

Judging the Limits of Cooperative Federalism

Eric M. Adams

University of Alberta, Faculty of Law

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>

 Part of the [Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Adams, Eric M.. "Judging the Limits of Cooperative Federalism." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 76. (2016).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Judging the Limits of Cooperative Federalism

Eric M. Adams*

I. INTRODUCTION

I have often wondered whether the history of Canadian constitutional law might best be taught by traversing a footbridge of metaphors. In the “Two Row Wampum”¹ of treaty relations, the “compact”² of Confederation, the “watertight compartments”³ and “balance”⁴ of the division of powers, the “living tree”⁵ of the *Canadian Charter of Rights and Freedoms*,⁶ and the “architecture”⁷ of our parliamentary structures, Canada’s Constitution has found expression in constructs of the imagination as much as commands of the text.⁸ Discerning meaning from abstract constitutional provisions invariably requires a turn to external

* Associate Professor, University of Alberta, Faculty of Law, and Research Fellow, Centre for Constitutional Studies. I thank Sarah Krotz and Rachel Weary for helpful discussions, and to Sonia Lawrence and Benjamin Berger for encouraging my participation in the Constitutional Cases Conference.

¹ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 75-76. See also Mark Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History after Marshall” (2001) 24 Dal. L.J. 75.

² Norman Rogers, “The Compact Theory of Confederation” (1931) 9 Can. Bar Rev. 395. On its revival as metaphor see Sébastien Grammond, “Compact is Back: The Revival of the Compact Theory of Confederation by the Supreme Court” (2016) 53:3 Osgoode Hall L.J.

³ *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326, at 354, [1937] 1 D.L.R. 673 (P.C.).

⁴ *Reference re Firearms Act*, [2000] S.C.J. No. 31, 2000 SCC 31, at para. 4 (S.C.C.), affg [1998] A.J. No. 1028, 1998 ABCA 305 (Alta. C.A.).

⁵ *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.), affg [1983] A.J. No. 715, 147 D.L.R. (3d) 420 (Alta. C.A.) [hereinafter “*Hunter v. Southam*”] citing *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136, [1930] 1 D.L.R. 98 (P.C.), revg [1928] S.C.J. No. 19, [1928] S.C.R. 276 (S.C.C.) [hereinafter “*Edwards*”].

⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

⁷ *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21, at para. 100 (S.C.C.) [hereinafter “*Supreme Court Act, ss. 5 and 6*”].

⁸ See generally Warren J. Newman, “Of Castles and Living Trees: The Metaphorical and Structural Constitution” (2015) 9 J. Parliamentary & Pol. L. 471 and Hugo Cyr, “Conceptual Metaphors for an Unfinished Constitution” (2014) 19 Rev. Const. Stud. 1.

principles and ideas to guide interpretation and to shape a larger constitutional story of purpose.⁹ Metaphors, norms, unwritten principles and narratives will always play a crucial role in constructing meaning in Canadian constitutional law. The question is not should courts turn to constitutional metaphors to guide constitutional interpretation — they will and must as a function of the interpretive role demanded of them — but rather what is the appropriate use of such metaphors in constitutional adjudication.

The Supreme Court of Canada’s recently divided decision, *Quebec (Attorney General) v. Canada (Attorney General)*,¹⁰ is the latest chapter in a long history concerning the legal regulation of firearms in Canada,¹¹ but its lasting contribution to Canadian constitutional law may well be as a battle over the meaning of cooperative federalism. At its heart, the case poses a novel constitutional question: can federal legislation repealing an *intra vires* statute itself be *ultra vires*? The controversy arose in response to Parliament’s attempt to repeal portions of the *Firearms Act*, dismantle its registry, and destroy its records.¹² Seeking to enact a provincial firearms registry of its own, Quebec challenged the constitutionality of the federal law; specifically, the provisions providing for the destruction of data in relation to Quebec firearms owners. Among its various arguments about the *ultra vires* nature of the repeal scheme and Canada’s refusal to hand over registry information, Quebec invoked the idea of cooperative federalism as a barrier to unilateral federal action.¹³

Before contrasting the different conceptions of cooperative federalism at work in the majority and dissenting judgments, this article briefly lays out how the interpretation of constitutions, like the search for meaning within all sets of rules, necessarily engages external, often metaphorical, references. A brief sketch of Canadian constitutional history reveals the ubiquity of metaphorical constitutional thought. Despite their practical necessity in matters of constitutional interpretation, I argue nonetheless

⁹ Eric M. Adams, “Canadian Constitutional Identities” (2015) 38 Dal. L.J. 311.

¹⁰ [2015] S.C.J. No. 14, 2015 SCC 14 (S.C.C.), affg [2013] J.Q. no 6676 (Que. C.A.) [hereinafter “*Quebec v. Canada*”].

¹¹ See R. Blake Brown, *Arming and Disarming: A History of Gun Control in Canada* (Toronto: The Osgoode Society for Canadian Legal History, 2012).

¹² *Ending the Long-gun Registry Act*, S.C. 2012 c. 6, amending the *Firearms Act*, S.C. 1995, c. 39.

¹³ The Attorney General of Quebec argued in its factum: “Le refus du Canada est en contradiction ... des principes structureaux de la Constitution canadienne, dont celui du fédéralisme coopératif.” Mémoire de L’Appelant, *Procureur Général du Québec et Procureur Général du Canada*, at para. 14.

that constitutional metaphors have important adjudicative limits that must be respected. The dissenting judgment in *Quebec v. Canada* reveals the theoretical and practical difficulties of relying on what the dissent calls “the spirit of co-operative federalism”¹⁴ to generate substantive constitutional commitments. As important as metaphor is to our conception of constitutional law, we must be careful, however “strong its pull may be”, not to be swept “out to sea” in its rhetorical wake.¹⁵ Understanding the mechanics of metaphor and its power to lead, but also to lead astray, may help us to adroitly steer the ship.

II. CANADIAN CONSTITUTIONAL METAPHORS

To apply the law to concrete cases is to interpret the meaning of words and phrases. To account for the inherent indeterminacy of language, the common law has developed practices of interpretation that look to overall purpose, background context, and extra-textual principles to determine precise and particular meaning when applying statutory or judicial language to real circumstances.¹⁶ Interpreting the meaning of vehicle in light of a particular legal purpose is necessary, for example, to determine which vehicles are truly banned from the park — cars, strollers, or military monuments — to borrow the famous examples from the Hart-Fuller debate.¹⁷ If reliance on purpose, context, and principle is necessary in interpreting statutes, the need is even more pronounced in constitutional law. Constitutions, necessarily drafted “with an eye to the future”, are especially abstract and indeterminate in order to provide “a continuing framework for the legitimate exercise of governmental power”.¹⁸ In order to endure and to enhance its legitimacy as supreme law, a constitution must be capable of governing the unanticipated, the changed and the new. Drafters select abstract constitutional language and concepts — think of property, equality, or unreasonable delay — to apply broadly to future developments and, in doing so, create possibilities for multiple meanings, divergent paths, and different outcomes. External references to larger animating ideas, ideals and purposes provide context in order to narrow the

¹⁴ *Supra*, note 10, at para. 149.

¹⁵ *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66, at para. 62 (S.C.C.).

¹⁶ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 at para. 21 (S.C.C.), *varg* [1995] O.J. No. 586 (Ont. C.A.); *Reference re Supreme Court Act, ss. 5 and 6*, *supra*, note 7, at para. 63.

¹⁷ Fred Schauer “A Critical Guide to Vehicles in the Park” (2008) 83 N.Y.U.L. Rev. 1109.

¹⁸ *Hunter v. Southam*, *supra*, note 5, at 155.

ranges of acceptable meanings in order to determine, for instance, whether a constitution envisages substantive or formal equality in the entrenchment of equality rights. In this respect, constitutional metaphors are a compass to assist in reading the map of constitutional text. As a character in Zia Haider Rahman's recent novel observes, "when the ancients saw clusters of stars in the sky, they joined them up in an order that evoked a shape they already recognized, something that held a meaning for them, and into this configuration they read properties of the celestial night."¹⁹ Like ancients gazing at the night sky, judges interpret the meaning of constitutions by finding constellations of meaningful and familiar forms.

The judicial impulse to look to constitutional metaphor — to connect constitutional provisions to external images and larger systems of understanding — goes well beyond the practicalities of legal interpretation. Metaphorical thinking and expression appears intrinsic to human thought and speech alike. "[M]etaphor," I.A. Richards reminds us in his classic study, "is the omnipresent principle of language."²⁰ "[M]etaphor is pervasive in everyday life", George Lakoff and Mark Johnson elaborate, "not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature."²¹ Forming associations and patterns between the concrete and the abstract, Steven Pinker argues, is intrinsic to language, and to rational and creative human thought itself.²² "Metaphor", Jeffery Donaldson agrees, "is both a form and a process. Like electricity, it is not so much a thing as the way things behave [I]t is the root and manner of imaginative thinking."²³ Given the imperatives of lawyers and judges not only to interpret, but also to defend those interpretations and

¹⁹ Zia Haider Rahman, *In the Light of What We Know* (New York: Picador, 2014), at 40.

²⁰ I.A. Richards, *The Philosophy of Rhetoric* (Oxford: Oxford University Press, 1965), at 92 [hereinafter "Richards"].

²¹ George Lakoff & Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), at 3 [hereinafter "Lakoff & Johnson"].

²² Steven Pinker, *How the Mind Works* (New York: W.W. Norton & Co, 1997). As Pinker explains elsewhere, "Conceptual metaphors point to an obvious way in which people could learn to reason about new, abstract concepts. They would notice . . . a parallel between a physical realm they already understand and a conceptual realm they don't yet understand." Emphasizing the ability to make and comprehend metaphor as a key evolutionary step in human intelligence, Pinker asks us to imagine the power when the mental mechanics of basic reasoning "cut themselves loose from actual hunks of matter The cognitive machinery that computes relations among things, places, and causes could then be co-opted for abstract ideas. The ancestry of abstract thinking would be visible in concrete metaphors, a kind of cognitive vestige." *The Stuff of Thought: Language as a Window Into Human Nature* (New York: Penguin, 2007), at 241-42.

²³ Jeffery Donaldson, *Missing Link: The Evolution of Metaphor and the Metaphor of Evolution* (Montreal & Kingston: McGill-Queen's University Press, 2015), at 9.

persuade others of them, it is no surprise that metaphor — with its succinct ability to capture and convey an idea visually, creatively and memorably — often plays a central role in law as in all rhetorical fields.

The need for judges to invoke larger animating ideas and principles in division of powers jurisprudence — often expressed metaphorically — was apparent from the outset. In *Parsons*, still cited for its influential definitions of property and civil rights and trade and commerce, Sir Montague Smith conceded that the literal meaning of the words of sections 91(2) and 92(13) alone could not provide an answer.²⁴ Rather, he averred, constitutional interpretation must draw meaning from what he later termed the “general scheme of the *British North America Act*”²⁵ and the larger purposes and legislative intentions that it evidenced.²⁶ The meaning and scope of individual heads of power could only be realized when understood collectively as a system, a division of powers, a federalism in which each head of power must exist in combination with the others. Interpretations of particular heads of power came to presuppose the continued and essential existence of the other heads of power in order to protect an essential balance of both federal and provincial power.

It was precisely the spirit of that overall federal scheme that supported the Privy Council’s confident assertion in *Hodge* that the “true character and position of the provincial legislatures” was one of coordinate autonomy and equal supremacy to that of the federal government.²⁷ In the period before the Privy Council’s vilification at the hands of progressive nationalists like Bora Laskin and Frank Scott,²⁸ its federalism jurisprudence was praised by Canada’s leading constitutional scholar and historian, W.P.M. Kennedy, for “gradually bringing to light the essentially federal nature of the Canadian Constitution”, and for “humanizing” the Constitution “with the elasticity of life”.²⁹ Interpreting the constitutional division of powers has always signalled more than a mechanical allocation of power: it expressed and drew upon an abstract idea and ideal of Canada; a lens through which the provisions of the text

²⁴ *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.).

²⁵ *Russell v. The Queen* (1882), 7 App. Cas. 829, at 836 (P.C.).

²⁶ *Supra*, note 24.

²⁷ *Hodge v. The Queen* (1883), 9 App. Cas. 117, at 132 (P.C.).

²⁸ R.C.B. Risk, “The Scholars and the Constitution: POGG and the Privy Council” in R.C.B. Risk, *A History of Canadian Legal Thought: Collected Essays*, G. Blaine Baker & J. Phillips, eds. (Toronto: The Osgoode Society for Canadian Legal History, 2006), at 233.

²⁹ W.P.M. Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (Oxford: Oxford University Press, 1922), at 422, 431.

could be read with greater clarity; a constitutional ideal that eventually found succinct expression in the metaphor of balance.

On many occasions, the broader constitutional ideas judges turned to found their greatest resonance when framed as metaphors. Lord Sankey did so most famously in declaring that the Constitution had “planted in Canada a living tree capable of growth and expansion within its natural limits”³⁰ just a few years before Lord Atkin reminded that the “ship of state” still retained “the watertight compartments which are an essential part of her original structure”.³¹ Whether in approbation or derision, both images have proved indelible in Canadian constitutional law and culture. It is the metaphors that we remember and quote after the particular facts and holdings of the cases that gave rise to them have faded. Indeed, the particular power of such metaphors gave Lord Sankey pause. In the *Aeronautics Reference*, though he again insisted that constitutional interpretation required consideration of the “foundation upon which the whole structure was subsequently erected”, he cautioned that there was “always a danger that in the course of this process the terms of the statute may come to be unduly extended and attention diverted from what has been enacted to what has been judicially said about the enactment.”³² This tension between constitutional words on the page and constitutional images in the mind has been an enduring dynamic in Canadian constitutional law. The challenge, as it turns out, has not been in conjuring a suitable roster of constitutional metaphors, but in controlling their capacity to reshape the constitutional text from which they emerge.

As we have seen, the division of powers already possessed basic normative content by the time the term “federalism” itself began to appear in Canadian legal decisions. Perhaps not surprisingly, Rand J. was the first to use the expression in any Canadian court (although use of the term federalism had been common in constitutional scholarship and the political science literature for decades). In *Saumur*, Rand J. opined that legislation must be “sufficiently definite and precise to indicate its subject matter” in order for courts to determine its constitutionality. “That principle”, he noted, “inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred

³⁰ *Edwards, supra*, note 5, at 136.

³¹ *Canada (Attorney General) v. Ontario (Attorney General)*, *supra*, note 3, at para. 15.

³² *Reference Re Regulations and Control of Aeronautics*, [1932] A.C. 54, [1932] 1 D.L.R. 58, at 70 (P.C.), revg [1930] S.C.J. No. 35 (S.C.C.).

which would end the division of powers.”³³ Federalism, in addition to creating relations between levels of government, also operated as a check on potential governmental abuse of power. Justice Rand extended this conception of federalism in the implied bill of rights jurisprudence in the decade that followed. In a series of cases, Rand J. framed the Canadian Constitution as a “pattern of limitations, curtailments and modifications” designed to protect a never fully defined roster of individual rights and freedoms.³⁴ Although the substantive contributions of Rand J.’s implied bill of rights never fully took hold and were certainly eclipsed by the Charter, the language of *federalism* did survive, a permanent reflection of the idea that the division of powers embodied a larger vision of democracy, diversity and good governance.

While the prominent place of unwritten principles in the *Secession Reference* surprised many observers, the identification of federalism among the four foundational features of constitutionalism recognized by the Court did not. “The principle of federalism”, the Court explained, “recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments” while facilitating “democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.”³⁵ Those values, the Court argued, although not altogether visible in “the written provisions of the Constitution”, provided the “light” by which the text should be interpreted.³⁶

But federalism has always been capable of an array of descriptive and normative qualities, its precise calibration of powers subject to reasonable disagreement. Even apart from the often different shades of meaning and characteristics of federalism in scholarship and political thought emanating from English and French Canada, political scientists have described a range of different kinds of federalism (open, asymmetrical, executive, collaborative, to name only a few), each with

³³ *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 333 (S.C.C.), revg [1952] B.R. 475 ext (Que. Q.B.). A year later, Rand J. held: “The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism”: *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.J. No. 14, [1954] S.C.R. 207, at 216 (S.C.C.), affg [1953] 3 D.L.R. 594 (B.C.C.A.).

³⁴ *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 303 (S.C.C.), revg [1954] B.R. 421 (Que. Q.B.). See generally, Eric M. Adams “Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture” (2010) 55 McGill L.J. 437.

³⁵ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 58 (S.C.C.).

³⁶ *Id.*, at para. 55.

distinct properties and political ramifications.³⁷ Into this complex of labels emerged the idea of “cooperative federalism”, a genial-sounding description premised on federal and provincial governments working collectively to achieve mutual policy objectives. It did not take long for cooperative federalism to migrate from descriptive political science into normative constitutional law. Others have well canvassed the concept’s introduction and rise to prominence, starting with Laskin C.J.C.’s response to an intervener argument in the *Anti-Inflation Reference* that “[c]o-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it.”³⁸ In the 40 years since, Laskin C.J.C.’s instinct that cooperative federalism was simply a matter of legislative practicalities and not law has been difficult to sustain. While continuing to recognize that much of the nature of the relationship between the federal and provincial governments lies beyond judicial concern, the Supreme Court also recognizes that “constitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism’”.³⁹ In *Reference re Securities Act*, a unanimous Court noted that the growing “practice” of “seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts” had become the “animating force” of the “federalism principle upon which Canada’s constitutional framework rests”.⁴⁰ Indeed, Hugo Cyr argues that Canadian federalism in any meaningful sense must be synonymous with cooperative federalism.⁴¹ “Today’s constitutional landscape”, Abella J. writes, “is painted with the brush of co-operative federalism.”⁴²

Less obviously than living trees and watertight compartments, cooperative federalism is a metaphor too. Federalism — itself an

³⁷ On various stages and types of federal arrangements in the post-war period see David Cameron & Richard Simeon, “Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism” (2002) 32:2 *Publius: The Journal of Federalism* 49.

³⁸ *Re: Anti-Inflation Act (Canada)*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 421 (S.C.C.). See Wade Kenneth Wright, *Beyond Umpire and Arbitrator: Courts as Facilitators of Intergovernmental Dialogue in Division of Powers Cases in Canada* (S.J.D. Thesis, Columbia University, 2014) [unpublished]; Warren J. Newman, “The Promise and Limits of Cooperative Federalism as a Constitutional Principle” in B. Berger & S. Lawrence, eds., *Constitutional Cases 2015* (2016) 76 S.C.L.R. (2d) 67.

³⁹ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, at para. 24 (S.C.C.), affg [2005] A.J. No. 21 (Alta. C.A.).

⁴⁰ *Reference re Securities Act*, *supra*, note 15, at paras. 132-33.

⁴¹ Hugo Cyr, “Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism” (2014) 23 *Const. Forum Const.* 20.

⁴² *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] S.C.J. No. 45, 2010 SCC 45, at para. 67 (S.C.C.), affg [2008] B.C.J. No. 1611 (B.C.C.A.).

abstraction of an allocation of powers to different levels of government — is neither cooperative nor uncooperative. It just is. Describing federalism as cooperative personifies it with human characteristics — acts of agency, kindness, consideration, mutuality, respect. It animates the inert with life while reframing the concrete (federalism) with an evocative external image (cooperation). As Lakoff and Johnson explain, personifications, as a subset of metaphor, “make sense of phenomena in the world in human terms — terms that we can understand on the basis of our own motivations, goals, actions, and characteristics.”⁴³ The word metaphor is itself metaphorical. Derived from the Greek, metaphor means “to ferry over” — and the transportation of meanings is what an apt metaphor can so brilliantly and succinctly accomplish.⁴⁴ “[T]he greatest thing by far,” Aristotle writes, “is to be a master of metaphor. . . . since a good metaphor implies an intuitive perception of the similarity in dissimilars.”⁴⁵ Metaphor does more than simply recognize existing similarities. More powerfully, in many cases “the metaphor *creates* the similarity.”⁴⁶ A constitution, quite obviously, is not a tree at all, but it *seems* more like a living tree after it is called one. This power of making meaning means that, in the constitutional context, metaphors must be approached with care. This is not a call to dispense with constitutional metaphors, but rather to fully respect them. To do so means paying closer attention to how they operate, and the role of their components in constitutional analysis.

In addition to noting the ubiquity and salience of metaphor, philosophers and literary theorists have long recognized that metaphors consist of two essential parts. These two parts have gone by a variety of labels, perhaps most influentially I.A. Richards’ description of the tenor and vehicle.⁴⁷ The tenor operates as the principal subject, the vehicle as the object or idea of comparison. In constitutional metaphor, a particular constitutional provision or feature (or, at times, the entire constitution itself) serves as the tenor, the image of comparison as the vehicle. In the metaphor that our Constitution is a living tree, the Constitution is the tenor and the tree is the vehicle. The danger foreseen by Lord Sankey

⁴³ Lakoff & Johnson, *supra*, note 21, at 34.

⁴⁴ Stephen Adams, *Poetic Designs: An Introduction to Meters Verse Forms and Figures of Speech* (Peterborough, ON: Broadview Press, 2003), at 133.

⁴⁵ Aristotle, *Poetics* (London: Aeterna Press, 2015), at 22.

⁴⁶ Max Black, “Metaphor” (1954-55) 55 *Proceedings of the Aristotelian Society* 273, at 285 [emphasis in original].

⁴⁷ Richards, *supra*, note 20, at 97.

was that in subsequent cases, lawyers and judges would come to focus on the meaning, scope and import of the vehicle at the expense of the tenor. Imagine a case in which in trying to determine whether a particular enactment was part of the Constitution, a court became concerned with whether or not the enactment metaphorically resembled the branch of a tree. Cooperation may be a useful way to understand the ideal qualities of federalism, but judges will fall into error if, in attempting to apply the division of powers, they insist on a precondition of cooperation. To do so switches the constitutional focus from tenor to vehicle. As I have argued, constitutional metaphors are indispensable for understanding constitutional text, but it is essential that the separation between text and its guiding metaphorical images remain robust. Judicial review, as La Forest J. reminded, “is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument” and not, application of the vehicle of a constitutional metaphor.⁴⁸

III. COOPERATIVE FEDERALISM IN *QUEBEC V. CANADA*

The nature and adjudicative impact of cooperative federalism occupies a central place in the decisions at all levels of court in Quebec’s constitutional challenge to Parliament’s *Ending the Long-gun Registry Act*.⁴⁹ At the outset of the constitutional analysis in the trial decision, Blanchard J. writes that “to facilitate ‘cooperative federalism’, the constitutional boundaries underlying the division of powers must prevail so as not to erode the constitutional balance between federal and provincial powers.”⁵⁰ Noting that in the *Secession Reference* the Supreme Court held that “underlying constitutional principles may in certain circumstances give rise to substantial legal obligations, which constitute substantial limitations upon government action,” Blanchard J. opined that “one of the keys to resolving this dispute can be found in the answer to the following question: Does the fact that Canada has announced that it wishes to prevent Quebec from using the [federal gun registry] data violate these principles?”⁵¹ Drawing particular attention to statements in Parliament by Ministers of the Crown, including the Prime Minister, indicating an “avowed intention” to prevent other levels

⁴⁸ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 315 (S.C.C.), revg [1995] M.J. No. 170 (Man. C.A.).

⁴⁹ S.C. 2012, c. 6.

⁵⁰ *Quebec (Attorney General) v. Canada (Attorney General)*, [2012] J.Q. no 8319, 2012 QCCS 4202, at para. 53 (Que. S.C.), revd [2013] J.Q. no 6676 (Que. C.A.).

⁵¹ *Id.*, at paras. 95, 97.

of government to establish gun registries, the trial judge found a direct interference with the principles of cooperative federalism. “Since the Supreme Court of Canada has urged Canadian legislators to adopt a flexible and cooperative approach to federalism based on pragmatic lawmaking”, Blanchard J. concludes, “it is clear that ... Parliament has acted in direct opposition to this teaching.”⁵² Cooperative federalism, in Blanchard J.’s handling, provides more than interpretive guidance, but also supplies direct substantive obligations. On the basis of the breach of those obligations, as well as his characterization of the pith and substance of the federal legislation as a colourable invasion of property and civil rights, Blanchard J. found the provision of the federal enactment purporting to destroy firearms records from Quebec *ultra vires* and of no force and effect. He ordered Canada to transfer specific gun registry data to Quebec within 30 days.

A unanimous bench of five judges of the Quebec Court of Appeal allowed the appeal.⁵³ In doing so, the Court of Appeal took an entirely different view of the role of cooperative federalism in division of powers cases. On the more direct question of the legislation’s constitutionality, the Court of Appeal held that the repeal of valid federal legislation and the destruction of records created under it must, by definition, equally fall within federal jurisdiction. “Since the impugned Act does nothing more than abolish a scheme that was constitutionally valid”, the Court reasoned, “it cannot encroach any further on provincial jurisdiction than did the statute that created and implemented the scheme in the first place.”⁵⁴ That such federal action was impolitic, wasteful and inconvenient to a province was of no constitutional moment. “If there is a price to be paid for enacting a statute that could engender pointless costs for another level of government”, the judges held, “it is to be paid at the polling booths and not before the courts.”⁵⁵ The Court specifically rejected the trial judge’s conception and use of cooperative federalism. “As a principle of interpretation”, the Court held, “it cannot, in itself,

⁵² *Id.*, at para. 144. “The Court emphasizes that it is not rendering a political judgment”, Blanchard J. clarified in anticipation of criticism, “as it has no authority to do so. Rather, it states a legal observation based on Canadian constitutional legal rules and principles” (at para. 145).

⁵³ *Canada (Attorney General) v. Quebec (Attorney General)*, [2013] J.Q. no 6676, 2013 QCCA 1138 (Que. C.A.), affd [2015] S.C.J. No. 14 (S.C.C.).

⁵⁴ *Id.*, at para. 49.

⁵⁵ *Id.*, at para. 35. Echoing Major J.’s admonishment a decade earlier that “the appellants’ arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.” *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC 49, at para. 66 (S.C.C.), affg [2004] B.C.J. No. 1007 (B.C.C.A.).

modify the division of powers. . . . Only the provisions of the *Constitution Act, 1867* dividing areas of jurisdiction between Parliament and the provincial legislatures can ground a judgment of constitutional invalidity based on the division of powers.”⁵⁶ For the Quebec Court of Appeal, cooperative federalism might be an important principle of Canadian constitutional law, but that did not transform it into a set of enforceable constitutional obligations, the breach of which gave rise to constitutional remedies.

Quebec’s appeal to the Supreme Court of Canada also turned on the Court’s understanding of cooperative federalism and its limits. The majority and dissenting judgments part company on the extent and ramifications of the federal-provincial partnership involved in the federal gun registry, but also set out two distinct visions of cooperative federalism and its operation in Canadian constitutional law. My focus is on the latter divergence. I begin with the dissent authored by LeBel, Wagner and Gascon JJ. joined in concurrence by Abella J. The dissent is notable for unifying all three of the Court’s members appointed from Quebec, a fact which might suggest a greater and more troubling schism along provincial lines if it were not for the unanimous judgment of five judges of the Quebec Court of Appeal which disagreed with them. Emphasizing that the degree of administrative integration and cooperation among governments in the creation, maintenance, and use of the long gun registry created a “novel circumstance”, the dissent held that “our analysis must be guided by the Constitution’s unwritten principles”, particularly, “the principle of federalism and its modern form — co-operative federalism.”⁵⁷ Given that cooperative federalism “reflects the realities of an increasingly complex society that requires the enactment of coordinated federal and provincial legislative schemes”, the dissenting judges stated that “our courts must protect such schemes both when they are implemented and when they are dismantled.”⁵⁸ In short, if cooperative federalism made the scheme possible in the first place, then only by complying with the spirit of cooperative federalism may such an arrangement be repealed.

Although the dissent ultimately employed a traditional division of powers analysis utilizing — pith and substance, classification and the ancillary doctrine to ground its decision,⁵⁹ significant portions of the

⁵⁶ *Id.*, at para. 52.

⁵⁷ *Supra*, note 10, at para. 151.

⁵⁸ *Id.*, at paras. 148, 152.

⁵⁹ See Paul Daly, “Dismantling Regulatory Structures: Canada’s Long-Gun Registry as Case Study” (2014) 33 N.J.C.L. 169.

judgment appear to join with the trial judge in elevating cooperative federalism into a substantive constitutional obligation: to hold governments to a constitutional duty to act cooperatively. The precise parameters of that obligation and its requirements are somewhat unclear, but the dissent states that “the dismantling of a partnership . . . *must* be carried out in a manner that is compatible with the principle of federalism that underlies our Constitution.”⁶⁰ Elaborating slightly, the dissent suggests that “a co-operative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner’s heads of power into account.”⁶¹ This obligation attaches even in situations, as in this case, without the presence of an interlocking legislative scheme where both levels of government are exercising valid legislative authority under the double aspect doctrine.

In what follows I raise several concerns with using cooperative federalism in this manner, not the least of which is the absence of authority for such obligations in the division of powers themselves. In addition to diverting judicial attention from constitutional text to constitutional metaphor, the principle of cooperative federalism provides no workable or predictable standard of enforcement and muddies the separation of powers. Ironically, its increased use judicially may also have the perverse incentive of reducing cooperation politically.

Judges will not be able to adjudicate in any predictable fashion a constitutional duty to act cooperatively, and will tend to extend them beyond their appropriate role under the separation of powers.⁶² What actions give rise to the breach of the duty of cooperative federalism or are required to satisfy its terms? The answer to either question is uncertain and probably unknowable. The dissent only suggests that legislatures take “into account the reasonably foreseeable consequences” on the other level of government, or that governments “be aware of the impact of that legislation or provision on the other partner’s exercise of its powers” in order to be judged to have

⁶⁰ *Quebec v. Canada*, *supra*, note 10, at para. 153 [emphasis added].

⁶¹ *Id.*, at para. 154.

⁶² There is, perhaps, a telling slip in para. 154, *supra*, note 10, of the dissent. In noting the necessity of protecting the “constitutional balance that protects the principle of federalism”, the dissenters write: “The concern here is not to alter the separation of powers in our Constitution through the application of co-operative federalism, but to ensure that it is respected.” I think it almost certain that the sentence should refer to the “division of powers” rather than the separation of powers. The irony is that the strict judicial enforcement of cooperative federalism while potentially solicitous of a particular vision of federalism *does* undermine the separation of powers, an equally crucial unwritten principle of Canadian constitutional law.

acted cooperatively.⁶³ Constitutional standards overly reliant on other (equally imprecise) abstractions tend not to yield predictable or satisfying jurisprudence, as the experience with employing the infringement of human dignity within the legal test for equality rights under section 15 of the Charter illustrated.⁶⁴ Judging whether such standards are met proves unworkably subjective, and, more problematically in this instance, will compel judges to evaluate an array of political behaviours, policy choices and intergovernmental relationships best left to the exclusive domain of the political process.

Faced with the prospect of being unable to alter or repeal a scheme judged to trigger these additional constitutional duties, governments may choose to forgo administrative cooperation in the first place to avoid limitations on their future legislative capacities.⁶⁵ Although the dissent proceeds on the assumption that such cooperative arrangements are rare, information sharing and coordination across government administrative schemes seems only likely to increase. Indeed, the rise of cooperative federalism as an interpretive doctrine was premised on making such coordination possible in order to deal with the overlapping realities of many subjects demanding legislative attention. Perhaps in its particulars the federal gun registry was “novel”, but the regulation of firearms is hardly unique in its engagement of multiple levels of government jurisdiction. From health care and education, to transportation and scientific research, to labour mobility and environmental standards, it is difficult to think of many subjects that do not possess both national and local dimensions, and which might not benefit from administrative regulation drawing upon multiple levels of government involvement. Data collected under the authority of *intra vires* legislation dealing with these subjects will almost always be of use or benefit to the other level of government.⁶⁶ The dissent’s substantive conception of cooperative federalism suggests a diminished capacity of government to control the data of their valid administrative schemes wherever there has been cooperation in collecting it. The dissent raises the prospect of a troubling legislative vacuum, a situation in which such data could not be fully

⁶³ *Id.*, at para. 153.

⁶⁴ See *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, at para. 21 (S.C.C.), affg [2006] B.C.J. No. 1273 (B.C.C.A.).

⁶⁵ *Id.*, at para. 20.

⁶⁶ Think of federal information relating to employment collected under s. 91(2A) Unemployment insurance, or the vast array of information collected under s. 91(6) The Census and Statistics.

controlled by either level of government. Cooperative federalism arose specifically to deal with the fact of overlapping constitutional powers and subjects of governmental concern that spanned both provincial and federal jurisdictions. Accordingly, courts developed an approach to federalism and its doctrines (pith and substance, paramountcy, ancillary and interjurisdictional immunity) which, instead of rigidly policing boundaries between levels of government, came to accept the exercise of legislative jurisdiction that might have impacts within the other level of government's jurisdiction. The dissent proposes a substantive conception of cooperative federalism which transforms its function from enabling the exercise of jurisdiction to fundamentally impairing it.

The majority reasons of Cromwell and Karakatsanis JJ. (with support from McLachlin C.J.C., and Rothstein and Moldaver JJ.), appear alive to several of these concerns. For the majority, cooperative federalism describes a *fact* about concurrency, and exists as a principle that gives rise to a permissive flexibility when interpreting the scope of sections 91 and 92.⁶⁷ In this view, cooperative federalism is a ripple in the surf of the dominant tide of federalism. Suggesting that a different result may attend to “a truly interlocking federal-provincial *legislative* framework”, the majority held that nothing in the nature of the particular scheme at issue or in cooperative federalism generally impaired the ability of the federal government to destroy records created under its legislative authority, even though some of those records had been produced with assistance from other levels of government.⁶⁸ “The principle of cooperative federalism”, the majority held, “cannot be seen as imposing limits on the otherwise valid exercise of legislative competence.”⁶⁹ In emphasizing instead the primacy of the written constitutional text, the majority stressed that cooperative federalism could not mandate an obligation on governments to cooperate, be cooperative, or prohibit actions which might hinder cooperation. Beyond the flexible constitutional strictures imposed by sections 91 and 92 of the *Constitution Act, 1867*, the majority implied, relations between governments (cordial or aggressive, magnanimous or obstreperous) were political matters to be executed and evaluated by other actors (politicians and public servants, media and voters) within Canada's constitutional culture. Voters can and do reward

⁶⁷ Of course, a unanimous Supreme Court has also stressed that a flexible and permissive interpretation of the division of powers cannot overwrite the jurisdictional lines that do and must exist between the various heads of power: *Reference re Securities Act*, *supra*, note 15.

⁶⁸ *Quebec v. Canada*, *supra*, note 10, at para. 4.

⁶⁹ *Id.*, at para. 19.

and punish the behaviour of governments, including on the basis of perceptions of government relations within the federation. The constitutional freedom to act uncooperatively may, in fact, yield the best protection of cooperative federalism in the form of electoral punishment and reward from the voting public.

IV. CONCLUSION

It is possible that the Supreme Court's more recent decision in *Rogers Communications Inc. v. Châteauguay*,⁷⁰ reveals that the gap in the approach to cooperative federalism between the majority and the dissent may have since narrowed. Writing for a majority of eight justices, Wagner and Côté JJ. agreed with Gascon J.'s partially concurring reasons that "when the courts apply the various constitutional doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels."⁷¹ Citing *Quebec v. Canada*, however, the majority emphasized that cooperative federalism "can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority."⁷² Justice Gascon alone appeared to argue for a more substantive conception of cooperative federalism capable of curbing the exercise of jurisdictional authority.⁷³ In retrospect, the dissent in *Quebec v. Canada* may stand as the high-water mark in the use of cooperative federalism to reshape the division of powers and their constitutional adjudication in its image.

And yet we would not want to live in a world without constitutional metaphors like cooperative federalism. To be governed by the rule of law is to live by the power of words and imagination, and the words of the Constitution, as we have seen, often take shape and meaning with the use of contextual metaphors. Constitutional metaphors serve a functional purpose too — to make law memorable, relatable and intelligible, not only to its practitioners but to the broader public as well. And, as I have

⁷⁰ [2016] S.C.J. No. 23, 2016 SCC 23 (S.C.C.).

⁷¹ *Id.*, at para. 38.

⁷² *Id.*, at para. 39.

⁷³ *Id.*, at para. 93. Reminiscent of the approach adumbrated by the dissent in *Quebec v. Canada*, Gascon J. writes: "If for no other reason than to respect Parliament's legislative choice to require collaboration in the process for determining where to locate radiocommunication equipment, it seems to me that it would be appropriate to adopt an analytical approach that favours co-operation between municipalities and businesses rather than one that risks making such co-operation difficult or impossible" (at para. 110).

argued, constitutional metaphors and other external references provide judges and political actors with the guidance required to select among interpretive alternatives. This is not to say that constitutional metaphors are always equally useful or germane. Their emergence and ascendancy, like their downfall, reflect moments in time in our constitutional culture and law, just as they help to shape and produce that law and culture. Like other features in our constitutional life they are contestable and contested, shifting and changeable. Particular metaphors will come and go as they form, change shape, break up, and recede as winter ice on the lake.

Cooperative federalism has captured political and legal imaginations alike. From Laskin C.J.C.'s initial offhand reference, to its dominant position as a guiding principle in division of powers jurisprudence today, cooperative federalism appealingly combines several aspirational goals: equal and coordinate levels of government, flexible and permissive interpretation of the division of powers, and respectful cooperation in service of collective goals. Perhaps because of its particular allure we need to be careful not to mistake the compass for the map, the constellations for the stars, the vehicle for the tenor in our constitutional analysis. As useful and necessary as external references are to constitutional navigation, it is the text that must continue to define judicially enforced constitutional obligations. The Canadian Constitution is, of course, more than inscribed words on the page, but its broader life, culture, and principles — its underlying ideas and their metaphors — are the avenues of negotiation, politics and pluralism of a healthy democracy. “If human rights and harmonious relations between cultures are forms of the beautiful”, the poet and constitutional scholar Frank Scott wrote, “then the state is a work of art that is never finished.”⁷⁴ Constitutional metaphors are destined to remain an integral part of Canada's constitutional canvas. So too must vigilance that they not dominate the painting.

⁷⁴ Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), at ix.

