out

40. See, e.g., Kathleen M. Sullivan, “Post-Liberal Judging: The Roles of Categorization and Balancing” (1992), 63 U. Colo. L. Rev. 293.

41. This trajectory is not unique to Canada; for instance, a similar shift occurred, more or less at the same time, within American jurisprudence. T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987), 96 Yale L.J. 943.

42. Patrick Monahan, “At Doctrine’s Twilight: The Structure of Canadian Federalism” (1984), 34 U.T.L.J. 47. Similarly, Grégoire Webber, an opponent of balancing, nonetheless suggests as a descriptive matter that “constitutional law is now firmly settled in the age of balancing.” G. Webber, “Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship” (2010), 23 Can. J.L. & Jur. 179, at p. 201.

even if it has not yet been entirely expunged from our jurisprudence and replaced with balancing. Monahan's essay nonetheless contained a clear normative message: Good riddance to categorical analysis!

From this perspective, the pending securities reference provides an opportunity to complete a task left half-finished by the *GM* decision. That decision articulates five criteria, of which three call for categorization: Does the law enact a regulatory scheme? Is the scheme under the oversight of a regulatory agency? Does it concern trade as a whole rather than particular industries?

The fourth criterion also appears to call for a categorical inquiry: either the provinces could enact the impugned law, or not. But it is also possible to interpret the fourth and fifth criteria as inviting a single inquiry into the relative effectiveness of national versus provincial regulation — a balancing inquiry. For the proponents of balancing, the court would take a step in the right direction if it combined the two criteria in this way. Ideally, the court would downplay the five criteria entirely — they were, after all, expressly said in *GM* not to constitute an “exhaustive list” but to be an entry point into “careful case by case analysis”— and instead recharacterize the whole enterprise in terms of the balancing of an open set of competing considerations in the search for the “best physician.”<sup>43</sup>

I am not partial to the view that decisions about jurisdiction should primarily be exercises in balancing competing policy considerations. In this Part, I begin by questioning the assumption that balancing is necessarily better, before describing the alternatives to balancing.

### 1. Is Balancing Best?

Two grounds of preference for balancing may be identified. The first is that behind the application of categorical rules often lies surreptitious balancing. The premise is that decision-makers pretend to apply rules; this pretence relieves decision-makers of accountability for their “real” reasons for decision; balancing should instead be done openly. The second ground for preferring

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43. The court would be following the example it set in *R. v. Kapp* (2008), 294 D.L.R. (4th) 1, [2008] 2 S.C.R. 483, a case concerning s. 15 of the Canadian Charter of Rights and Freedoms. The court downplayed the specific elements of the framework it had laid down in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, in light of their potential to distract from the overall task of identifying discrimination.

balancing is that, to the extent that categories actually constrain, they dictate outcomes that deviate, by definition, from those that would be optimal, all things considered. In short, categories are undesirable because they are either a smokescreen or a straitjacket.

However, there is another side to the equation. Categorical reasoning can be poorly done, for instance, when labels are offered as a substitute for analysis. But balancing, too, can be a charade in which conclusory statements and rhetoric are passed off as arguments<sup>44</sup> — as, for instance, when the current Canadian securities regulatory system is described in loaded terms as “balkanized” or “fragmented”<sup>45</sup> as if they were synonyms for “decentralized.” Just as poor balancing can be criticized, so too can poor categorical analysis.

The straitjacket argument is also not clear-cut. The distinction between categorization and balancing is a version of the familiar distinction between rules and standards.<sup>46</sup> Legal directives vary as to the amount of discretion they confer upon the officials who apply the directives (such as judges). The concepts of rules and standards represent polar positions on the continuum of discretion; rules leave officials with less discretion than standards.<sup>47</sup>

By their nature, rules prevent officials from making an all-things-considered assessment of what should be done.<sup>48</sup> However, no one suggests for that reason that rules should be abandoned in favour of

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44. Aleinikoff, *supra*, footnote 41, at pp. 974-979, describes the methodological challenges posed by balancing, and provides numerous illustrations of the relative lack of success of courts in meeting these challenges.

45. Wise Persons' Committee to Review the Structure of Securities Regulation in Canada, *It's Time* (Ottawa, Department of Finance Canada, 2003), p. 15 (“fragmented”), online: Wise Persons' Committee <[http://www.wise-averties.ca/finalreport\\_en.html](http://www.wise-averties.ca/finalreport_en.html)>; Expert Panel, *supra*, footnote 21.

46. See Kathleen M. Sullivan, “The Supreme Court, 1991 Term – Foreword: The Justices of Rules and Standards” (1992), 106 *Harv. L. Rev.* 22, at p. 59; Louis Kaplow “Rules Versus Standards: An Economic Analysis” (1992), 42 *Duke L.J.* 557; Francesco Parisi, “Rules Versus Standards” in C.K. Rowley and F. Schneider, eds., *The Encyclopedia of Public Choice* (Dordrecht, Netherlands, Kluwer Academic Publishers, 2004), p. 510.

47. See Frederick Schauer, *Playing By The Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford, Clarendon Press, 1991).

48. For instance, the relevant official within Industry Canada who receives articles of incorporation submitted under s. 7 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, does not have the discretion to consider whether it would be in the public interest to issue a certificate bringing the corporation into existence. Section 8(1) provides that, except where there is non-compliance with formal requirements, “. . . on receipt of articles of incorporation, the [official] shall issue a certificate of incorporation.”

standards. Instead, we all recognize that the choice between rules and standards presents a trade-off.

On the one hand, withholding discretion from officials (by using rules) is useful if there are reasons to doubt the officials' aptitude to exercise the discretion (such as their expertise and fairness).<sup>49</sup> Rules also facilitate the ascertainment by citizens of their legal position, and economize on the application of the directives by officials. It is easier for us to obey, and for police to enforce, a directive to drive no faster than 100 km/h than a directive to drive at an "appropriate speed under the circumstances." On the other hand, conferring discretion upon officials (by using standards) permits the specific requirements of the directive to be tailored to particular situations, and protects the directive against obsolescence. For instance, as the social understanding of the "best interests of the child" evolves, legal outcomes can change without the need to amend the family law statute. Whether a given directive should take the form of a rule or a standard depends on the factual salience of each of these considerations in the particular circumstances, as well as on society's tolerance level for under- or over-inclusiveness, unpredictability, and other injustices or dysfunctionalities.

Constitutional rules, including categories, limit the discretion of present-day officials. The presence of such rules entails costs: For instance, the federal government's options on marijuana policy are constrained by the fact that Parliament's jurisdiction to regulate the trade in a lawful commodity is more doubtful than is its jurisdiction to criminalize the trade entirely. However, the same rules also provide certainty:<sup>50</sup> We can confidently answer the question about whether Parliament can criminalize marijuana possession, without having to divine the views of the Supreme Court, as presently constituted, on whether the existing national response is more effective than a decentralized regulatory approach would be.<sup>51</sup>

Consider, too, that it is in the nature of a constitution to establish norms at one moment for the governance of a community that extends into the future. These norms are very often the product of a

49. For further discussion of the trade-off, see Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts, Harvard University Press, 2009), pp. 190-195, in which versions of the examples in this paragraph are also discussed.

50. At least, that is the assumption underlying the criticism of categorization as a straitjacket.

51. The outcome in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, 233 D.L.R. (4th) 415, insofar as it concerned the power of Parliament to prohibit marijuana possession under The Constitution Act, 1867, at s. 91(27), was foreseeable.

bargaining process in which the parties commit themselves and their successors to unity, but negotiate terms the purpose of which is to provide continuing protection for the separate interests of the constituent parts. An analogy may be made to the debt covenants on which lenders insist before parting with their money; so too do prudent collectivities demand assurances before alienating a portion of their sovereignty to federal institutions. When these assurances are written as standards, they are more flexible and less susceptible to obsolescence; when they are written as rules, they insulate the interest somewhat more against future encroachment.<sup>52</sup> One form is not always better than the other.

In discussing the advantages and disadvantages of conferring discretion on officials by using standards or withholding discretion from them by using rules, it is usual to adopt the perspective of the authors of the directive. It is, after all, they who choose whether to articulate the directive in the form of a rule or standard, and therefore they who make the calculation as to whether the benefits of discretion outweigh its costs. In the case of constitutional directives, we adopt the perspective of the framers, who face the choice of employing language that calls for categorization or balancing.<sup>53</sup>

But some categories originate with judges rather than the framers. For instance, the categorical distinction between the regulation of “trade as a whole” and the regulation of “particular industries” does not appear in s. 91(2). Rather, it is the creation of the Judicial Committee of the Privy Council.<sup>54</sup> Theoretically, in deciding *Citizens Insurance*, the Judicial Committee could have employed balancing in determining whether to classify the regulation of insurance contracts within the category of “the regulation of trade and commerce.”<sup>55</sup> If it had done so, the framers’ initial choice to employ categorization would have been to some extent undone.<sup>56</sup>

52. Consider Jean Leclair’s praise for the “neglected virtues of formalism,” namely its usefulness as a safeguard for provincial autonomy. Leclair, *supra*, footnote 3, at pp. 431-432.

53. Evidently, the framers of The Constitution Act, 1982 made the choice of categorization in crafting the amendment procedure in Part V, and in designating certain rights but not others as susceptible to be overridden under s. 33 of the Charter; but they selected balancing in the drafting of s. 1 (“reasonable limits . . . justified”), s. 8 (“unreasonable search[es]”), and s. 23 (“where numbers warrant”), among others.

54. *Citizens Insurance Company of Canada*, *supra*, footnote 29.

55. See, e.g., the *Reference re: Firearms Act (Canada)*, *infra*, footnote 92, in which the Supreme Court was asked (but declined) to introduce the “balance of federal-provincial power” as a consideration in the application of the criminal law power.

56. For discussion of the general notion that officials can defeat the drafters’ choice

Charter of Rights case law abounds with similar examples. For instance, the Supreme Court has flirted with a categorical approach to the concept of “reasonable limits” under s. 1 of the Charter, by suggesting that outcomes (via the standard of review) might depend on such questions as whether the state is a singular antagonist, or is instead seeking to protect a vulnerable group.<sup>57</sup> A categorical gloss was thus placed on a provision that on its face invites balancing. The court went in the opposite direction when it experimented with dissolving the categorical exemption for affirmative action programs under s. 15(2) into a comprehensive balancing inquiry to be carried out under s. 15(1).<sup>58</sup>

The upshot is that a present-day court has choices. Looking backwards, a court might choose to go along with, or seek to escape from, the decision made by its predecessors as to how much discretion it and future courts should have. Looking forward, it can seek to limit the discretion of future judges by establishing categorical norms of its own, or leave their discretion unfettered by directing them to make a “careful case-by-case assessment.” I have suggested that the forward-looking choice, in particular, should be approached as involving a trade-off between the benefits and costs of discretion. We should not simply assume the superiority of balancing and approach cases such as the securities reference as occasions for hastening the collapse of legal questions into policy questions.

## 2. Other Mechanisms of Flexibility

I have tried to make balancing seem less inevitable by describing a choice between balancing and categorization that corresponds to the familiar choice in legal design between rules and standards.<sup>59</sup> The

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between rules or standards, see Frederick Schauer, “The Convergence of Rules and Standards” (2003), N.Z.L. Rev 303.

57. *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577. Another example is the debate about the categorical exclusion of “budgetary considerations” from the set of objectives permissible under s. 1 (*Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1) with a further categorical carve-out for “budgetary crises” or for “financial considerations wrapped up with other public policy considerations” (*Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 244 D.L.R. (4th) 294).

58. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193. But now see *R. v. Kapp*, *supra*, footnote 43.

59. A familiar and current example is the debate about whether securities regulation should be based on principles or rules is an obvious example: see Lawrence A. Cunningham, “Principles and Rules in Public and Professional Securities Law Enforcement: A Comparative U.S.-Canada Inquiry” in Task Force to Modernize

choice involves a trade-off between flexibility and other values, such as predictability and security.

It would be a fair reply to these observations that flexibility weighs especially heavily in the constitutional context, given that the constitutional document is intended to remain in service for many generations. However, even if one ignores the possibility of formal amendment, judicial balancing is not the only mechanism of constitutional flexibility. In this section, I describe three alternative mechanisms.

(a) A Relaxed Attitude Toward Precedent

One alternative source of flexibility is a relaxed attitude toward precedent.<sup>60</sup> Even if past judges have imposed a layer of categorical doctrine upon the text, the price to be paid in terms of flexibility is modest to the extent that later judges can simply overrule it. Less drastically, if the doctrine just needs a bit of updating, later judges can do that, too, when an appropriate case presents itself.<sup>61</sup>

At first glance, it may appear that there is little practical difference between this method and recourse to judicial balancing. Both rely on judicial discretion to achieve flexibility. Both purchase flexibility at some cost in terms of predictability and security.

There is, however, an important difference between them in the extent to which discretion is conferred upon or withdrawn from lower courts. When the Supreme Court lays down a rule, it limits the discretion of lower courts to make their own assessment of the balance of advantage—even if the Supreme Court reserves the right to change the rule. For instance, between the Supreme Court's decision in *Delisle v. Canada (Deputy Attorney General)*<sup>62</sup> and its change of heart in *Dunmore v. Ontario (Attorney General)*,<sup>63</sup> lower

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Securities Legislation in Canada, ed., *Canada Steps Up, Volume 6 – Research Studies: Strengthening Market Credibility and Integrity* (T.I.A. Allen, Chair) (Toronto, Task Force to Modernize Securities Legislation in Canada, 2006), p. 253 at p. 259, online: Task Force to Modernize Securities Legislation in Canada <<http://www.tfmsl.ca/>>.

60. Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto, Thomson-Carswell, 2007), s. 8.7 (pp. 8-23 to 8-24). Hogg appears to recommend a greater judicial readiness to depart from precedent in constitutional cases than in other cases, on the ground that, given the difficulty of formal amendment, more responsibility necessarily falls on the shoulders of judges to update the law lest it become obsolete.

61. Thus, for example, Karazivan and Gaudreault-DesBiens recommend incorporating additional elements into the “*General Motors* test.” Karazivan and Gaudreault-DesBiens, *supra*, footnote 3, at pp. 31-32.

62. [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513.

63. [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193.

courts were expected to apply a doctrinal rule against the recognition of positive state obligations under the Charter. It is otherwise when the Supreme Court instead describes a particular issue as calling for “case-by-case analysis.”

The difference between the two mechanisms may be described in the following conceptual terms. The rules/standards trade-off between constraint and flexibility is normally understood as operating along two axes: across situations and over time. (See Fig. 1.) That is, rules have the benefit across situations of being easier for citizens and officials to apply; they have the disadvantage of being over- and under-inclusive. Rules have the benefit over time of giving greater security for past commitments or bargains; but they are at greater risk of obsolescence. When a constitutional jurisprudence gives a leading role to balancing, it purchases situational tailoring and protection against obsolescence at the price of ease of application and stability and security for past bargains.

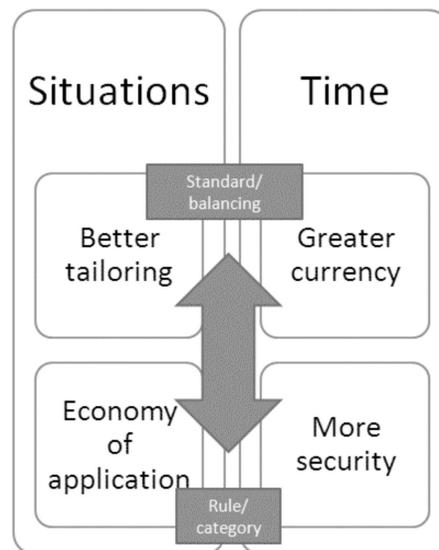


Fig. 1: The rules/standardstrade-off

Judicial policy in respect of precedent offers the promise of severing the time axis from the situational axis. (See Fig. 2.) When the Supreme Court adopts a relaxed attitude towards precedent, it is in essence purchasing flexibility (and sacrificing the benefits of

constraint) along the axis of time. Obsolescence is avoided, but cross-temporal stability and security are reduced. Yet, the Supreme Court remains free to devise categories and other doctrinal elements which it expects lower courts and other officials to follow; in so doing it attempts to limit the use of balancing by lower courts and officials, purchasing ease of application at the price of situational tailoring.

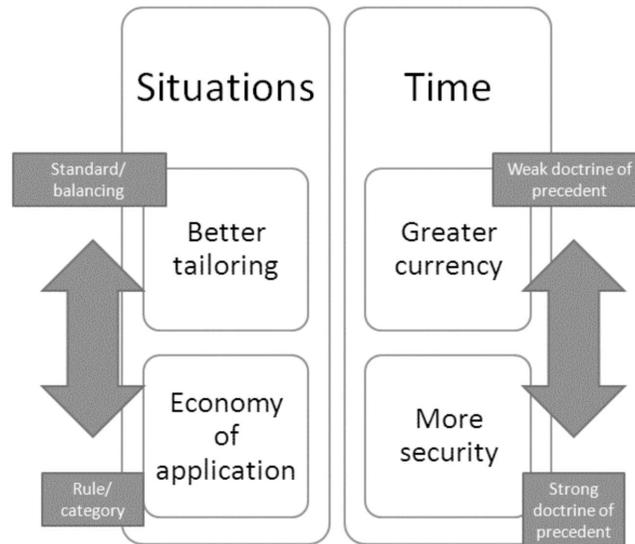


Fig. 2: Judicial policy towards precedent  
severs the time axis  
from the situational axis

In short, the adoption of a relaxed attitude toward precedent enables the Supreme Court to obtain the benefit of reduced obsolescence without forgoing the ability to employ rules and categories to limit the discretion of lower courts and officials.

(b) Large and Liberal Interpretation

Another alternative to judicial balancing as a source of flexibility is a judicial policy of large and liberal interpretation — a policy of favouring generous rather than narrow limits on legislative power. We may analogize the law to a fence which separates a zone of permission, within the fence, from a zone of prohibition outside. The choice between rules and standards may be thought of as a choice

about the material from which the fence is made (rigid or flexible). If the fenced-in zone of freedom is small; it matters a lot whether the fence is rigid or flexible. If the fenced-in area is large, it matters less.

The notion that interpretive generosity is desirable as a source of flexibility is the thesis of one of the most celebrated passages in any Canadian judicial opinion:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention.

Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.<sup>64</sup>

Today, it is very common to read the first quoted paragraph in isolation and to assume that the living tree metaphor refers to the judicial modification of precedent as a source of constitutional flexibility.<sup>65</sup> But when the two paragraphs are read together, it appears that Lord Sankey was referring to something else, for when a leading role is given to judicial modification of precedent, constitutional limits are not “fixed.” Rather than doctrinal shifts, the instrument of flexibility envisaged by Lord Sankey is “development through usage and convention,” which is to say changes in the norms making up the *unwritten* constitution.<sup>66</sup> Lord

64. *Edwards v. Canada*, [1930] A.C. 124, [1930] 1 D.L.R. 98 *sub nom. Re Section 24 of the B.N.A. Act* (P.C.) (*Persons* case), at p. 136 (A.C.).

65. See, e.g., C. L’Heureux-Dubé, “The Legacy of the ‘Persons Case’: Cultivating the Living Tree’s Equality Leaves” (2000), 63 Sask. L. Rev. 389, at p. 390: “Lord Sankey conveyed [his] approach through the now famous metaphor of the Constitution viewed as a ‘living tree capable of growth and expansion within its natural limits.’ Using this interpretive method, the Privy Council was able to depart significantly from its prior jurisprudence on the question of whether the term ‘person’ included women.” B. McLachlin, “Judicial Power and Democracy” (2000), 12 Sing. Acad. L.J. 311, at p. 318: “It is difficult to conceive of a more effective expression of the oxymoron of a fixed law subject to modification by judges than Lord Sankey’s ‘living tree’: the tree of the law exists, but it is the judges who promote and prune its growth.”; R. Graham, “A Unified Theory of Statutory Interpretation” (2002), 23 Stat. L. Rev. 91, at pp. 107 and 108: interpreting *Persons* as recognizing that “the Constitution’s provisions must be permitted to evolve in response to changing ideals and shifting social conditions” — thus, the “‘living tree’ approach to constitutional interpretation was adopted by the Privy Council as the principal doctrine of constitutional construction.”

66. Today, most commentators understand the Judicial Committee of the Privy Council to have decided in the *Persons* case that the constitutional meaning of

Sankey's insight was that if judges follow a policy of interpreting the formal legal powers of Canada's political institutions broadly rather than narrowly, the shape of our constitutional arrangements will largely be determined by Canadian political mores, which evolve over time. In such a system, citizens and political actors, rather than judges, are the leading agents of constitutional change.

A generously wide interpretation of "fixed limits" achieves protection from obsolescence while retaining some of the advantages of rule-based regulation (such as ease of application). It avoids the legal uncertainties associated with shifting judicial doctrines. Still, there is no free lunch. The flexibility that comes from large and liberal interpretation comes at the expense of security for the interests that are protected by constitutional rules. In particular, a large and liberal interpretation of federal powers may come at the expense of provincial autonomy.<sup>67</sup>

This was a more serious problem in earlier decades, when the notion prevailed that the federal and provincial powers were mutually exclusive. A generous interpretation of exclusive federal powers automatically reduces the scope of provincial powers.<sup>68</sup> It is otherwise when, as today, powers are understood in practice to be overlapping.

Nevertheless, in the event of a conflict, provincial law is rendered inoperative. It follows that, theoretically, a generous interpretation might permit an activist Parliament to impair provincial autonomy.<sup>69</sup> This threat can and should be mitigated through judicial restraint in the application of the paramountcy doctrine. For the principle that constitutional constraints should not prevent Canadian political institutions from being "mistresses in their own

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"persons" had changed between 1867 and 1929. My own reading is different. Lord Sankey was saying: if "usage and convention" — political mores — had evolved by 1929 in Canada to the point where the executive felt it permissible and appropriate to appoint women to the Senate, it was hardly the duty of the Judicial Committee to stand in the way by adopting a narrow interpretation of the Governor-in-Council's formal powers.

67. See Leclair, *supra*, footnote 3, at pp. 423-425. This concern accounts for Lord Sankey's remark that "their Lordships are not here considering the question of the legislative competence either of the Dominion or its provinces which arise under secs. 91 and 92 of the Act."

68. This is one way of understanding the necessity for the doctrine of mutual modification: *Citizens Insurance Company of Canada, supra*, footnote 29.

69. In both the United States and Australia, the federal trade and commerce power is concurrent, and judges in both countries have given it a generous interpretation. Presumably, the interest in national self-governance was regarded as outweighing the risk to state autonomy from federal legislative activism.

house” also weighs against being too eager to deprive validly enacted provincial laws of operative force.<sup>70</sup>

(c) Indirect Doctrinal Evolution

A further alternative source of flexibility is indirect doctrinal evolution. Doctrinal evolution refers to changes in judge-made law; by “indirect” evolution, I mean changes other than those enabled by the adoption of a liberal policy towards overruling past decisions.

Although today the Supreme Court often proceeds by directly announcing “new” or “modified” rules — that is, by prospectively overruling the law as embodied in its past decisions — this is hardly the only mechanism of judicial law-creation. More traditionally, rules arise through the accumulation of decisions, rather than coming into existence at a single point in time by judicial proclamation. Frederick Schauer describes the process in this way:

[C]ommon law judges make decisions by applying legal principles contained in generations of previous judicial opinions, with each of those previous opinions being the written justification and explanation of the decision in a particular lawsuit. As the stock of such opinions increases, certain justifications recur, and certain principles become ossified. . . . These general prescriptions appear as rules.<sup>71</sup>

Despite the apparent rigidity of the resulting rules, the system is in fact characterized by flexibility. For one thing, depending on the frequency with which relevant cases arise, the process of “ossification” can take a long time, leaving scope along the way for differences of opinion as to the content of the underlying principles. For example, there are only a couple of handfuls of cases involving attempts to support federal legislation under s. 91(2).<sup>72</sup> The propositions that the trade and commerce power authorizes Parliament to regulate cross-border transactions, and that it does not include the power to regulate particular industries, have probably recurred enough to be considered cast in stone. Other propositions that might plausibly be ascribed to one decision or another — for instance, that the prohibition of transactions does not come within the concept of the “regulation of trade and

70. See *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 281 D.L.R. (4th) 125 (endorsing the principle, at para. 37, that “a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government.”)

71. Schauer, *supra*, footnote 47, at p. 175.

72. These cases are discussed in Part V below.

commerce”<sup>73</sup> — have yet to reach that stage, if they ever will. In the meantime, there may not be certainty; by the same token, there is not rigidity.

For another thing, even an established doctrinal rule is “inherently revisable at the point of application,” to the extent that a “new cas[e] . . . exhibit[s] hitherto unappreciated features.”<sup>74</sup> The applying court distinguishes the new case from those in which the doctrine arose and thereby relieves itself of the obligation to apply the doctrine, without calling into question the doctrine’s binding force with respect to circumstances not presenting the new features. Eventually, the doctrine may become subject to so many exceptions that it becomes sounder to regard the principle underlying the exceptions as the new rule.

The most obvious difference between indirect evolution and direct overruling concerns the speed of change. There is also a more fundamental difference, concerning the allocation of the discretion to effect doctrinal change. Direct overruling is a mechanism of change centralized within the Supreme Court at any given moment. When a constitutional system relies to a greater extent on indirect evolution, responsibility for change is more decentralized, both across institutions and across time. Distinguishing is available to lower courts, and therefore doctrinal evolution is not dependent upon persuading the Supreme Court to change its mind. Moreover, doctrine is viewed the collective product of judges deciding cases over time; its content and constraining force, accordingly, are not within the exclusive discretion of the present-day holders of judicial office.

## V. IMPLICATIONS FOR FEDERAL SECURITIES JURISDICTION

I have cautioned against thinking of the *GM* decision and the pending securities reference as successive way stations on the path towards an ideal of direct judicial balancing of national and provincial interests in the adjudication of disputes under s. 91(2). I do not support the view that the fourth and fifth criteria formulated in *GM* amount or should be reduced to a single criterion of relative

73. *Ontario (Attorney-General) v. Attorney-General for the Dominion (The Local Prohibition Reference)*, [1896] A.C. 348, 12 T.L.R. 388 (P.C.).

74. W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York, Cambridge University Press, 2007), p. 199.

effectiveness.<sup>75</sup> We are not at “doctrine’s twilight,”<sup>76</sup> and should not wish ourselves to be.

It would equally be an error to exaggerate the significance of the criteria formulated in *GM*. The court was careful to express its contribution to the law in hedged terms,<sup>77</sup> and the case should be viewed as an accretion to the doctrine rather than as a comprehensive statement of the requirements of valid federal legislation under s. 91(2). In the pending securities reference, it would be an error to devote so large a share of scarce analytical resources to the parsing of the five criteria that other relevant legal sources, such as the remainder of the s. 91(2) case law, are neglected.

In this Part, I defend the view that Parliament has the authority under s. 91(2) to enact the proposed Act. My argument, which proceeds in two steps, does not depend on any showing that securities markets are more effectively regulated on a unitary basis than on a decentralized basis. In addition to avoiding direct balancing, the argument reveals a preference for indirect doctrinal evolution rather than explicit departures from precedent, and a preference for “large and liberal interpretation” of constitutional powers.

**First, the proposed Act bears a greater resemblance to the Combines Investigation Act than to the various federal statutes that have been ruled to fall beyond s. 91(2).**

As previously mentioned, the federal government has not enjoyed much success in defending federal legislation under s. 91(2). Aside from trivial exceptions, *GM* and *Kirkbi*<sup>78</sup> are the two cases in which laws not principally concerning international or interprovincial trade have been upheld under s. 91(2). By contrast, federal laws have been

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75. By the same token, I also disavour Karazivan and Gaudreault-DesBiens’ suggestion that the court should modify the criteria so that they involve a proportionality-style analysis in which both the relative merits of provincial and federal regulation and the effect of the legislation on the “balance of power between the federal and provincial governments” are weighed. See Karazivan and Gaudreault-DesBiens, *supra*, footnote 3, at pp. 23 and 32.

76. Monahan, *supra*, footnote 42.

77. *E.g.*, the reference to the five elements as a “preliminary checklist,” and their characterization as “indicia” rather than criteria.

78. *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, 259 D.L.R. (4th) 577 (holding that the Trademarks Act comes within s. 91(2)).

held to fall beyond s. 91(2) in the *Insurance Reference*,<sup>79</sup> *Board of Commerce*,<sup>80</sup> *Snider*,<sup>81</sup> *Eastern Terminal*,<sup>82</sup> the *Natural Products Marketing Reference*,<sup>83</sup> the *Margarine Reference*,<sup>84</sup> and *Labatt*.<sup>85</sup> However, the principles on which the earlier failures were based have either been internalized by the federal government or else been discredited by subsequent case law.

In particular, the federal statutes struck down in *Insurance Reference*, *Eastern Terminal*, and the *Margarine Reference* regulated individual industries (respectively, insurance, grain elevators and dairy). The same is true of the brewing provisions of the Food and Drug Act, which were invalidated in *Labatt*. Although in aggregate the provisions of that Act covered a large portion of the national economy, the statute established a “single industry regulatory pattern”<sup>86</sup> — that is, it was a collection of separate regulatory schemes for individual industries. Similarly, in the *Natural Products Marketing Reference*, the impugned statute purported to authorize a federal agency to adopt individualized schemes regulating the conditions of distribution and sale of particular natural products.

It has been evident to everyone for a long time that Parliament may not rely on s. 91(2) as the foundation for the regulation of a particular industry, and Parliament no longer attempts to do so.

The proposed Securities Act regulates capital raising by issuers across the entire economy, as well as secondary market transactions in the securities of all issuers. It is not a collection of individualized schemes relating to the raising of capital for ventures in particular industries. Admittedly, the Act requires the registration of the members of three specific professions: dealer,

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79. *Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference)*, [1916] 1 A.C. 588, 31 T.L.R. 32.

80. *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919 (the Board of Commerce case)*, [1922] 1 A.C. 191, 38 T.L.R. 90 (P.C.).

81. *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 (P.C.).

82. *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, [1925] 3 D.L.R. 1.

83. *Attorney-General for British Columbia v. Attorney-General for Canada (Reference re Natural Products Marketing Act, 1934)*, [1937] A.C. 377, [1937] 1 D.L.R. 691 (P.C.).

84. *Canadian Federation of Agriculture v. Attorney-General for Québec (The Margarine Reference)*, [1951] 1 A.C. 179, [1950] 4 D.L.R. 689 (P.C.). The statute prohibited the importation, manufacture and sale of margarine. It was struck down aside for the import ban; the latter was severed from the remainder of the statute and upheld under s. 91(2) as regulation of international trade.

85. *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)*, [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594.

86. *Ibid.*, at p. 935.

financial adviser and investment fund manager;<sup>87</sup> it imposes obligations on such persons that might reasonably be characterized as the regulation of those professions. However, the obligations support the overall scheme of the Act and it is therefore reasonable to treat them as ancillary to it rather than as the main feature of the Act.

It may be tempting to view *Snider* as a problematic precedent, given the analogy between capital markets regulation and labour relations regulation: both are economy-wide interventions in the market for a factor of production common to businesses in all industries. Significantly, however, the labour relations scheme actually invalidated in *Snider* applied only to a collection of industries enumerated in the statute. It was not an economy-wide intervention.

*Board of Commerce* might similarly appear, at first glance, not to have concerned an individualized regulatory scheme. The Board of Commerce Act empowered a federal agency to investigate and prohibit cartels; it also prohibited the hoarding of specified consumer products and empowered the same agency to set the prices at which any business offered such products for sale. In an attempt to reconcile the outcome in *Board of Commerce* with the “regulation of particular industries” theory of s. 91(2), Chief Justice Dickson characterized the legislation as “an attempt to authorize the issuance of an uncoordinated series of local orders and prohibitions.”<sup>88</sup>

Whether or not one finds this characterization accurate, there is another reason for not regarding *Board of Commerce* as fatal to federal jurisdiction to enact securities regulatory legislation. The ruling rests upon a principle that, within a decade after its initial assertion, was repudiated by the Judicial Committee itself, namely that “the authority of the Dominion Parliament to legislate for the regulation of trade and commerce [does] not . . . enable interference with particular trades.”<sup>89</sup> The principle, in other words, was that the effect of the law on particular trades disqualified even economy-wide regulation from enactment under s. 91(2). Although this principle was repeated in *Snider*, the Judicial Committee explicitly disavowed it at the next subsequent opportunity, in *PATA*,<sup>90</sup> emphasizing that “[m]ost of the specific subjects in s. 91 do affect property and civil

87. Proposed Canadian Securities Act, *supra*, footnote 9, at Part 5.

88. *Supra*, footnote 30, at p. 267.

89. *In re the Board of Commerce Act, 1919*, *supra*, footnote 80, at para. 10.

90. *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.).

rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.”<sup>91</sup> It is the latter principle that has become entrenched within Canadian constitutional doctrine.<sup>92</sup>

**Second, it is not a requirement under s. 91(2) that the provinces be incapable of enacting similar legislation, or that federal legislation be more effective in dealing with the problem.**

The fourth and fifth criteria formulated in *GM* are not requirements of valid federal legislation under s. 91(2). In *GM* itself, Dickson C.J.C. denied that the “presence or absence” of the criteria is “necessarily determinative.”<sup>93</sup> Instead, in introducing the criteria in *A.G. Canada v. Canadian National*, Dickson J. (as he then was) described them as “stron[g] indications of valid general regulation,”<sup>94</sup> which is to say that their presence strengthens the case for validity. It does not follow that their absence is an indication of invalidity. In logic, “A implies B” does not entail “not-A implies not-B.”

Consider the fourth criterion: provincial incapacity. The principle underlying the criterion is that there cannot be gaps in the distribution of powers. It follows that if it is established that the provinces lack the power to enact a law on a given subject-matter, then it should be the case that Parliament possesses the power to enact it. Thus, provincial incapacity is a “strong indication” of federal jurisdiction. However, the converse is not true. There is no constitutional principle against overlapping legislation — quite to the contrary.<sup>95</sup> Therefore, one cannot reason from the premise that the provinces possess the power to enact a given law to the conclusion that Parliament does not. Provincial *capacity* is not an indication (strong or otherwise) of the absence of federal jurisdiction.

91. *Ibid.*, at p. 327 (A.C.).

92. See, e.g., *R. v. Klassen* (1959), 20 D.L.R. (2d) 406 (Man. C.A.), at p. 412; *Munro v. National Capital Commission*, [1966] S.C.R. 663 at p. 671, 57 D.L.R. (2d) 753; *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543 at p. 550, 20 D.L.R. (3d) 472; *General Motors of Canada Ltd.*, *supra*, footnote 2, at p. 673; *Reference re: Firearms Act (Canada)* (2000), 185 D.L.R. (4th) 577, [2000] 1 S.C.R. 783, at para. 26.

93. *General Motors of Canada Ltd.*, *supra*, footnote 2, at pp. 662-663.

94. *Supra*, footnote 30, at p. 268.

95. See, e.g., *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1; *Canadian Western Bank*, *supra*, footnote 70.

As for the fifth criterion, we must ask why the presence of extra-provincial consequences of a provincial failure to deal with the intraprovincial aspects of an issue should be a “strong indication” of federal jurisdiction. One possible answer is that the power to enact laws on a given subject-matter should be allocated to the level of government most capable of dealing effectively with the related problems. But there are a variety of other ways of answering this question that fall short of mandating an inquiry into the overall balance of advantage.

For instance, an alternative interpretation of the principle underlying the fifth criterion is that the dysfunctionality of a particular allocation of legislative power is a reason not to interpret the constitution as requiring that allocation. Such an interpretation would correct a much criticized feature of the Judicial Committee’s case law; its critics alleged that that body imposed restrictions on federal legislative capacity that had impaired the nation’s ability to deal effectively with contemporary social problems.<sup>96</sup> The criticisms rest on the eminently defensible principle that constitutional constraints should not be interpreted in such a manner as to impose dysfunctionality. It would turn this principle on its head if a demonstration that federal jurisdiction is necessary to avoid dysfunctionality (or that the balance of advantage favours federal jurisdiction) were erected as an additional hurdle in the path of federal legislative authority.<sup>97</sup>

In *A.G. Canada v. Canadian National*, Justice Dickson described trade and commerce jurisprudence as a jurisprudence of “subtraction” from the scope of the words “regulation of trade and commerce.”<sup>98</sup> What has been subtracted from those words over

96. See, e.g., Bora Laskin, “Peace, Order and Good Government Re-examined” (1947), 25 Can. Bar Rev. 1054, at p. 1085; F.R. Scott, “The Development of Canadian Federalism” in *Papers and Proceedings of the Canadian Political Science Association* (Kingston, The Association, 1931), at p. 247, cited in Alan C. Cairns, “The Judicial Committee and its Critics” (1971), *Can. J. of Pol. Sci.* 301, at p. 309.

97. Another possibility is that the presence of extraprovincial consequences is an indication of a federal “aspect” in circumstances where the power of the province to regulate the same subject-matter is acknowledged. While extraprovincial consequences are indeed suggestive of a federal aspect, there is no reason to suppose that they are the only way in which a federal aspect can exist. For instance, securities regulation has two aspects: an investor protection aspect which, by analogy to consumer protection, appears more “provincial”; and an economy-wide capital allocative efficiency aspect which appears more “national.” Regarding the investor protection aspect, see *Lymburn v. Mayland*, [1932] A.C. 318, [1932] 2 D.L.R. 6 (P.C.).

98. *Supra*, footnote 30, at pp. 260, 265-266.

time is “laws the main characteristic of which is the regulation of particular businesses.” Neither the case law prior to *GM* nor the analysis within that case itself provide any ground for subtracting, further, legislation that could be enacted by a province or legislation on matters with respect to which provincial regulation is functionally adequate.

As old-fashioned as it may seem to rely on doctrinal analysis to answer a question of constitutional law, such analysis appears sufficient to authorize the conclusion that the proposed Act lies within Parliament’s power to enact laws for the regulation of trade and commerce.<sup>99</sup>

## VI. CONCLUSION

The undeniable importance of *General Motors* lies in the fact that it sets a precedent for the use of the trade and commerce power as a legislative basis for nationwide economic regulation not limited to the regulation of international and interprovincial transactions. But it is easy to overstate the significance of the five-indicia framework, and especially of the fourth and fifth criteria, which some have understood as calling for an assessment of the relative effectiveness of national as opposed to provincial regulation.

In my view, the question whether unitary securities regulation would be more effective than the existing decentralized system should not play a role in the assessment of the validity of federal securities regulatory regulation. I have suggested that the proposed Securities Act comes within the federal trade and commerce power, independently of the merits of the policy arguments in favour of unitary securities regulation.

A particular jurisprudential choice underlies my analysis of the constitutionality of the proposed Act. Specifically, my analysis exhibits a preference for doctrinal conservatism,<sup>100</sup> interpretive liberalism,<sup>101</sup> and a cautious approach to first-order judicial

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99. Some commentators, such as MacIntosh, *supra*, footnote 1, regard the opt-in feature of the proposed Act as a constitutional weakness on the theory that it undermines the case for the functional necessity of unitary securities regulation. I do not share this view, given that I do not believe that there is any constitutional requirement to demonstrate the functional necessity of unitary regulation. In any event, the argument that an opt-in mechanism is indicative that a law deals with local rather than national subject-matter has been tried and rejected before: *Local Prohibition Reference*, *supra*, footnote 73.

100. That is, a preference for indirect doctrinal evolution rather than explicit departures from precedent.

101. That is, a preference for “large and liberal interpretation” so that “development

balancing.<sup>102</sup> These are admittedly choices, not imperatives. There are other ways to strike a balance between flexibility and constraint.

Some might prefer, for instance, that flexibility be realized through a more aggressive use of first-order judicial balancing or of direct judicial updating of doctrinal “tests,” rather than through recourse to large and liberal interpretation. In particular, such a preference could arise in a person who had serious reservations about the threat to provincial autonomy posed by wide constitutional limits and, in particular, the risk of federal legislative activism.<sup>103</sup>

I take a different view, for three reasons. First, the implications of interpretive liberalism for provincial autonomy are not unambiguously negative, given that “large and liberal interpretation” can equally be followed in construing provincial powers. Second, provincial laws only become inoperative in the event of a “conflict” with valid federal laws; consequently, the threat posed by a generous reading of legislative powers can be mitigated through judicial restraint at the point of determining whether there is a conflict. Third, the residual risk to provincial autonomy does not outweigh the virtues of decentralized responsibility for doctrinal change and the institutional disadvantages of the judiciary relative to the legislative and executive branches in making first-order policy determinations. Though the constitution is a living tree, the Supreme Court is not the only agent of its growth and development.

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through usage and convention” can occur with less need for judicial tinkering with constitutional limits.

102. By first-order balancing, I mean the weighing of the costs and benefits of unitary versus decentralized regulation in a particular situation. I have, of course, engaged in “second-order balancing”; that is, I accept that it is desirable in matters of jurisprudential choice to consider the merits and demerits of particular jurisprudential approaches, such as balancing.

103. See, e.g., B. Descôteaux, “Commission nationale des valeurs mobilières: une démarche perverse,” *Le Devoir*, May 29, 2010, p. B4 (“Une fois qu’il aura le pied dans le domaine des valeurs mobilières, le gouvernement fédéral aura beau jeu d’élargir son champ d’intervention pendant que celui du Québec se rétrécira contre son gré.”).

## APPENDIX A: THE POLICY QUESTION

In Part V, I argued that Parliament has the power to enact securities regulatory legislation, independently of whether unitary or decentralized regulation is better as a matter of securities regulatory policy. The proposition that Parliament has the power to enact a law does not entail the proposition that it should do so. In this Appendix, I offer a few brief observations on the latter question.

I recognize that the values potentially at stake include not only efficiency, understood as aggregate welfare calculated on a national scale, but also the intrinsic value of provincial autonomy.<sup>104</sup> An analogy may be made to individual autonomy: in policy-making, we treat individual autonomy as an intrinsic good and do not value it only because private ordering may maximize aggregate social welfare. Similarly, group autonomy — and, more specifically, provincial autonomy — is viewed in our federal system as a good in itself and not simply as an instrumental means to the maximization of aggregate social welfare.

Nonetheless, I begin by discussing the question from an economic perspective. The principal benefits claimed for unitary securities regulation are as follows:

- Lower administrative costs and lower costs for issuers<sup>105</sup>
- More efficient enforcement<sup>106</sup>
- Faster and more coherent policy development<sup>107</sup>
- A single voice for Canada in international fora<sup>108</sup>

The first three listed benefits represent, essentially, cost savings — in the form of either money or time. The monetary savings may be passed along to investors or taxpayers, or the freed-up resources may be invested in better enforcement and policy development. As the Wise Persons' Committee put it, “[I]f Canada were to [centralize] its securities regulatory structure, it could have the same level of

104. See Jean Leclair, *supra*, footnote 3. Regarding the non-efficiency values engaged by federalism questions, see also Richard E. Simeon, “Criteria for Choice in Federal Systems” (1983), 8 Queen’s L.J. 131.

105. The problems with the existing system are detailed in Wise Persons’ Committee, *supra*, footnote 45, at p. 33; Crawford Panel on a Single Canadian Securities Regulator, *Blueprint for a Canadian Securities Commission* (Toronto, 2006), p. 12; Expert Panel, *supra*, footnote 21, at p. 41.

106. Crawford Panel, *ibid.*, at p. 13; Wise Persons’ Committee, *ibid.*, at p. 27.

107. Crawford Panel, *ibid.*, at p. 13; Expert Panel, *supra*, footnote 21, at p. 40; Wise Persons’ Committee, *ibid.*, at pp. 30-31.

108. Wise Persons’ Committee, *ibid.*, at p. 32; Expert Panel, *ibid.*, at p. 40, Crawford Panel, *ibid.*, at App. A, p. 2.

regulation at materially less cost, or much better regulation at the same cost.”<sup>109</sup>

We may think of the fourth benefit as the avoidance of a type of collective action problem. The premise is that there is a common Canadian interest that is less well represented in international settings than it could be because the provinces “cannot get their act together.” To some extent, it appears that the other provinces free-ride on Ontario, which alone is an active participant in the International Organization of Securities Commissions.<sup>110</sup>

Regarding these benefits, it may be observed that provincial co-operation has yielded harmonization instruments in relation to each of the “three conspicuous examples” of inefficient regulatory divergence cited by the Wise Persons’ Committee as evidence of additional compliance costs in 2003.<sup>111</sup> In addition, the enforcement problems cited by the proponents of change relate to a large extent to unpunished fraud;<sup>112</sup> it is not clear why these problems could not be remedied through an increased investment by the federal government in the enforcement of existing criminal laws.

However, it is not my main purpose in this Appendix to test the existence or magnitude of the claimed benefits.<sup>113</sup> Instead, I wish to

109. Wise Persons’ Committee, *ibid.*, at p. 34.

110. Crawford Panel, *supra*, footnote 105, at App. A, p. 2. It is not obvious to me that this free-riding involves a diseconomy; in fact, it may be a mutually beneficial arrangement. While the other provinces benefit from Ontario’s participation in international fora, Ontario enjoys the benefits of leadership — the opportunity to shape international policy in its own interest while having its own position viewed as “the Canadian position.”

111. The three examples cited by the Wise Persons’ Committee were: Differences in substantive registration requirements (but now see NI 31-103); divergences in the procedure and conditions for private placement exemptions (but now see NI 45-106); and divergences concerning resale restrictions for securities issued in connection with a takeover bid (but now see NI 45-102). Wise Persons’ Committee, *supra*, footnote 45, p. 33.

112. *E.g.*, Crawford Panel, *supra*, footnote 105, App. A, p. 2 (“fraudsters are not constrained by political boundaries”).

113. I note that a strategy adopted by the critics of unitary regulation appears to be to challenge the notion that the existing system is costly and deficient rather than answering directly the claim that better regulation could be had at lower cost. For instance, critics point to the high placement achieved by Canada in international rankings of the quality of securities regulation, and to evidence suggesting that Canadian securities regulation does not impose a higher cost burden on Canadian issuers, compared to U.S. securities regulation. *E.g.*, Pierre Lortie, “The National Securities Commission Proposal: Challenging Conventional Wisdom,” *Montreal Gazette* (May 24, 2010), available online: <<http://www.montrealgazette.com/pdf/May24-Challenging-Conventional-Wisdom.pdf>>.

identify three debatable assumptions underlying the standard case for federal legislation.

The premise of my comments is that efficiency potentially cuts both ways in federalism debates. Aggregate social welfare is maximized when citizens' preferences are maximally satisfied at least cost. On the one hand, centralization may reduce the costs of producing and administering policies.<sup>114</sup> On the other hand, these economies come at the expense of reduced fit with citizen preferences, for it is a truism that the smaller the population unit on behalf of which policies are made, the more closely the resulting policies fit the citizens' preferences.<sup>115</sup> The question, of course, is as to the relative magnitude of the costs and benefits.

It appears that a first assumption made by the proponents of unitary regulation is that the costs of centralization are negligible. Specifically, heterogeneous local preferences are assumed to be a non-issue in securities regulation; consequently, uniformity of policies across jurisdictions (including at an international level, between countries) is unambiguously desirable.<sup>116</sup> The validity of this assumption is not self-evident.

For one thing, securities regulatory policy involves a trade-off between investor protection and contractual freedom. To what extent should disclosure by issuers be mandatory and to what extent can marketplace incentives be relied upon to produce adequate disclosure? Should takeover bids be regulated in the interests of fairness, or is it better to leave the market for corporate control unfettered? There could well be different local preferences as to these matters, even if, in determining to what extent to indulge these preferences, local policy-makers must, of course, take into account the costs of diverging from what is done in other jurisdictions.

For another, decentralization enables provinces to decide for themselves what proportion of scarce public resources to devote to

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114. I write "may" because these economies may be outweighed by increases in the aggregate costs of governance. Centralization — the organization of government so that decisions are made on behalf of large collectivities rather than small ones — aggravates the collective action problems that hinder effective citizen oversight, and increases the cost of internal coordination. An analogy may be made to firms, the optimal scale of which is not infinitely large. Instead, there is a trade-off between the costs of inter-firm and intra-firm coordination. See Ronald Coase, "The Nature of the Firm" (1937), 4 *Economica* 386.

115. Gordon Tullock, "Federalism: Problems of Scale" (1969), 6 *Public Choice* 19, p. 23.

116. Wise Persons' Committee, *supra*, footnote 45, at p. 30 ("There is no legitimate reason why investors should have different protection depending on the province in which they happen to live.")

securities regulation rather than other public priorities. The Expert Panel writes of this flexibility as if it were a liability of the existing system when, in fact, it is a benefit: “[E]ach jurisdiction dedicates a different level of resources to securities regulation, which causes the intensity of policy development, supervision, and enforcement activities to vary across Canada. . . . Canadians, in turn, are afforded different levels of investor protection depending on the jurisdiction in which they reside or invest.” The undefended assumption in the Expert’s Panel’s statement is that divergence on these matters is *per se* undesirable.

A second assumption concerns the argument that centralization leads to better policy development. This assumption is counterintuitive, for it is not normally supposed that centralization is more conducive to innovation than is decentralization. Canada does not content itself with having just one research university; nor does it encourage a monopolistic market structure for its high-tech industry. Instead, we recognize that, while there are economies of scale in research and parallel research efforts result in some duplication, these considerations are outweighed by the social interest in facilitating experimentation and by the incentives for innovation that are provided by competition.<sup>117</sup>

A different model of innovation appears to underlie the argument for a unitary regulatory structure: policy development is treated primarily as the task of international bodies and foreign regulators (especially the SEC). It follows from this model that Canada’s interest lies in (1) “speaking with one voice” so that it will have input in the content of policies developed elsewhere, and (2) in implementing the resulting policies in Canada as quickly as possible. It is not obvious to me that we should rush to embrace this model of innovation.

Third and finally, I would observe that the debate about securities jurisdiction has, until the proposed Act, had a pre-Coasean flavour. By this I mean that the basic assumption has been that, if uniform legislation and a common regulatory apparatus would be efficient, then the central government should proceed unilaterally to establish them. It has not been explained why, if the provinces could save money and improve their citizens’ well-being by pooling their resources, they would not do so of their own accord.<sup>118</sup> “Coasean bargains” are far from unknown in Canadian

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117. Regarding the contribution of decentralization to policy innovation, see Robert W. Hahn *et al.*, “Federalism and Regulation: An Overview” (2003-2004), 26 *Regulation* 46, at pp. 48-49.

constitutional practice: For instance, economies of scale have led every province but Ontario and Québec to subcontract rural policing to the RCMP. Similarly, every province but Québec has entered into agreements with Ottawa for the collection of personal income tax, presumably because the administrative and compliance cost savings outweigh the value for the province of being able to use inclusions and deductions as policy levers. In Australia, the states have formally transferred power to enact corporate and securities regulation to the federal Parliament, having apparently calculated that the cost disadvantages of regulatory diversity outweigh the value of flexibility.

To be sure, the Coase Theorem suggests that transaction costs may prevent the parties (here, the provinces) from making welfare-improving bargains; such costs may create a role for unilateral action by a central planner (the federal government), after all. Nonetheless, when provinces such as Alberta and Québec have expressed strong reticence in relation to national securities regulation, the possibility should not be lightly dismissed that the reason for their opposition is that such a regime would entail more costs than benefits for those provinces. Québec, in particular, will be weighing the economic benefits of uniformity against the loss of a portion of its autonomy. Alberta may worry, on the basis of past experience, that a national policy will serve the needs of Ontario more than its own.<sup>119</sup>

The intrinsic value of autonomy returns at this point in the analysis. The respect for an individual's judgment as to his or her own welfare is a virtue of the reliance on private ordering that many have taken to be the recommendation of the Coase Theorem. Similarly, the view that Alberta and Québec should be dragged "kicking and screaming" into a national regulatory scheme, in the interests of their own citizens, sits uneasily with the principle of respecting their collective choices that is the foundation of our federal system.

It is, for this reason, a significant merit of the proposed Act, relative to the Expert Panel's recommendation, that provinces are given the option of joining the national regime if the cost savings

118. Ronald Coase, "The Problem of Social Cost" (1960), 3 *J.L. & Econ.* 1.

119. See Alberta Securities Commission, "Submission of the Alberta Securities Commission to Joint Symposium of the TSE and Capital Markets Institute on Canada's Securities Regulation System" (Toronto, March 8, 2002, S.P. Sibold, Chair) ("We have to give some serious thought to the question of whether issues that are so crucial to Alberta would be given the same prominence by a single national commission headquartered on Bay Street").

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justify the loss of flexibility and autonomy, or of declining to join the national regime if the opposite is true.