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“The Federal Ideal.  
Empirical and Normative  
Explorations.”

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François ROCHER

### **“The Federal Ideal. Empirical and Normative Explorations.”**

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#### ***Introduction***

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The literature on Canadian federalism is characterized by two particular phenomena. First, Quebec Francophone scholars have, in large measure, attempted to illustrate that the spirit which marked the adoption of a federated state in Canada has been betrayed. Federal initiatives are invariably judged by these authors to be contrary to the initial division of powers. Conversely, scholars from English Canada have dealt with more pragmatic questions. Their approach to political institutions has been influenced by three dominant questions. On one hand, they have studied the links between federalism and democracy. On the second hand, they have explored the capacity of governments to develop public policies responsive to the needs of their citizens. Finally, they have focused on federalism as a way to manage Canada's diversity and reduce tensions by giving territorially concentrated minorities control of institutions which would allow them to protect and promote their distinctive features. In this presentation, I would like to argue that a third perspective has been absent from the reflections on federalism in Canada in the sense that the principles and normative dimensions of



federalism are rarely discussed, at least compared to studies on federalism's political and institutional dimensions.

The modes of representation of federalism and its ideals have not solicited much attention. Without suggesting that the idea of federalism should determine its practice, it is important to recognize that representations are crucial bases for the evaluations that we make.

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### ***1. Federation, Federalism, Federal Society : From Organizational Principle to Normative Model***

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Federalism is foremost conceived of as a mode or principle of institutional organization. However, the concept of federalism also refers to the principle, the idea and the belief upon which the federal system is built.

The taking into account of the normative dimensions of federalism carries with it practical consequences that are important to mention before we start. The notion of federalism refers to both the collection of federal institutions and the collection of principles which must precede the putting into place of these institutions. In this regard, the analysis of federalism cannot only pay attention to the organization of power. Rather, it requires a detour for the exploration of ideas, representations, values and ideals. What philosopher Daniel Weinstock calls the normative justification of federalism consists of examining the desirability of the values that a federal system of government allows to be realized. This justification contrasts with another justification, which is purely instrumental, in which the choice of a federal system is only the fruit of a calculation of the advantages to be obtained and the relations of forces which are present. It is also a question of attitude.

The power of a central structure is not and should not be absolute. Rather, it must co-exist with the autonomy of federated entities. The recognition of autonomy must be substantial enough to permit groups participating in a federation to manage their own affairs with the means at their disposal. In summary, it is not the majority who governs the minorities, but the minorities who are self-governing. The federation

organizes this heterogeneity and does not oblige the "minorities" to bow to demands defined by the general government. The sharing of powers guarantees the autonomy both of the federated entities and the general government. It presupposes that federated entities are exempt from all guardianship by and hierarchal links with the general government. The notion of non-subordination comes from this conception of a lack of guardianship and, thus, liberty within the areas where the federated government is presumed to be autonomous.

The autonomy and the multiplicity of powers within the federated governments and the general state should be balanced by the necessity to establish reciprocal contacts. The federation organizes this solidarity through common institutions. The imperative of autonomy is tied to the requirement of cooperation and participation.

Further, federated communities should be conscious of the fact that the decisions that they make, even within their own sphere of autonomy, could affect the other communities constitutive of the federal space. This interdependence obliges the putting in place of mechanisms to [37] ensure dialogue and cooperation among the federated communities (horizontality) and between the federated communities and the general government (verticality).

Federalism calls for a collective transformation of societal consciousness. For Elazar, "the first step is a shift of minds of men from thinking statist to thinking federal. Once begun, the possibility for combining various arrangements of different degrees of scope and intensity has wide limits". Thus, for the federal experiment to function well, it is required that the different federal components (states, groups, collectivities) abandon the idea that a concentration of power constitutes the best way to govern. In other words, a federal culture has to be valorized, promoted and respected. Federalism, like all other forms of government, constitutes a response to the values present in societies characterized by diversity and pluralism. While federalism cannot be reduced to bargaining, its study should include that of the negotiation process. Societies claiming to be federal can call upon a diversity of political arrangements but these must reflect the diversity out of which the society is constituted. Therefore, while the political act which directs a society towards the federal style of organization could be guided by economic or military considerations, or is the result of a "reasonable marriage" to use Maurice Lamontagne's expression, the

ultimate success of federalism depends on the correlation which exists between governmental structures and social consensus. Thus, the management of territorially defined social cleavages - whether of an ethnic, cultural, linguistic or religious nature - becomes a major preoccupation.

\* \*  
\*

These general institutional and normative considerations allow us to put into focus four aspects that will illuminate our path to understanding the evolution of the federal idea in Canada. First, in a federal state, structures and attitudes are closely connected. There must be a level of congruence between the mode of organization and societal values.

Second, the presence of several orders of autonomous governments, and more generally a federal culture, implies both a double loyalty and a shared identity. Loyalty expressed towards the general state, which coordinates solidarity, is as important as the reinforcement of the autonomy of the constitutive groups of a federation.

Third, the federal order, which encompasses a multiplicity of powers which are both autonomous and interdependent, cannot be definitive. It is important to mention that the federation evolves not only because it is [38] exposed to internal conflicts, but because it permits the expression and affirmation of such internal conflicts.

Fourth, the significance accorded to normative principles in relation to institutional arrangements underlines the importance of the function of legitimacy. Federal legitimacy is, in large measure, dependent upon the capacity to reflect normative principles. Moreover, federal legitimacy is reinforced by the necessary linkage between the presence of a federal culture and the institutions which nourish it. The absence of either a federal culture or the institutions to sustain that culture could only plunge the federal political regime into a profound crisis. This crisis would not take the form of disagreements over certain choices but the fundamental questioning of the conditions which allow the continuance of the federal political community.

## ***2. The Evolution of the Canadian Political System or the Negation of the Federal Ideal***

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It is my argument that the contemporary representations of federalism have been consistently articulated for several decades. In Quebec, the dominant understanding of federalism and federal institutions has its origins in the Tremblay Report, named for the president of the Quebec provincial government's Royal Commission on Constitutional Problems, published in 1956. Since then, while evidently being adapted for particular political conjunctures, the Quebec-Canada debate has taken place almost exclusively within the argumentative framework set out in the report. Similarly, English Canadian literature on federalism, as well as the practice of federalism by the general government, follows the argumentation advanced by the Rowell-Sirois Commission, named for co-presidents of the Report of the *Royal Commission on Dominion-Provincial Relations*, which published its report in 1940.

These two documents have shaped the manner in which intergovernmental relations and citizen-state relations are understood in Canada. The reasoning that we find in these reports has nurtured the way in which political actors and intellectuals have understood the evolution of the Canadian federal system and have interpreted the key events, such as the putting into place of the Canadian welfare state ; the constitutional debate which culminated in the repatriation of the Constitution of Canada, which included a Charter of Rights and Freedoms and an amending formula ; the saga of the Meech and Charlottetown Accords ; the creation of NAFTA (inspired by the recommendations of the Macdonald Commission) ; and more generally, the diminishing role of the general government which paralleled the increasing power of the provinces. The representations of federalism contained in the Rowell-Sirois and Tremblay reports, as well [39] as the understanding that flows from these reports, do not respect the ideal and normative federal project articulated within the above triptychs that have as their central element the twin notions of autonomy and interdependence. The dominant understanding of the English Canadian literature on federalism pays no heed to the notion of

autonomy in favor of the notion of efficiency, while Quebec Francophone scholars and the practices of the Quebec provincial government have not adequately taken into account the notion of interdependence. If the institutional problems concerning the functioning of the federal system which are raised in the literature are often pertinent, the understanding of such problems is embedded in a mode of thought which leaves little place for a federal conception of the nature of relations that should characterize a federation.

### *2.1. A Double Obsession : Pact and Autonomy*

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The work on the evolution of federalism emanating from Francophone Quebec emphasizes the Canadian federal regime's invariably centralizing character and desires the rehabilitation of the original federative idea. This interpretation must recognize the fact that the political regime put in place in 1867 was not completely federal and, in fact, subordinated the provinces to the general government. The political regime of 1867 did not respect the principle of autonomy of the provinces nor did it permit the provinces to participate in the decisions taken by the general government. Essentially, the above interpretation follows the principal arguments of the Tremblay Commission and adapts them to contemporary realities.

The definition of federalism for the authors of the Tremblay Report was explicitly inspired by the classic works of Albert Dicey, Kenneth C. Wheare and Georges Burdeau. The emphasis is placed on both the balancing of unity and pluralism, and the presence of two orders of equal and co-coordinated governments. The regional governments have the mission to protect the particular interests of their political communities. The Tremblay Commission insisted that the actions of each order of government should be limited to its proper sphere of jurisdiction, within which it has independence *vis-à-vis* the other order of government. The principle of non-subordination thus occupied a place of privilege within the structure of federal institutions. Non-subordination was even presented as the "first and general idea of the regime, which applies to all authentically federal states".

The question of the origins of the political system is central because it determines the way in which the federation is evaluated and its evolution judged. The reading of the *BNA Act* of 1867 by the Tremblay Commission illustrates the clash of two tendencies : the unitary spirit embodied by [40] John A. Macdonald and the federal spirit articulated by those who wanted provinces to have real autonomy and sovereignty.

The spirit of the federation rests on the implicit recognition of the equal treatment of two national peoples as associates and partners, each possessing rights regarding and ensuring the survival of their group within the Canadian union.

While the Tremblay Commission's report is almost entirely devoted to the philosophical, historical, judicial and institutional justification of the principle of provincial autonomy (and therefore the principles of heterogeneity and non-subordination), it devotes only six pages to the matter of how the principle of interdependence should be materialized. The issue of the coordination of policies, which is nonetheless essential to respecting federal principles, merits only superficial consideration in the Commission's report.

This imbalance constitutes no less than the distortion of the federal ideal, a distortion which subsequently had a profound influence on the way political discourse was articulated around the question of the Quebec-Canada dynamic.

For Quebec governments, the Quebec-Canada dynamic is illustrated through several concepts : attachment to the principle of autonomy, respect for and the expansion of provincial jurisdiction, achieving a distinct status, and asymmetrical federalism. The position of Quebec governments (and the majority of intellectuals) is not one of holding back Quebec. Rather, the position of Quebec governments aims at the construction and legitimatization of a "national" political space which corresponds to the proclaimed and proven particularities by which Quebec defines itself as a "complete society". It is remarkable to note that this construction has taken place, both at the discursive level and concerning Quebec-Canada state relations, on the basis of the non-participation of Quebec in the building of the Canadian political community. In other words, Quebec's relationship with the rest of Canada is primarily utilitarian (Premier Robert Bourassa spoke of a "profitable federalism").

## *2.2. A Double Preoccupation : Performance and Legitimacy*

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The interpretation of the federal regime within English Canadian literature emphasizes the transition from a highly centralized system, in which the general government could intervene in provincial jurisdiction using declaratory powers of reservation and disallowance, to one of the most decentralized federations in the world. The narrative is generally that the recourse to unitary mechanisms has diminished over time to the point where the power of disallowance has not been exercised since [41] 1943. Responding to the demands of the provinces, including Ontario, the JCPC in London rendered several decisions which contributed to the "federalization" of the Canadian political regime through the forcing of the general government to respect the original division of powers. Therefore, the authority of the provinces was confirmed and their subordination to the general government was reduced.

Ultimately, the growth of the Canadian state made the compartmentalized model of federalism obsolete. The increase in the size of the Canadian state was accompanied by an interpretation of the federal regime which aimed less at accommodating its constitutive communities and more at a "pragmatic" approach to the sharing of jurisdictions. Postwar federalism was characterized by a dense overlapping of jurisdictions, an interdependence of policies and a greater level of intergovernmental competition. Thus, several mechanisms of "intergovernmental collaboration" were put into place though the increased practice of executive federalism.

In summary, federalism within English Canadian literature is presented first, foremost and above all as *a formula* or an *arrangement* relative to the exercise of power. Viewed through the lens of functionality, the overall evaluation of the Canadian political regime is generally positive despite the inevitable tensions it creates.

On the whole, the criteria used to evaluate the evolution of the Canadian political regime make little reference to the dimensions

pertaining to the normative federal project. Richard Simeon remarked that recent studies have mostly emphasized the analysis of the efficiency of public policies. The value judgments contained in these studies are not concerned with notions of autonomy or interdependence but with the themes of democracy and access to the exercise of power, social justice, equality and, only secondarily, with the accommodation of the constitutive communities (Quebec and First Nations).

This mode of understanding Canadian federalism with its insistence on efficiency, transparency, legitimacy and, more specifically, the capacity to deepen democracy is not new. Already in 1940, the Rowell-Sirois Report displayed a political discourse in which the concepts of efficiency, rationalization, (fiscal) equity between the two "orders" of government, constitutional flexibility and national unity occupied a central place. Indeed, the quest for efficiency and the rebalancing of federal-provincial relations was at the heart of the mandate of the Rowell-Sirois Commission. However, since the publication of the report, observers have noted the absence of deep reflection on the underlying principles of the Canadian federal regime. Nonetheless, similar to the Tremblay Commission, the Rowell-Sirois Commission played a determining role in the understanding of federalism throughout Canada.

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The general philosophy of the Commission attempts to legitimize a more functional approach to the federal regime. Thus, the principle of provincial autonomy was never directly questioned in areas of health, social assistance and education. In the same vein, the centralization of powers was never favoured in order to respect regional particularities.

The novelty of the approach put forth by the Rowell-Sirois Report was not in its search for a new division of powers which would favour the general government, but its argument for the decompartmentalization of federalism. In this respect, the notion of interdependence is well represented in the Report.

This change in perspective permitted the Canadian federation to gradually transform itself without having to make numerous formal modifications to the Constitution. Inter-governmentalism, presented as



the vector of flexibility <sup>1</sup>, became the principal preoccupation of elites and political analysts in Canada.

Further, the judgments and opinions of the Supreme of Court of Canada have also shifted towards emphasizing functionality over principles.

It is clear that the return of the compact or *covenant* thesis becomes increasingly less likely as the Canadian political community consolidates itself. According to the new principles which have accompanied the re-founding of Canada, such as the primacy of individual rights as guaranteed by the Charter and the formal equality of the provinces entrenched by the amending formula of the Constitution, the demands formulated by the "federalist" political elites in Quebec are incompatible with the modern representation of the pan-Canadian civic republican nation. For Cairns, only this new type of Canadian nationalism could correspond to the new constitutional foundations of the Canadian federation.

What remains of the normative federal political project as defined by the literature ? Honestly, very little. The principles of autonomy, non-subordination and heterogeneity are contradictory to the managerial approach that has gradually taken over since the work of the Rowell-Sirois Commission emphasized notions of efficiency, performance and formal equality in 1940. Even the normative principle of interdependence, which arises from the multiple mechanisms of federal-provincial collaboration, only seeks participation as part of the quest for efficiency.

## **Conclusion**

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This analysis invites us to re-visit the terms on which the debates and analyses of Canadian federalism rest. The interpretative frameworks have [43] evolved very little over time. In the case of Quebec, the dominant way of understanding the Quebec-Canada

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<sup>1</sup> Wheare, Kenneth C, *Federal Government* (4<sup>th</sup> éd.), London, Oxford University Press, 1963, p. 227.

dynamic is based upon the work of the Tremblay Commission which took place over a half a century ago. Similarly, the preoccupations which animate English Canadian literature on federalism have their roots in the work of the Rowell-Sirois Commission whose mandate was defined in 1937. Perhaps, it is time suggest a small paradigmatic revolution.

**Fin du texte**