

## Haldane Unrevealed

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### Résumé de l'article

Quand les historiens présentent des vérités historiques, ils « ne doivent pas uniquement dire des vérités », ils doivent également en « démontrer leur véracité », observe Hackett Fisher. Au regard de cette norme, la biographie intellectuelle de Richard Burdon Haldane par Frederick Vaughan ne fait pas bonne figure. Vaughan affirme que l'inclinaison jurisprudentielle du vicomte Haldane, qui prenait parti pour les provinces dans les litiges sur le fédéralisme canadien portées devant le Comité judiciaire du Conseil Privé, était ancrée dans la lecture que Haldane faisait de Hegel. Toutefois, cette affirmation ne tient pas suffisamment compte des courants politiques et juridiques dans lesquels Haldane pensait, écrivait et prospérait. Plus encore, la lecture que Vaughan fait de Haldane et Hegel ne démontre aucune préférence claire de ces auteurs pour le local par rapport au national. Nous sommes donc obligés d'aller voir ailleurs pour trouver ce qui explique la préférence de Haldane pour la partie provinciale dans les décisions portant sur la division des pouvoirs. Par ailleurs, Vaughan spéculé à propos des raisons qui ont poussé le prédécesseur de Haldane, Lord Watson, à prendre une voie judiciaire similaire, en n'offrant à son support que des justifications mal ficelées et peu convaincantes. Enfin, Vaughan arrache Haldane de son contexte historique en l'employant pour condamner le processus décisionnel contemporain de la Cour suprême du Canada sous la *Charte*. Sous le couvert d'une interprétation intentionnelle, Vaughan affirme que les juges sont coupables de constitutionnaliser un « relativisme historique », que Vaughan attribue à tort à Hegel. Tout en évaluant les mérites du livre, l'objectif de cette recension est d'évaluer cet ouvrage en le situant dans son contexte historiographique, un contexte que Vaughan ignore à son péril.

## HALDANE UNREVEALED\*

*David Schneiderman\*\**

When historians proffer historical truths they “must not merely tell truths,” they must “demonstrate their truthfulness as well,” observes Hackett Fisher. As against this standard, Frederick Vaughan’s intellectual biography of Richard Burdon Haldane does not fare so well. Vaughan argues that Viscount Haldane’s jurisprudential tilt, which favoured the provinces in Canadian federalism cases before the Judicial Committee of the Privy Council, was rooted in Haldane’s philosophizing about Hegel. He does so, however, without much reference to the political and legal currents within which Haldane thought, wrote, and thrived. More remarkably, Vaughan does not derive from his reading of Haldane and Hegel any clear preference for the local over the national. We are left to look elsewhere for an explanation for Haldane’s favouring of the provincial side in division-of-powers cases. Vaughan additionally speculates about why Haldane’s predecessor Lord Watson took a similar judicial path, yet offers only tired and unconvincing rationales. Vaughan, lastly, rips Haldane out of historical context for the purpose of condemning contemporary Supreme Court of Canada decision making under the *Charter*. Under the guise of purposive interpretation, Vaughan claims that the justices are guilty of constitutionalizing a “historical relativism” that Vaughan wrongly alleges Hegel to have propounded. While passing judgment on the book’s merits, the purpose of this review essay is to evaluate the book by situating it in the historiographic record, a record that Vaughan ignores at his peril.

Quand les historiens présentent des vérités historiques, ils « ne doivent pas uniquement dire des vérités », ils doivent également en « démontrer leur véracité », observe Hackett Fisher. Au regard de cette norme, la biographie intellectuelle de Richard Burdon Haldane par Frederick Vaughan ne fait pas bonne figure. Vaughan affirme que l’inclinaison jurisprudentielle du vicomte Haldane, qui prenait parti pour les provinces dans les litiges sur le fédéralisme canadien portées devant le Comité judiciaire du Conseil Privé, était ancrée dans la lecture que Haldane faisait de Hegel. Toutefois, cette affirmation ne tient pas suffisamment compte des courants politiques et juridiques dans lesquels Haldane pensait, écrivait et prospérait. Plus encore, la lecture que Vaughan fait de Haldane et Hegel ne démontre aucune préférence claire de ces auteurs pour le local par rapport au national. Nous sommes donc obligés d’aller voir ailleurs pour trouver ce qui explique la préférence de Haldane pour la partie provinciale dans les décisions portant sur la division des pouvoirs. Par ailleurs, Vaughan spéculé à propos des raisons qui ont poussé le prédécesseur de Haldane, Lord Watson, à prendre une voie judiciaire similaire, en n’offrant à son support que des justifications mal ficelées et peu convaincantes. Enfin, Vaughan arrache Haldane de son contexte historique en l’employant pour condamner le processus décisionnel contemporain de la Cour suprême du Canada sous la *Charte*. Sous le couvert d’une interprétation intentionnelle, Vaughan affirme que les juges sont coupables de constitutionaliser un « relativisme historique », que Vaughan attribue à tort à Hegel. Tout en évaluant les mérites du livre, l’objectif de cette recension est d’évaluer cet ouvrage en le situant dans son contexte historiographique, un contexte que Vaughan ignore à son péril.

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\* A Review of Frederick Vaughan, *Viscount Haldane: ‘The Wicked Step-Father of the Canadian Constitution’* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2010) [Vaughan, *Viscount Haldane*].

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## Introduction

Historians “toil and sweat to get the last ounce of inferential knowledge out of the sources [they] possess.”<sup>1</sup> Unlike scientists who offer theorems built upon processes that can be replicated, historians are at the mercy of the “strictly limited quantity” of their sources, which are “seldom free from grave defects.”<sup>2</sup> All historians “can do is to build lean-to sheds of inference,” Collingwood admits.<sup>3</sup> Preliminary conclusions are defensible, however, to the extent that they comply with the historical “rules of the game”:<sup>4</sup> extant sources need to be scoured, inferences checked against all of the evidence, and simple-minded theories of causation rejected. When historians proffer historical truths, adds Hackett Fischer, they “must not merely tell truths, but [they must] demonstrate their truthfulness as well.”<sup>5</sup>

Against these standards, Frederick Vaughan’s intellectual biography of Richard Burdon Haldane does not fare so well. Vaughan argues that Viscount Haldane’s jurisprudential tilt, which favoured the provinces in Canadian federalism cases before the Judicial Committee of the Privy Council (JCPC), was rooted in Haldane’s philosophizing about Hegel. Vaughan does so, however, without much reference to the political and legal currents within which Haldane thought, wrote, and thrived. More remarkably, Vaughan does not derive from his reading of Haldane and Hegel any clear preference for the local over the national. We are left to look elsewhere for an explanation of Haldane’s favouring of the provincial side in division-of-powers cases. Vaughan additionally speculates about why Haldane’s predecessor Lord Watson took a similar judicial path and yet offers only tired and unconvincing rationales. Vaughan, lastly, rips Haldane out of historical context for the purpose of condemning contemporary Supreme Court of Canada decision making under the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> Haldane’s influence lives, Vaughan argues, by reason of Supreme Court of Canada justices channelling his Hegelianism. Like accusations contemporaneously made about Haldane’s JCPC rul-

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<sup>1</sup> RG Collingwood, “The Limits of Historical Knowledge” (1928) 3:10 *Journal of Philosophical Studies* 213 at 215.

<sup>2</sup> *Ibid* at 214.

<sup>3</sup> *Ibid* at 216.

<sup>4</sup> *Ibid* at 219.

<sup>5</sup> David Hackett Fischer, *Historians’ Fallacies: Toward a Logic of Historical Thought* (New York: Harper & Row, 1970) at 40.

<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

ings,<sup>7</sup> the book's contribution to periods both past and present is opaque and mystical. While passing judgment on the book's merits, my principal purpose here is to evaluate the book by situating it in the historiographic record, a record that Vaughan ignores at his peril.

## I. Hegel Relativized

Like so many early twentieth-century British political figures,<sup>8</sup> Haldane's life has been treated to numerous book-length studies,<sup>9</sup> including a valuable autobiography published posthumously in the year after he died.<sup>10</sup> Having authored seven books, principally on philosophical matters, together with a cache of letters (he wrote daily to his mother, who died in 1925 at the age of ninety-nine), historians have not been bereft of material with which to reconstruct and recount Haldane's life. Vaughan's aim is to fill this oeuvre by situating Haldane's Canadian decisions in the context of his Hegelianism. McGill philosopher Jonathan Robinson undertook this inquiry in 1970 for the *University of Toronto Law Journal*.<sup>11</sup> Others,

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<sup>7</sup> Bram Thompson, "Lord Haldane: Philosophy and Lucidity of Language" (1922) 42:10 *Can LT* 644 at 644.

<sup>8</sup> His certainly was a "life in full": Haldane was a member of Parliament, peer in the House of Lords, secretary of state for war, lord chancellor, well-respected philosopher writing in the service of Hegel and German idealism, civil service reformer, adult educator, the youngest ever Queen's Counsel, and leading member of the Judicial Committee of the Privy Council—the final court for the British Empire. See his sister Elizabeth Haldane's entry in JRH Weaver, ed, *The Dictionary of National Biography* (London: Oxford University Press, 1937) *sub verbo* "Haldane, Richard Burdon".

<sup>9</sup> See e.g. Major-General Sir Frederick Maurice, *Haldane: The Life of Viscount Haldane of Cloan K.T., O.M.*, vol 1 (London: Faber and Faber, 1937); Dudley Sommer, *Haldane of Cloan: His Life and Times, 1856-1928* (London: George Allen & Unwin, 1960); RFV Heuston, *Lives of the Lord Chancellors, 1885-1940*, vol 1 (Oxford: Clarendon Press, 1964) at 183-240; Jean Graham Hall & Douglas F Martin, *Haldane: Statesman, Lawyer, Philosopher* (Chichester: Barry Rose Law, 1996). There are numerous other remembrances of Haldane in both journals and books, one of the most important among them being the tribute by his old friend A. Seth Pringle-Pattison ("Richard Burdon Haldane (Viscount Haldane of Cloan), 1856-1928" in *Proceedings of the British Academy, 1928* (London: Oxford University Press for The British Academy, 1928) 405), which is not cited by Vaughan. See also the remembrances in Hiralal Haldar, *Neo-Hegelianism* (London: Heath Cranton, 1927) ch XIII at 391-414; G Watts Cunningham, *The Idealistic Argument in Recent British and American Philosophy* (New York: Century, 1933) ch IX at 239-52; Lord Russell of Liverpool, *The Royal Conscience* (London: Cassell, 1961) ch 12 at 181-206. For a more recent assessment, see Andrew Vincent, "German Philosophy and British Public Policy: Richard Burdon Haldane in Theory and Practice" (2007) 68:1 *Journal of the History of Ideas* 157.

<sup>10</sup> Richard Burdon Haldane, *An Autobiography* (London: Hodder and Stoughton, 1929) [Haldane, *Autobiography*].

<sup>11</sup> Jonathan Robinson, "Lord Haldane and the British North America Act" (1970) 20:1 *UTLJ* 55.

including this writer, have explored Haldane's Hegelianism in this context.<sup>12</sup> Yet there has been, to date, no book-length treatment of Haldane's interpretation of the *British North America Act, 1867* in light of his reading of Hegel. Scholars should welcome Vaughan's effort, then, with open arms. Regrettably, Vaughan does not build on these earlier efforts; he all but ignores them.<sup>13</sup> Instead, he reads Hegel and Haldane on his own terms, ignoring alternative interpretations and running the risk of setting us back in our understanding of the period.

The book appears to have been precipitated somewhat by John Saywell's account of Haldane in *The Lawmakers*,<sup>14</sup> his *longue durée* treatment of the constitution in Canada's high courts. Saywell described the Haldane judicial record as being "inconsistent",<sup>15</sup> "virtually incomprehensible",<sup>16</sup> "confused",<sup>17</sup> "legally absurd",<sup>18</sup> and "extreme".<sup>19</sup> Saywell, Vaughan complains, dismisses the theory that Haldane's Hegelianism was an explanatory force in his JCPC decision making.<sup>20</sup> While this appears a good place to start, what readers receive instead is a succession of chapters dealing with well-trodden Haldane ground: his home life in Edinburgh and Cloanden (the family's country estate),<sup>21</sup> his early legal career, election as a member of Parliament, running of the War Department in the lead up to the First World War and subsequent drumming out of office for alleged pro-German sympathies—all of which has been treated in detail

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<sup>12</sup> See e.g. Stephen Wexler, "The Urge to Idealize: Viscount Haldane and the Constitution of Canada" (1984) 29:4 McGill LJ 608; David Schneiderman, "Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century" (1998) 48:4 UTLJ 521 [Schneiderman, "Laski, Haldane"].

<sup>13</sup> There is an acknowledgment in the preface of Robinson's 1970 contribution (Robinson, *supra* note 11) and also a quotation, without further elaboration of Robinson's argument, and then there is no more mention made of him (see Vaughan, *Viscount Haldane*, *supra* note \* at xii, 158-59).

<sup>14</sup> John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2002) [*The Lawmakers*].

<sup>15</sup> *Ibid* at 152.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 158.

<sup>18</sup> *Ibid* at 160.

<sup>19</sup> *Ibid* at 161.

<sup>20</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 152-53. Saywell writes that neither Ontario Premier Oliver Mowat nor Lord Watson were immersed in "Teutonic metaphysics" but does admit, however, that the "extent to which theory dictated his law cannot be determined" (*supra* note 14 at 186).

<sup>21</sup> This chapter draws principally on the posthumously published life of Mary Elizabeth Haldane. See Elizabeth Sanderson Haldane, ed, *Mary Elizabeth Haldane: A Record of a Hundred Years (1825-1925)* (London: Hodder and Stoughton, 1925).

in other works. There is a subsequent chapter devoted to Hegel and another to his precursor on the JCPC, Lord Watson. Two chapters in this work are devoted to Haldane's JCPC decisions.<sup>22</sup> Then there is the surprising postscript, which largely is a complaint directed at the contemporary Supreme Court of Canada. Under the guise of purposive interpretation under the *Charter*, Vaughan claims that the justices are guilty of constitutionalizing the "historical relativism" that Hegel is alleged to have propounded.

At the outset, it should be acknowledged that Hegel is a notoriously difficult philosopher to decipher, having written "some of the worst prose in the history of philosophy."<sup>23</sup> He offered metaphysical interpretations of a wide range of subjects; principally, the philosophy of history, philosophy of religion, and political philosophy (the latter in his *Philosophy of Right*,<sup>24</sup> to which I shall refer below). These writings and lectures precipitated an even more diverse range of followers from both the right and the left, both reactionary and radical.<sup>25</sup> As there is no succinct means of capturing Hegel's varying depths of thought, one can point to certain distinctive markers that would have been relevant to a study such as Vaughan's: the idea that history represents reasoned progress, devotion to the state as the supreme manifestation of a people's "spirit", identification of civil society as a medium for ethical life, and belief that individual freedom is made manifest via the communal morality he called *sittlichkeit*.<sup>26</sup> All of which suggests that Hegel is a complex and multi-faceted thinker who escapes simplistic formulations and token portrayals. Rather, the burden of a work such as Vaughan's is to portray Hegel as fully and as feasibly possible in a book that is devoted to an explanation of Haldane's jurisprudence.

Vaughan's success will depend, then, on those aspects of Hegel that turn up in Vaughan's account. The version of Hegel he adopts, regretta-

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<sup>22</sup> Even here, there is no close reading of Haldane's JCPC record (nor of Hegel, for that matter, as I explain below in the text associated with *infra* notes 40-54).

<sup>23</sup> Frederick Beiser, *Hegel* (New York: Routledge, 2005) at 1.

<sup>24</sup> GWF Hegel, *Elements of the Philosophy of Right*, Allen W Wood, ed, translated by HB Nisbet (Cambridge: Cambridge University Press, 1991) at paras 316-19 [Hegel, *Philosophy of Right*].

<sup>25</sup> See Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972) at vii; Frederick C Beiser, "Introduction: Hegel and the Problem of Metaphysics" in Frederick C Beiser, ed, *The Cambridge Companion to Hegel* (Cambridge: Cambridge University Press, 1993).

<sup>26</sup> Alexander Somek, "German Legal Philosophy and Theory in the Nineteenth and Twentieth Centuries" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory* (Malden, Mass: Blackwell, 1999) 343 at 346. What is real is rational and what is rational is ideal, for Hegel: see LT Hobhouse, *The Metaphysical Theory of the State* (London: George Allen & Unwin, 1918) at 17.

bly, lacks depth. It is not situated, moreover, within contemporaneous intellectual debates in Britain in which Haldane actively participated. Vaughan focuses almost exclusively on the aforementioned notion of *sittlichkeit*, which Haldane likened to “habitual good behaviour.”<sup>27</sup> It is the search for this “system of habitual or customary conduct”<sup>28</sup> that, Vaughan claims, prompted Haldane to set off in pursuit of a nontextual constitutional ordering, one that deviated significantly from that originally intended.<sup>29</sup> *Sittlichkeit* is represented as a nonlegal source of constraint on individual action,<sup>30</sup> a “standard of the community,”<sup>31</sup> that is as binding in its effects as is positive law. Yet another source of nonlegal constraint lay behind the state, for Haldane, and this was the “general will”. This is of little interest to Vaughan. On occasion, however, Haldane equates *sittlichkeit*, operating at its highest level, with the general will.<sup>32</sup> Similarly appropriated from Rousseau by Haldane’s friend, the philosopher Bernard Bosanquet,<sup>33</sup> this is no mere aggregation of individual wills but an expression of a “higher will”.<sup>34</sup> For Bosanquet, the general will represents the

identity between my particular will and the wills of all my associates in the body politic which makes it possible to say that in all social co-operation, and in submitting even to forcible constraint, when im-

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<sup>27</sup> Viscount Haldane, *The Reign of Relativity* (London: John Murray, 1921) at 374 [Haldane, *Reign*]. See also Viscount Haldane, “Higher Nationality: A Study in Law and Ethics” in Viscount Haldane, *Selected Addresses and Essays* (London: John Murray, 1928) 49 at 68 [Haldane, “Higher Nationality”]. Vaughan describes *sittlichkeit* as “the spirit of the people at a given historic moment in the cause of freedom” (*Viscount Haldane, supra* note \* at 112). He also entitles a chapter “Haldane and the Reign of *Sittlichkeit*” (*ibid* at 145).

<sup>28</sup> Haldane, *Reign*, *supra* note 27 at 352. See also Haldane, “Higher Nationality”, *supra* note 27 at 71 (“The system of ethical habit in a community”).

<sup>29</sup> This itself is a highly problematic claim. Vaughan finds support for this proposition in the text of the *Constitution Act, 1867* ((UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5), pronouncements of John A. Macdonald, and “Discussions in Conference of the Delegates from the Provinces of British North America, October 1864” (in Joseph Pope, ed, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) 53), which A.G. Doughty described as “quite meagre” (GP Browne, ed, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at 126). This is discussed further below in the text associated with *infra* notes 59-73.

<sup>30</sup> Haldane, “Higher Nationality”, *supra* note 27 at 66ff.

<sup>31</sup> Haldane, *Reign*, *supra* note 27 at 352.

<sup>32</sup> Haldane, “Higher Nationality”, *supra* note 27 at 72.

<sup>33</sup> On their friendship, see Haldane, *Autobiography*, *supra* note 10 at 154-55.

<sup>34</sup> Haldane, “Higher Nationality”, *supra* note 27 at 79.



posed by society in the true common interest, I am obeying only myself, and am actually attaining my freedom.<sup>35</sup>

For Haldane, the general will, which he equates with “public opinion” (following Hume<sup>36</sup>), turns out to be “the fountain from which flows power and in which the true source of sovereignty is to be sought.”<sup>37</sup> State and sovereignty, then, are not single and indivisible because “the state is never the last word in controversy.”<sup>38</sup> Instead, the general will is what truly “holds the community together[.] ... We see it in time of war, when a nation is fighting for its life or for a great cause,” he declared in his 1913 address to the Canadian and American Bar Association joint meeting in Montreal entitled “Higher Nationality”.<sup>39</sup>

By focusing almost entirely on *sittlichkeit*, Vaughan marginalizes the importance to Haldane of this higher “general will” and also the discursive connections between his philosophizing about “public opinion” and the JCPC rulings.<sup>40</sup> To the extent Vaughan talks about “public opinion”, it is to chastise Saywell for equating the “*general will*” with “public opinion”,

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<sup>35</sup> Bernard Bosanquet, *The Philosophical Theory of the State*, 2d ed (London: Macmillan and Co, 1910) at 107 [Bosanquet, *Philosophical Theory*].

<sup>36</sup> See David Hume, “Of the First Principles of Government” in Ralph Cohen, ed, *Essential Works of David Hume* (New York: Bantam Books, 1965) 477. Hegel also refers to “public opinion” but views it in a more ambivalent light: see Hegel, *Philosophy of Right*, *supra* note 24 at paras 316-19; Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975) at 446-47.

<sup>37</sup> Haldane, *Reign*, *supra* note 27 at 371. This is also how Haldane responded to the whirlpool of “controversy between monists and pluralists” (*ibid* at 373). The “true source of sovereignty,” Haldane maintained, cannot be found in the mere existence of the state—as the monists maintained and the pluralists railed against—but rather in the general will or public opinion (*ibid* at 366). This is discussed further below in text associated with *infra* notes 83-95.

<sup>38</sup> *Ibid* at 374.

<sup>39</sup> “Higher Nationality”, *supra* note 27 at 79. Note that this is ten years before Haldane invoked this sort of reasoning in *Reference Re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* ((1921), [1922] 1 AC 191 at 197, (*sub nom Canada (AG) v Alberta (AG)*) 60 DLR 513 (PC) [*Board of Commerce*]), and, the following year, in *Fort Frances Pulp and Power Company, Limited v. Manitoba Free Press Company, Limited* ([1923] AC 695 at 703-704, (*sub nom Fort Frances Pulp and Paper Co v Manitoba Free Press Co*) 3 DLR 629 (PC) [*Fort Frances*]). Note also that Haldane’s friend Bosanquet spoke, in the year after Haldane’s address, of an “emergency” as a circumstance in which the “collective force of the whole” is “capable of drastic operation”: Bernard Bosanquet, “A Note on Mr. Cole’s Paper” (1914-1915) 15 *Proceedings of the Aristotelian Society* 160 at 163.

<sup>40</sup> As I suggest below, this provides an important window on Haldane’s thinking about “peace, order, and good government” (POGG) authority. See text associated with *infra* notes 96-100.

not in the Humean sense but as it is commonly understood.<sup>41</sup> The connection otherwise is lost. It is severed entirely in the following passage, in which Vaughan accuses Haldane of making a similar error: “However much Haldane—following Hegel—allows for the role of public opinion, the ‘general will’ and majority public opinion are not the same thing; public opinion must always be subservient to the general will.”<sup>42</sup> Public opinion for Haldane was not equivalent to majority opinion,<sup>43</sup> but was on a plane equivalent to general will and to *sittlichkeit*—they were virtually interchangeable.<sup>44</sup>

Haldane’s philosophical and judicial preoccupations, Vaughan contends, were focused on seeking out this moral code of conduct associated with *sittlichkeit*. Haldane, Vaughan writes, “set out to uncover the *Sittlichkeit* of the Canadian nation by way of uncovering and enforcing the *Sittlichkeiten* of the several provinces.”<sup>45</sup> It is curious that, on Vaughan’s own account, this emphasis on *sittlichkeit* does not direct that judicial palms be placed firmly on the provincial side of the federalism scale. The version of Hegel that Vaughan takes up provides Haldane with no particular guidance about how to resolve federalism disputes. On Vaughan’s account, a Hegelian judge might be as likely to endorse the national side in a division-of-powers case as the provincial side. Indeed, one would have expected the Hegelian-inspired judge to tip those scales in favour of national over provincial governments given Hegel’s emphasis on the unity promoted by the state, which it is everyone’s overriding ethical duty to promote.<sup>46</sup>

The interpretive problems are compounded by Vaughan’s reading of Hegel as embracing historical relativism, which he describes as “Hegel’s most enduring contribution to modern public philosophy.”<sup>47</sup> Haldane,

<sup>41</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 159 [emphasis in original].

<sup>42</sup> *Ibid* at 187.

<sup>43</sup> For Hegel, both truth and error are contained within public opinion, which “embodies not only the eternal and substantial principles of justice—the true content and product of the entire constitution and legislation and of the universal condition in general—in the form of *common sense* ... (the ethical foundation which is present in everyone in the shape of prejudices), but also the true needs and legitimate ... tendencies of actuality” (*Philosophy of Right*, *supra* note 24 at para 317 [emphasis in original]).

<sup>44</sup> On multiple occasions, including in his address to the American and Canadian Bar Association in 1913, Haldane equates the general will with the idea of “public opinion” (see “Higher Nationality”, *supra* note 27).

<sup>45</sup> *Viscount Haldane*, *supra* note \* at 117.

<sup>46</sup> This is what Avineri calls “the unity of subjective consciousness and the objective order” (*supra* note 25 at 178). Hegel once declared that the “*highest duty* is to be members of the state” (*Philosophy of Right*, *supra* note 24 at para 258 [emphasis in original]).

<sup>47</sup> *Viscount Haldane*, *supra* note \* at 193.

Vaughan claims, advanced this view in *The Reign of Relativity* in which Hegel's thesis that all knowledge is "relative"—that "ethical or moral standards change over time"<sup>48</sup>—was a prevalent theme. All of this would have emboldened Viscount Haldane to impose his own vision of Canada's evolving federation on the country, Vaughan argues. Though Hegel did accept some historicist premises—that a community's ethical standards differed across the stages of time<sup>49</sup>—he was no ethical relativist.<sup>50</sup> To the contrary, his appeal to the universal authority of reason distinguished his philosophizing about history and ethical progress from a relativist one. "This [relativist] interpretation," writes Wood, "cannot withstand even the most casual acquaintance with Hegel's actual views."<sup>51</sup> As for Haldane, there is much going on in *The Reign of Relativity*, including a restatement of Haldane's philosophical position in light of Einstein's recent contribution to science, but the book does not promote moral or ethical relativity. Rather, as Pringle-Pattison explained in a tribute to his old friend, knowledge for Haldane was relative only because it depended upon "the end we have in view."<sup>52</sup> Relativity, in its "comprehensive form" is not about "partial or 'relative' truth" but a "final and complete truth," namely, the kind of truth in unity associated with Hegelian idealism.<sup>53</sup> "[A]ll forms of knowledge," Haldane writes, "are reconcilable if construed as aspects within one entirety."<sup>54</sup> Not only is Vaughan's account of Hegel and Haldane faulty, it also is incomplete. That account needs to be deepened and then supplemented by associated currents of political thought in early twentieth-century Britain.

## II. Haldane Decontextualized

What is omitted from Vaughan's reading of Hegel (as well as from Robinson's 1970 effort) is a discussion of the ethical value Hegel placed on associational life. This principally can be found in Hegel's discussion of civil society and of the "corporation" in the *Philosophy of Right*; what Hegel called "intermediate estates" formed the ethical root of the state.<sup>55</sup> It is via particular units of association that the individual comes eventually to

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<sup>48</sup> *Ibid.*

<sup>49</sup> See Taylor, *supra* note 36 at 390.

<sup>50</sup> See Beiser, *The Cambridge Companion to Hegel*, *supra* note 25 at 262-63.

<sup>51</sup> Allen W Wood, "Hegel's Ethics" in Beiser, *The Cambridge Companion to Hegel*, *supra* note 25, 211 at 229.

<sup>52</sup> *Supra* note 9 at 440.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Reign*, *supra* note 27 at 409.

<sup>55</sup> *Philosophy of Right*, *supra* note 24 at paras 250, 255.

look to the state “because it finds in the state the means of sustaining its [a group’s] particular ends.”<sup>56</sup> These groups, for Hegel, amount to a “second family” where it is “recognized that he belongs to a whole which is itself a member of society in general, and that he has an interest in, and endeavours to promote, the less selfish end of this whole.”<sup>57</sup> This sort of associational life, grounded in trade, occupation, or particular interest, accounts for a “substantial segment of the population”<sup>58</sup> and operates under the supervision of the state, providing the “ethical man with a universal activity in addition to his private end.”<sup>59</sup> It equips individuals with meaning beyond, in public choice parlance, the self-interested preferences of rational self-maximizers.<sup>60</sup> This emphasis on intermediate associations, between the state and the individual, anticipates Tocqueville’s reliance on associational life to temper the democratic excesses of the America he observed in the mid-nineteenth century.<sup>61</sup> In contrast to Tocqueville, observes Rosanvallon, Hegel “ascribed general philosophical importance to the question of intermediary bodies.”<sup>62</sup> Though in the Middle Ages, Hegel observed, intermediate bodies gained too much independence, deteriorating “into a miserable guild system,”<sup>63</sup>

it can still be argued that the proper strength of states resides in their internal communities. In these, the executive encounters legitimate interests which it must respect; and since the administration can only encourage such interests—although it must also supervise them—the individual finds protection for the exercise of his rights, so that his particular interest is bound up with preservation of the whole.<sup>64</sup>

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<sup>56</sup> *Ibid* at para 289.

<sup>57</sup> *Ibid* at para 253.

<sup>58</sup> G Heiman, “The Sources and Significance of Hegel’s Corporate Doctrine” in ZA Pelczynski, ed, *Hegel’s Political Philosophy: Problems and Perspectives, A Collection of New Essays* (Cambridge: Cambridge University Press, 1971) 111 at 123.

<sup>59</sup> Hegel, *Philosophy of Right*, *supra* note 24 at para 255.

<sup>60</sup> See Michael Prosch, “The *Korporation* in Hegel’s Interpretation of Civil Society” in Shaun Gallagher, ed, *Hegel, History, and Interpretation* (Albany: State University of New York Press, 1997) 195 at 207; Antony Black, *Guild & State: European Political Thought from the Twelfth Century to the Present* (New Brunswick, NJ: Transaction, 2003) at 203-206.

<sup>61</sup> Alexis de Tocqueville, *Democracy in America*, edited and translated by Harvey C Mansfield & Delba Winthrop (Chicago: University of Chicago Press, 2000) at 498-99.

<sup>62</sup> Pierre Rosanvallon, *The Demands of Liberty: Civil Society in France since the Revolution*, translated by Arthur Goldhammer (Cambridge, Mass: Harvard University Press, 2007) at 71.

<sup>63</sup> *Philosophy of Right*, *supra* note 24 at para 255.

<sup>64</sup> *Ibid* at para 290. See discussion in Avineri, *supra* note 25 at 164-68.

Intermediate associations, for Hegel, were the “secret of patriotism,” promoting the highest of ethical achievements: unity at the level of the state.<sup>65</sup> Intermediate associations, for these reasons, played a vital role in Hegel’s constitutional design: the lower assembly of the legislative branch, he recommends, should be made up of deputies elected by civil society’s “associations, communities, and corporations.”<sup>66</sup> According to this critical strand in Hegelian political theory, local associational life—or what we might call, for our purposes, provincial life in a federation—has an important ethical role to play in the development of universal citizens. This precisely is what Haldane admits in his encounters with dominant British political thought in the early twentieth century, namely, theories of political pluralism.<sup>67</sup>

“The theory of sovereignty,” A.D. Lindsay observed in 1924, “is at the present time the storm centre of political theory.”<sup>68</sup> Professor Lindsay was describing the debate between the “monists” and the “pluralists”; between, on the one hand, the dominant account of the British state that emphasized its unity, with the monarch at its apex, and a historically minded account of group life. According to the pluralists, politics was practised in all variety of locales and these did not require the state’s imprimatur. Rather, English constitutional law was expected to adapt to this vibrant local associational life, though it seemed incapable of doing so. The pluralist account was given its kick-start by Maitland in his famous “Introduction” to the translation of Gierke’s *Political Theories of the Middle Age*; Maitland ridiculed the English legal system’s failed attempts at reconciling the “manyness of the members” with the “oneness of the body.”<sup>69</sup> “[I]njustice will be done,” he wrote, “unless corporateness is treated as matter of fact.”<sup>70</sup>

The pluralist critique permeated work in political, legal, and philosophical theory. Haldane was not impervious to this “federalistic feeling”<sup>71</sup> and found the pluralist account both ethically superior and sociologically

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<sup>65</sup> *Philosophy of Right*, *supra* note 24 at para 289. See also Heiman, *supra* note 58 at 128.

<sup>66</sup> Hegel, *Philosophy of Right*, *supra* note 24 at para 308. See discussion in Taylor, *supra* note 36 at 445-46.

<sup>67</sup> Heiman even describes Hegel’s corporatist doctrine as a species of “legal-political pluralism” (*supra* note 58 at 133).

<sup>68</sup> AD Lindsay, “Sovereignty” (1923-1924) 24 *Proceedings of the Aristotelian Society* 235 at 235.

<sup>69</sup> Frederic William Maitland, “Translator’s Introduction” in Otto Gierke, *Political Theories of the Middle Age* (Cambridge: Cambridge University Press, 1900) vii at xxvii.

<sup>70</sup> *Ibid* at xxxviii.

<sup>71</sup> See Sir Ernest Barker, *Political Thought in England 1848 to 1914*, 2d ed (London: Oxford University Press, 1928) at 158.

appealing.<sup>72</sup> Haldane described the pluralist view as the source of “an ethical ideal” and “true citizenship, and so the superiority of the pluralist State becomes evident.”<sup>73</sup> Decentralization, he concluded, was “essential.”<sup>74</sup>

Haldane’s attachments to Hegel—who, along with Austin, was one of the principal theoretical targets of the pluralist critique<sup>75</sup>—ensured that Haldane could never be considered one among them. He was, nevertheless, considered an ally. His appearance before the House of Lords in the Free Church of Scotland case contributed greatly to this impression. Haldane appeared as co-counsel on behalf of the Free Church of Scotland majority who sought union with the United Presbyterian Church. In opposition to the union was a dissenting faction (the “wee frees”) who sought to wrest control of the Free Church of Scotland’s assets from the majority on the grounds that union departed from fundamental tenets of Free Church of Scotland doctrine. The House of Lords agreed with the dissenters and held that Church assets would remain in the control of those who adhered to the Church’s original doctrine.<sup>76</sup> In the course of his argument, Haldane famously declared that “the test of the personal identity of this Church lies, not in doctrine, but in its life.”<sup>77</sup> In contrast to the formal legal entity, “[t]he Free Church is the actual association which has gone on from year to year,” Haldane implored, “and which has had an actual continual history, and can be identified, just as you would identify John Jones, and say, notwithstanding his hair has changed colour, and his clothes are different, he is John Jones, who has had a continuous history.”<sup>78</sup> Haldane must

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<sup>72</sup> Nicholls goes so far as to describe Hegel as “[s]ociologically ... a pluralist”: David Nicholls, *The Pluralist State* (New York: St Martin’s Press, 1975) at 77.

<sup>73</sup> “On Sovereignty”, Book Review of *The Foundations of Sovereignty, and Other Essays* by Harold J Laski, *The Nation & The Athenaeum* (25 March 1922) 946.

<sup>74</sup> *Ibid.*

<sup>75</sup> John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidenfeld & Nicolson, 1955). “[S]overeignty implies ... [t]he bulk of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior” (*ibid* at 193-94 [emphasis in original]).

<sup>76</sup> *General Assembly of Free Church of Scotland v Lord Overtoun*, [1904] AC 515, 20 TLR 730 (HL Scot).

<sup>77</sup> “Mr Haldane’s Speech” in Robert Low Orr, ed, *The Free Church of Scotland Appeals, 1903-4* (Edinburgh: Macniven & Wallace, 1904) 477 at 518.

<sup>78</sup> *Ibid* at 548. The argument anticipates by several years one Laski would make about the railways being “as real as ... Lancashire” and, therefore, a locus for self-government: “We must learn to think of railways and mines, cotton and agriculture, as areas of government just as real as London and Lancashire”: Harold J Laski, *The State in the New Social Order* (London: Fabian Society, 1922) at 12. And similarly: “It means making the mining industry a unit of administration in the same sense as Lancashire” (Harold J Laski, *A Grammar of Politics*, 5th ed (London: George Allen & Unwin, 1967) at 271).

have been pleased by the warm embrace of this argument by the political pluralists.<sup>79</sup> Laski in 1916 described it as a “brilliant effort to urge that the identity of the Church consisted in its life.”<sup>80</sup> Maitland famously declared the House of Lords ruling as the moment when “the dead hand fell with a resounding slap upon the living body.”<sup>81</sup> Haldane wrote about the case in some detail in his autobiography—it was one for which he “had always entertained a strong opinion.”<sup>82</sup>

I have elsewhere explored affiliations between Haldane’s jurisprudence and pluralist thought, principally through his personal and professional relationship with Professor Harold J. Laski.<sup>83</sup> An examination of Haldane’s oeuvre, including published reviews of two of Laski’s books, reveals that Haldane was continually engaged in the early twentieth century with questions raised by the pluralist challenge to monist thinking and that this engagement helps explain his thinking in the Canadian cases.<sup>84</sup> Vaughan dismisses this context: “Haldane’s jurisprudence can be understood from his own writings alone,” he declares, and “it does not require the support of external forces such as the writings of Maitland or others.”<sup>85</sup> Elsewhere, in a footnote, Vaughan writes that these “speculations ... fly in the face of Haldane’s own musings on the subject of Hegel and the law of the state, especially in his preface to Follett’s book.”<sup>86</sup> In rejecting these linkages, Vaughan places special emphasis on Haldane’s 1920 introduction to the third impression of Mary Follett’s book entitled *The*

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<sup>79</sup> See John Neville Figgis, *Churches in the Modern State* (London: Longmans, Green and Co, 1913) at 34-35; Harold J Laski, “The Personality of Associations” (1916) 29:4 Harv L Rev 404 at 419.

<sup>80</sup> Harold J Laski, “Notes on the Strict Interpretation of Ecclesiastical Trusts” (1916) 36:3 Can LT 190 at 203.

<sup>81</sup> *Supra* note 69 at 319.

<sup>82</sup> Haldane, *Autobiography*, *supra* note 10 at 76.

<sup>83</sup> Schneiderman, “Laski, Haldane”, *supra* note 12.

<sup>84</sup> I focus particularly on the cases concerning the power of federally and provincially incorporated companies (which he would not confine) and the scope of federal authority when in conflict with provincial power (which he would confine). See the discussion below in text associated with *infra* notes 96-100.

<sup>85</sup> *Viscount Haldane*, *supra* note \* at 188. This turns out to be false. As I have argued above, Haldane’s “writings alone” do not provide an explanation for his provincial bias. Vaughan as much as admits this when he turns to other sources and facts in order to try to explain these results.

<sup>86</sup> *Viscount Haldane*, *supra* note \* at 271-72, n 18. This footnote is confusing. It appears in Vaughan’s chapter on Lord Watson. The reference to Haldane does not follow from its placement in the book, nor from the footnote’s opening sentence.

*New State*.<sup>87</sup> Yet, he overlooks the revealing subtitle of Follett's book: *Group Organization the Solution of Popular Government*. By the book's second paragraph, Follett declares that "[g]roup organization is to be the new method in politics[.] ... Group organization will create the new world we are now blindly feeling after, for creative force comes from the group, creative power is evolved through the activity of the group life."<sup>88</sup> Inspired by Hegelian idealism, Follett proceeds to cede to the pluralists much ground without fully conceding the need to do away with the state. She thereby mediates a "pathway"<sup>89</sup> between monists and pluralists that was congenial to Haldane. This is how Haldane describes Follett's effort in the second page of his introduction to *The New State*: "The great point in her theory is that the controversy between Monism and Pluralism arises out of views that are too contracted on both sides."<sup>90</sup> Haldane concedes that the collective will "evolves itself only through living with others in group life" and that the state is merely "a great group unified by common ends."<sup>91</sup> This "general will ... is no entity separate from these individual wills;" rather, "[i]t is their common expression."<sup>92</sup> "But", Haldane continues as he did in his "Higher Nationality" address of 1913, "it may, as in war time, present these individual wills as unified at a tremendous level."<sup>93</sup> Fully one-half of Haldane's introduction to Follett's book is concerned with the debate over sovereignty and the place of group life.<sup>94</sup> It engages precisely with the pluralist context. It is incomprehensible that Vaughan could write that this pluralist engagement "flies in the face" of Haldane's "own musings".<sup>95</sup>

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<sup>87</sup> Vaughan describes the introduction as the "most explicit account of Haldane's statecraft" (*Viscount Haldane*, *supra* note \* at 114).

<sup>88</sup> MP Follett, *The New State: Group Organization the Solution of Popular Government* (New York: Longmans, Green and Co, 1920) at 3 [*The New State*].

<sup>89</sup> Viscount Haldane, *The Pathway to Reality: Being the Gifford Lectures Delivered in the University of St Andrews, 1902-1904* (London: John Murray, 1926). See also Pringle-Pattison, *supra* note 9 at 433.

<sup>90</sup> Viscount Haldane, "Introduction" in Follett, *supra* note 88, v at vi.

<sup>91</sup> *Ibid* at viii.

<sup>92</sup> *Ibid*.

<sup>93</sup> *Ibid*. See also Haldane, "Higher Nationality", *supra* note 27. This is the same point he would incorporate into his *Fort Frances* ruling a number of years later (*supra* note 39 at 703-704).

<sup>94</sup> Haldane dedicates the second half of the introduction to talk about another of his great preoccupations, education: see Eric Ashby & Mary Anderson, *Portrait of Haldane at Work on Education* (Hamden, Conn: Archon, 1974).

<sup>95</sup> Vaughan also places a great deal of emphasis on Haldane's book *The Reign of Relativity* (*supra* note 27). The book's chapter XII makes precisely the same points as Haldane's "Introduction" to Follett (*supra* note 90), as does Viscount Haldane's lecture "The Na-



This early twentieth-century context, in which Haldane theorized about the relationship between the state, group life, general will, and public opinion, are missing in action from Vaughan's account. In earlier work, I have tried to show how they provide discursive keys with which to open the doors to Haldane's reasoning in the JCPC cases. I have deliberately made repeated mention in this review of how Haldane's "general will" would emerge to the surface in times of war, as this precisely is how he describes peace, order and good government (POGG) emergency authority in the *Board of Commerce* case (1922): "In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them."<sup>96</sup> He does so, again, in *Fort Frances* (1923): "In the event of war, when the national life may require for its preservation the employment of very exceptional means ... the interests of individuals may have to be subordinated to that of the community in a fashion which requires s. 91 to be interpreted as providing for such an emergency."<sup>97</sup> In contrast to the superordinate authority required in times of war, Haldane indicates a preference for provincial jurisdiction in times of peace. In *Toronto Electric Commissioners v. Snider*,<sup>98</sup> Haldane, during the course of argument, observed that in labour disputes "you have a better chance" if "all local [men]" resolve these disputes "than if you are spread over a huge Dominion."<sup>99</sup> He is making the pluralist point that associational life is better practised on the shop floor than at Whitehall or in Ottawa and helps to explain why the JCPC invalidated the federal *Industrial Disputes Investigation Act* in that case. There are other discursive linkages, as in the cases concerning federally and provincially incorporated companies, which I have addressed in detail elsewhere.<sup>100</sup>

Vaughan chooses to ignore this context.<sup>101</sup> Yet, as argued above, his version of Hegelian idealism cannot alone fully explain Haldane's ap-

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ture of the State" ((1920) 117 *The Contemporary Review* 761 at 767, 771 [Haldane, "Nature"]).

<sup>96</sup> *Supra* note 39 at 197.

<sup>97</sup> *Supra* note 39 at 703-704.

<sup>98</sup> [1925] AC 396, (*sub nom Toronto Electric Com'rs v Snider*) 2 DLR 5 (PC).

<sup>99</sup> Canada, Department of Labour, *Judicial Proceedings Respecting Constitutional Validity of the Industrial Disputes Investigation Act, 1907 and Amendments of 1910, 1918 and 1920: Toronto Electric Commissioners v. Snider et al* (Ottawa: FA Acland, 1925) at 253.

<sup>100</sup> Schneiderman, "Laski, Haldane", *supra* note 12 at 552-54.

<sup>101</sup> I do not believe he has recognized the argument or, if he has, has understood it as it is not adequately addressed anywhere in his book. For the record, Vaughan also purports to correct my reference to Haldane's "Federal Constitutions within the Empire" lecture, writing in his bibliography that it "is incorrectly cited by Schneiderman as a separate book" (*Viscount Haldane*, *supra* note \* at 295). In fact, the "Federal Constitutions" lec-

proach to Canadian federalism. In which case, Vaughan is forced to look elsewhere for an explanation of Haldane's bias in favour of the provinces. There are two further arguments, mostly made in passing, which could make up for this absence in Vaughan's account. The first, he claims, is Haldane's reading of Follett's book. Until that time (some time after the first publication of its first US edition in 1918), "Haldane's understanding of federalism was imperfectly conceived ... [and] it was not until he had read [Follett's] *The New State* that he understood more clearly how compatible his instincts were with Hegelianism."<sup>102</sup> This argument seems implausible. Haldane had been reading, speaking, and writing about groups and associational life long before 1920. As member of Parliament he espoused the virtues of local government.<sup>103</sup> He had framed legal arguments (and not simply tapped into his instincts) about precisely such things in the Free Church of Scotland case in 1903. Haldane's correspondence with Laski (the leading young political pluralist) began in 1917, with Haldane praising Laski's pluralist scholarship that had been appearing in the law reviews.<sup>104</sup> In 1918 correspondence, Haldane implored Laski to "go on with this invaluable work which you are doing. The problem of decentralization requires the best thought that can be given ... and your papers are full, not only of facts, but of light."<sup>105</sup> After re-reading Laski's *Authority in the Modern State* (first published in 1919), Haldane admitted in correspondence to Laski that "you Pluralists make out an excellent case on the facts. Even Bosanquet does not dispute this."<sup>106</sup> Sovereignty, which is limited by "general opinion", does not exclude the presence of a "General Will but that Will appears to me to be only partially expressed by governments. It is distributed among groups."<sup>107</sup> That general will, Haldane claimed, "may manifest itself as supreme, and may arm [Government] with extended au-

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ture was published as a separate book (RB Haldane, *Federal Constitutions within the Empire: An Address Delivered before the Society of Comparative Legislation* (London: John Murray, 1900)) two years earlier than the edition he cites ("Federal Constitutions within the Empire" in *Education & Empire: Addresses on Certain Topics of the Day* (London: John Murray, 1902) 88).

<sup>102</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 195.

<sup>103</sup> See "Liberal Meeting at Auchterarder", *The Scotsman* (9 April 1885) 3, online: The Scotsman Digital Archive <<http://archive.scotsman.com>>. He implored "ploughmen" to organize "by means of association" their hours of labour in "Mr Haldane, M.P., at Haddington" *The Glasgow Herald* (9 January 1889) 8, online: <<http://news.google.com>>.

<sup>104</sup> Isaac Kramnick & Barry Sheerman, *Harold Laski: A Life on the Left* (London: Hamish Hamilton, 1993) at 145.

<sup>105</sup> Letter from Haldane to Harold J Laski (12 October 1918) in *Harold Joseph Laski Papers*, Amsterdam, International Institute of Social History (26.6).

<sup>106</sup> Heuston, *supra* note 9 at 230 (reproducing a letter from Viscount Haldane to Harold Laski, 7 April 1920).

<sup>107</sup> *Ibid.*

thority on occasions,”<sup>108</sup> as Haldane explained in *Board of Commerce* and *Fort Frances* a few years earlier. This letter to Laski is easily accessible to Haldane biographers after 1964 as it is reproduced in full in Heuston’s chapter on Haldane in *Lives of the Lord Chancellors, 1885-1940*.<sup>109</sup> By March 1920, Haldane had helped to secure Laski an offer of a full-time appointment from the London School of Economics.<sup>110</sup> His new colleague, Graham Wallas, wrote to Laski in advance of his arrival in autumn 1920 that the position would not have been secured “without Haldane’s help”.<sup>111</sup> Other British idealists, such as Haldane’s friend and fellow Hegelian, Bernard Bosanquet,<sup>112</sup> had also been ceding ground to the pluralists years before Follett’s book ever appeared.<sup>113</sup> As for Follett’s alleged influence on Haldane, she is nowhere mentioned in contemporaneous restatements of the same points he made in the preface<sup>114</sup> nor in the pages of his autobiography.

The second means by which Vaughan aims to explain Haldane’s provincial bias is Haldane’s meeting, on a personal basis, with leading Canadian lawyers and politicians. Haldane famously hosted dinner parties regularly at his home at 28 Queen Anne’s Gate with notable figures in politics, law, literature, and education in attendance. It is in this context that he “sought out”, writes Vaughan, “the company of lawyers, judges, and politicians from the Empire in order to learn from them directly what the sentiments and progressive aspirations—the *Sittlichkeit*—of their

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Kramnick & Sheerman, *supra* note 104 at 145-46.

<sup>111</sup> *Ibid.* at 146.

<sup>112</sup> Bosanquet brought Follett’s book to Haldane’s attention and then briefly reviewed the book: Bernard Bosanquet, Book Review of *The New State: Group Organization the Solution of Popular Government* by MP Follett (1919) 28 *Mind* 370.

<sup>113</sup> See the opening pages of “Introduction to the Second Edition” (in Bosanquet, *Philosophical Theory*, *supra* note 35), the first edition appearing in 1899, which is dedicated to addressing pluralist accusations that his theory of the state was “too narrow and too rigid” as to be applicable “to the varied gradation of communities with which modern life makes us acquainted” (*ibid.* at xxi). Bosanquet acknowledged straight away that “elected representative bodies [such as Parliament] may not be in every case the preferable type of organs of the general will” (*ibid.* at xxii). Referring to “Maitland’s delightful Introduction to his translation of Gierke’s *Political Theories of the Middle Age*,” Bosanquet notes that “[t]he position there sketched by him, according to which the real or general will is present in its degree in every co-operating group of human beings, is one with which the theory of the State is fully in accord” (*ibid.* at xxiii). “It must be remembered,” Bosanquet reiterates, “that our theory does not place Sovereignty in any determinate person or body of persons, but only in the working of the system of institutions as a whole” (*ibid.*).

<sup>114</sup> See Haldane, *Reign*, *supra* note 27; Haldane, “Nature”, *supra* note 95.

people were.”<sup>115</sup> He would invite “lawyers from Canada,” Vaughan echoes, in order to “keep in touch with Canadian legal and political affairs.”<sup>116</sup> The “more he talked with members of the Canadian bar who visited London,” Vaughan claims, “the more he became the champion of the cause of provincial autonomy.”<sup>117</sup> “As we have seen,” he concludes, Haldane “frequently held dinner parties for visiting Canadian lawyers and politicians. ... [H]e constantly sought out from his Canadian visitors news about developments in Canada.”<sup>118</sup> Vaughan restates this claim no less than eight times in the course of the book, always with the same imprecision. Names and dates go unmentioned, and virtually no specificities are discussed, only that Haldane was treated with fatherly reverence by his Canadian guests.<sup>119</sup> Chief justice of the Supreme Court of Canada and first Canadian JCPC Board member, Lyman Poore Duff, is the only person mentioned as having dined there, in 1924.<sup>120</sup> It is likely that Duff would not have been redirecting Haldane’s thinking on anything.<sup>121</sup> Without more, we are left where we started, though readers will have endured yet another account of the life of Viscount Haldane.

### III. Watson Unexplained

Vaughan devotes a chapter to Haldane’s forerunner, Lord Watson. Haldane’s views, Vaughan writes, “were intimately tied to—if not restrained by—those of Lord Watson.”<sup>122</sup> In the *Local Prohibition* case (1896) Watson famously severed federal POGG authority from the enumerations and “strictly confined” POGG to only those exceptional circum-

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<sup>115</sup> *Viscount Haldane*, *supra* note \* at 163.

<sup>116</sup> *Ibid* at 175.

<sup>117</sup> *Ibid* at 186.

<sup>118</sup> *Ibid* at 236.

<sup>119</sup> *Ibid* at 175.

<sup>120</sup> *Ibid*.

<sup>121</sup> As Gerald LeDain writes, “Duff is believed to have enjoyed close intellectual relations with Haldane, and his own judgments give evidence that he was in broad sympathy with Haldane’s general approach to the interpretation of the constitution. Haldane showed his confidence by inviting Duff to render the judgment of the Judicial Committee in several cases in the early 1920’s” (“Sir Lyman Duff and the Constitution” (1974) 12:2 *Osgoode Hall LJ* 261 at 264).

<sup>122</sup> *Viscount Haldane*, *supra* note \* at 124. Elsewhere, Vaughan writes that Haldane was in “fundamental agreement with the direction his predecessor had charted” (*ibid* at 123-24). It remains unclear how Haldane was “restrained” by Watson, particularly in light of Vaughan’s claim that precedent played no constraining role in his JCPC jurisprudence (*ibid*).

stances in which local matters rose to national levels.<sup>123</sup> In the course of so doing, he also narrowly read down federal trade and commerce authority to include only the regulation, and not the prohibition, of trade. Vaughan seeks to explain Watson's manipulation of the text in this and other cases with reference to his "Scottish heritage" and the influence of lawyer Judah P. Benjamin in promoting a states' rights approach to Canadian federalism cases.<sup>124</sup>

As to the first explanation, Vaughan wishes to ascribe to Watson the "widely circulated" views of John Stewart Blackie promoting federal union between Scotland, Ireland, and England. "It would be passing strange if Watson, the deep-dyed Scot, was unaware of these sentiments," declares Vaughan, "and even more passing strange if he did not agree with them with a characteristic ebullience."<sup>125</sup> This may be so, but there is nothing Watson said or did outside of the Canadian cases to suggest any sympathy with these views. Nor does Watson purport to be doing anything in the Canadian cases other than interpreting the text of the 1867 constitution. In an earlier work, Vaughan accused James Mallory of offering nothing "more than an hypothesis" when Mallory sought to explain JCPC decision making in the late nineteenth century with reference to judicial hostility to legislation for social protection.<sup>126</sup> "It clearly requires more support than is provided; it is especially in need of support in the judgments of Lord Watson," Vaughan wrote dismissively of Mallory.<sup>127</sup> Vaughan now stands similarly accused.<sup>128</sup>

The second explanation for Watson's views, attributing them to Judah P. Benjamin's influence, is risible, particularly in light of the fact that he appeared only once before Watson and lost (in *Dobie*<sup>129</sup>). Benjamin was attorney general, secretary of war, and secretary of state for the Southern

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<sup>123</sup> *Ontario (AG) v Dominion of Canada (AG)*, [1896] AC 348 at 360, 11 CRAC 222 (PC) [*Local Prohibition*].

<sup>124</sup> *Viscount Haldane*, *supra* note \* at 124, 135.

<sup>125</sup> *Ibid* at 144.

<sup>126</sup> Frederick Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation" (1986) 19:3 Can J Pol Sci 495 at 513 [Vaughan, "Critics"] (referring to JR Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954) at 30-32, 47-56).

<sup>127</sup> "Critics", *supra* note 126.

<sup>128</sup> Vaughan might have more fruitfully pursued this sort of claim about Haldane. See "Liberal Meeting at Auchterarder" (*supra* note 103 at 3) where Haldane described "local government" as "one of the great questions" in which he called for, among other things, a Scottish secretary in cabinet for Scotland's affairs.

<sup>129</sup> *Dobie v Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada* (1882), [1881-82] 7 App Cas 136, 8 CRAC 446 (PC) [*Dobie* cited to App Cas].

Confederacy. After the fall of Richmond, in the midst of the American Civil War, he escaped to England in 1865. He quickly rose through the ranks of the English bar, making Queen's Counsel in only five years. In the course of this second successful career, Benjamin appeared before the JCPC in seven Canadian federalism cases—he won only one of these.<sup>130</sup> Ironically, Benjamin argued unsuccessfully for the provincial side in *Russell v. The Queen*<sup>131</sup>—the Board upholding the *Canada Temperance Act, 1878* in a poorly reasoned opinion—which became the ire of the provincial rights campaign under Mowat's leadership.<sup>132</sup> The provincial side, Risk finds, was badly argued by Benjamin's junior as Benjamin appeared for only part of the second day.<sup>133</sup> Canadian historian Arthur Lower initially suggested that it was "probable" that Benjamin planted the seeds of provincial autonomy into JCPC proceedings by drawing on the dominant sensibility of the pre-Civil War American South.<sup>134</sup> The American political scientist Claudius O. Johnson exhaustively examined that very hypothesis in a 1967 issue of the *Canadian Bar Review*, taking up every Canadian federalism case in which Benjamin appeared in order to ascertain his purported influence. Johnson concluded that the suspicion about Benjamin's influence "is largely a myth."<sup>135</sup> Johnson found that "Benjamin probably cared little about which side he represented" in the constitutional cases and that, in the single case he did win, it was not "on the point he had stressed" before the JCPC.<sup>136</sup> Johnson concluded that "[o]n the basis of the Committee's opinions it would appear that he had practically no influence with it, whether he argued the Dominion or the provincial side."<sup>137</sup> Acknowledging that Benjamin's arguments "may have later served as something of a guide" to the JCPC in the Watson-Haldane years, the burden of proof remained on those who would make such an unfounded prop-

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<sup>130</sup> Claudius O Johnson, "Did Judah P. Benjamin Plant the 'States' Rights' Doctrine in the Interpretation of the British North America Act?" (1967) 45:3 Can Bar Rev 454 at 459.

<sup>131</sup> (1882), [1881-82] 7 App Cas 829, 8 CRAC 502 (PC).

<sup>132</sup> See Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: University of Toronto Press for The Osgoode Society, 1986) at 259-74.

<sup>133</sup> RCB Risk, "Canadian Courts Under the Influence" (1990) 40:4 UTLJ 687 at 706 [Risk, "Canadian Courts"].

<sup>134</sup> ARM Lower, "Theories of Canadian Federalism—Yesterday and Today" in ARM Lower et al, eds, *Evolving Canadian Federalism* (Durham, NC: Duke University Press, 1958) 3 at 29.

<sup>135</sup> Johnson, *supra* note 130 at 477.

<sup>136</sup> *Ibid* at 474.

<sup>137</sup> *Ibid*.

osition.<sup>138</sup> “Those who hold the suspicion,” Johnson emphatically declared, “should produce the evidence.”<sup>139</sup>

Vaughan, remarkably, ignores Johnson’s earlier undertaking<sup>140</sup> and fails to disturb his 1967 conclusions. Vaughan takes up only one piece of so-called evidence in his support. It concerns the order of argument that Benjamin is said to have invited Watson to take up in his losing appearance in the *Dobie* case (it is unclear what source Vaughan relies upon for this part of the argument because it does not appear in the reported version and he provides no reference for it).<sup>141</sup> When considering a federalism problem under the *British North America Act, 1867* Benjamin allegedly argued, the Board first should examine the enumerations in section 92 to determine whether the subject matter of the legislation falls within provincial classes of subjects. It is only after undertaking this inquiry that the Board should then turn to the federal enumerations in section 91. Vaughan views this structure of inquiry as giving “undue weight to the provinces because the constitution act states that the provincial powers are ‘exclusive,’ which implied that they were *in some sense* beyond the reach of central government jurisdiction.”<sup>142</sup> The assumption is that, by going to provincial enumerations first, this somehow gives the provincial side in a division-of-powers case an advantage. On this basis, Vaughan labels it the “reverse two-step approach.”<sup>143</sup> He fails to notice, however, that this is precisely the order of inquiry laid down by Sir Montague Smith in the earlier *Parsons* case<sup>144</sup>—a case which the province won (with legal arguments developed by Premier Mowat<sup>145</sup>) and which laid the foundation

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<sup>138</sup> *Ibid* at 476-77.

<sup>139</sup> *Ibid* at 477.

<sup>140</sup> One finds a reference to Johnson’s article in Vaughan’s bibliography, but it inaccurately cites to Jonathan Robinson’s 1970 article on Haldane in the *University of Toronto Law Journal* and not to the *Canadian Bar Review*, where it appeared (Vaughan, *Viscount Haldane*, *supra* note \* at 296).

<sup>141</sup> See *Dobie*, *supra* note 129 at 139-40.

<sup>142</sup> *Viscount Haldane*, *supra* note \* at 136 [emphasis in original].

<sup>143</sup> *Ibid*.

<sup>144</sup> *Citizens Insurance Company of Canada v Parsons* (1881), [1881-82] 7 App Cas 96 at 109, 113, 8 CRAC 406 (PC) [*Parsons*]. The *Parsons* and *Dobie* cases were argued closely together. The *Parsons* case was argued on 7-9 July and opinion released on 26 November 1881. The *Dobie* case (*supra* note 129) was argued 13-15 July 1881 and the opinion released 21 January 1882.

<sup>145</sup> Romney, *supra* note 132 at 261-78. See also Ontario, Legislative Assembly, “Report of the Attorney-General of Ontario with Respect to Certain Proceedings Before the Imperial Privy Council, Involving the Right of the Provincial Legislature to Pass the Act to Secure Uniform Conditions in Policies of Insurance” by O Mowat (31 December 1881) in *Sessional Papers*, No 31 (1882).

for a narrowing of federal regulation of trade and commerce authority. Lord Watson did not sit on the Board in *Parsons* while Benjamin appeared on behalf of the losing insurance company side as a junior to Sir Farrer Herschell. Lord Watson declares this so-called “reverse two-step”<sup>146</sup> the appropriate order of inquiry, in the Board’s *Dobie* opinion, as it is “[a]ccording to the principles established by the judgment of this Board in the cases already referred to,”<sup>147</sup> presumably referring to *Parsons*. What is worse, Vaughan also fails to notice that Watson reverses this previously endorsed order of inquiry in the *Local Prohibition* case.<sup>148</sup> Lord Watson begins his analysis in *Local Prohibition* with a discussion of federal enumerations precisely with a view to narrowing federal authority.<sup>149</sup> Watson thereby adopts a structure of inquiry that Vaughan claims would have been advantageous to the federal side so as to find in favour of the province! This does not advance our understanding of Watson or of the period in which he operated.

Vaughan does not mean to suggest that “Benjamin taught Watson all he knew about ‘federalism’.”<sup>150</sup> Instead, the suggestion appears to be that Benjamin would have provided helpful guidance to the JCPC in resolving federalism disputes as, Vaughan claims, “there was very little literature available on the subject of federalism for any British judge to consider even if he wished to do so.”<sup>151</sup> This is a revealing admission: Vaughan seemingly is unaware of the enormously influential *Introduction to the Study of the Law of the Constitution*<sup>152</sup> by Albert Venn Dicey, first published in 1885 and already in its fifth edition by 1897. Dicey initially published his views about federalism in the *Law Quarterly Review*,<sup>153</sup> and subsequently included the article as a chapter in his widely circulating book. Not only does Vaughan omit any consideration of what a leading English constitutional lawyer may have thought about federalism in the

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<sup>146</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 136.

<sup>147</sup> *Dobie*, *supra* note 129 at 149.

<sup>148</sup> *Supra* note 123.

<sup>149</sup> The Board felt it “expedient” to answer the seventh question—whether Ontario had the authority to enact local prohibition law—first (*ibid* at 355), and noted that “[i]n order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada Temperance Act” (*ibid* at 358-59).

<sup>150</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 136-37.

<sup>151</sup> *Ibid* at 137.

<sup>152</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan & Co, 1965). For a review of the various editions, see FH Lawson, “Dicey Revisited I” (1959) 7:2 *Pol Studies* 109.

<sup>153</sup> AV Dicey, “Federal Government” (1885) 1 *Law Q Rev* 80.



late nineteenth century, more unforgivingly, he fails to consider the legal culture in which Watson would have operated. In earlier work, I provide this sort of linkage by connecting Watson to “ideological suppositions of the common law prevalent in the late Victorian era that exhibited a distrust of legislative power and fear of democratic ‘tyranny.’”<sup>154</sup> I highlight Dicey’s rule of construction that federal constitutions should be read as limited charters for law making, like the charters of railway companies, where laws are in the nature of delegated (or subordinate) authority. Tapping into Mallory’s earlier intuition, I connect Dicey’s view of federal constitutions as limiting, and therefore conservative, documents with a close reading of the *Local Prohibition* case and its transcript of argument. In particular, I emphasize Watson’s narrowing of the federal trade and commerce power to encompass only the regulation and not the prohibition of trade, despite very good arguments by Edward Blake to the contrary. Watson drew, instead, on an earlier JCPC case, *Virgo*, concerning the scope of powers available to the municipality of Toronto to regulate, but not to prohibit, trade.<sup>155</sup> In so doing, he likened federal authority to delegated municipal authority, just as Dicey would have prescribed. R.C.B. Risk has advanced associated claims about nineteenth century legal culture and how this helps to explain Lord Watson’s reasoning.<sup>156</sup> Though the record is difficult to explain, Risk acknowledges, “ideas about freedom” had some influence in the *Local Prohibition* outcome.<sup>157</sup> None of this appears to be of interest to Vaughan. Risk’s argument is not even acknowledged and my earlier work is dismissed in a confused footnote.<sup>158</sup>

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<sup>154</sup> David Schneiderman, “A.V. Dicey, Lord Watson, and the Law of the Canadian Constitution in the Late Nineteenth Century” (1998) 16:3 LHR 495 at 498 [Schneiderman, “Dicey”].

<sup>155</sup> *Toronto (City of) v Virgo* (1895), [1896] AC 88 at 93, 11 CRAC 203 (PC) [*Virgo*].

<sup>156</sup> “Canadian Courts”, *supra* note 133 at 734.

<sup>157</sup> *Ibid.*

<sup>158</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 271-72, n 18. The footnote reads:

For an extensive discussion of David Schneiderman’s view that the roots of Watson’s jurisprudence can best be found in “the ideological presuppositions of the constitutional lawyer of the [late] nineteenth century” rather than in “the text of the constitution,” see Saywell, *The Lawmakers*, 143-4 and 185-6. I am in agreement with Saywell that there is no plausible evidence to support Schneiderman’s speculations. Indeed, they fly in the face of Haldane’s own musings on the subject of Hegel and the law of the state, especially in his preface to Follett’s book (*ibid.*).

The footnote is confused because it is included in the chapter on Watson and appears to be making a point about the weakness of my argument about Watson, but then seems to be making a specific point about Haldane. Note also that Schneiderman, “Dicey” (*supra* note 154) appears nowhere in the bibliography. Vaughan refers only to the oblique

#### IV. Reign of Simplicity

There is much more to take issue with in Vaughan's account of the Watson and Haldane years. I prefer to focus instead, in this last part, on a single, recurring problem with the book. It concerns Vaughan's naïve understanding of constitutional text and the limits of judicial propriety. It also infects Vaughan's postscript, where he turns his sights to recent Supreme Court of Canada opinions.

As already inferred, Vaughan believes that the *Constitution Act, 1867* could not have been clearer. Provinces were to be subordinate to the greater authority of Parliament—the “legislative powers of the federal Parliament could hardly have been more precisely enunciated,” he declares.<sup>159</sup> “Nowhere in the constitutional act of 1867 is there to be found anything remotely suggestive of ‘provincial autonomy,’” he proclaims.<sup>160</sup> Parliament, presumably, can exercise this superior authority in any matter it so chooses—Vaughan lays down no other rule of interpretation. This golden rule—which resembles more the legislative union that was rejected over the federal union that was adopted<sup>161</sup>—is supported not by any close reading of the 1867 text but by fleeting references to the centralizing ambitions of John A. Macdonald.<sup>162</sup> Though this becomes the dominant account from the mid-1880s until the 1930s,<sup>163</sup> he dismisses as outlandish any rival interpretation, such as that advanced by George Brown<sup>164</sup> and

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summary in Saywell (*supra* note 14 at 143-44), where Saywell engages not at all with the argument summarized above.

<sup>159</sup> *Viscount Haldane*, *supra* note \* at 130.

<sup>160</sup> *Ibid* at 134. But see the speech of Sir N.F. Belleau to the Legislative Council in support of confederation, where he proclaims that the “autonomy” of Lower Canada would be preserved (*Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* (Quebec: Hunter Rose, 1865) at 181).

<sup>161</sup> Though Waite concludes that equating federal with legislative union was a prevalent nineteenth century Canadian view, that is, outside of Canada East. See PB Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America* (Toronto: University of Toronto Press, 1962) at 114.

<sup>162</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 130-31.

<sup>163</sup> RCB Risk, “Constitutional Scholarship in the Late Nineteenth Century: Making Federalism Work” in *A History of Canadian Legal Thought: Collected Essays*, G Blaine Baker & Jim Phillips, eds (Toronto: University of Toronto Press, 2006) 33 at 39-40.

<sup>164</sup> At a banquet in Toronto on the evening of 2 November 1864, George Brown summed up the drafting effort in this way: “we have given nothing to the local bodies which did not necessarily belong to the localities, except education and the rights of property, and the civil law, which we were compelled to leave to the local governments, in order to afford that protection which the Lower Canadians claim for their language and their laws, and their peculiar institutions” (Edward Whelan, ed, *The Union of the British Provinces* (Charlottetown: GT Hazard, 1865) at 197).

taken up in contemporary times by Paul Romney<sup>165</sup> and most every Quebec constitutional scholar.<sup>166</sup> What is strikingly missing is any attempt at reconciling the role of the enumeration “property and civil rights” with Vaughan’s claims about expansive federal authority. The enumeration has its genesis in the 1759-1760 Articles of Capitulation, where local laws and customs were preserved after the British conquest, which then gets expressly taken up in the *Quebec Act, 1774*. There, the French civil law tradition inherited by Britain’s “new subjects” is declared to apply to all disputes outside of the criminal law context. The phrase then gets carried over into the 1867 act, but not before Quebec’s civil law is codified in 1866 in anticipation of exercising provincial authority in these private law realms.<sup>167</sup> George-Etienne Cartier, attorney general for Canada East and Macdonald’s ally in the confederation project, is credited with having spearheaded this effort. By the time of codification, the outlines of the confederation scheme were well known, and so the drafters of the code steered clear of enumerated federal subjects. Thomas McCord, in the introduction to the first English-language edition of the code, declared that the effort:

is perhaps better calculated than any other available means to secure to Lower Canada an advantage which the proposed plan of confederation appears to have already contemplated, that of being the standard of assimilation and unity, and of entering into new political relations without undergoing disturbing alterations in her laws or institutions.<sup>168</sup>

Presumably, then, there was intended to be some continuity of authority in those realms covered by property and civil rights. How is this plausible interpretation to be reconciled with Vaughan’s centrist account? It never is. Yet, Sir Montague Smith struggled precisely with this question in *Parsons* (1881):

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<sup>165</sup> *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999).

<sup>166</sup> See e.g., Jean Beetz, “Les attitudes changeantes du Québec à l’endroit de la constitution de 1867” in P-A Cr  peau & CB Macpherson, eds, *The Future of Canadian Federalism/L’avenir du f  d  ralisme canadien* (Toronto, Montreal: University of Toronto Press, Les Presses de l’Universit   de Montr  al, 1965) 113; Henri Brun & Guy Tremblay, *Droit Constitutionnel*, 2d ed (Cowansville: Les   ditions Yvon Blais, 1990) at 424-25; Jacques-Yvan Morin & Jos   Woehrling, *Demain le Qu  bec ... Choix politiques et constitutionnels d’un pays en devenir* (Sillery, Qu  : Septentrion, 1994).

<sup>167</sup> See Brian Young, *The Politics of Codification: The Lower Canadian Civil Code of 1866* (Montreal: McGill-Queen’s University Press, 1994).

<sup>168</sup> Thomas McCord, “Synopsis of the Changes in the Law Effected by the Civil Code of Lower Canada” in Thomas McCord, *The Civil Code of Lower Canada*, 2d ed (Montreal: Dawson Brothers, 1870) i at i-ii.

[I]f the narrow construction of the words “civil rights,” contended for by the appellants were to prevail, the dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.<sup>169</sup>

The enumeration “property and civil rights” barely gets a mention from Vaughan. He seems to have a view of the judicial function under a constitution as requiring the application of mechanical rules as commanded by unambiguous text.<sup>170</sup> The churning of this constitutional machine was described by Alexander Hamilton in the *Federalist Papers*—judges, he famously wrote, exercise “judgment” and not “will”.<sup>171</sup> Judicial propriety requires nothing more than placing the impugned statute next to constitutional text and, presto, either the subordinate law is or is not authorized by the superior instrument. Though we should place a great deal of emphasis on what people have written down in their constitutional texts,<sup>172</sup> constitutions rarely provide ready answers to complex constitutional questions. What is required in most but not all cases is interpretation—the text, in other words, rarely speaks for itself.<sup>173</sup> Presumably the meaning of the federal power to regulate “trade and commerce” is, to Vaughan, self-evident. The judicial function merely is to apply the text as written. When contrasted with provincial authority over “property and civil rights,” how is the content of that provincial authority not pertinent? Must the provincial authority inevitably yield to the federal or does the text of the provincial enumeration also matter?

The same interpretive problems arise in the postscript, dedicated to Supreme Court of Canada rulings under the *Charter*. Vaughan again asserts that the Court has departed significantly from the text and has

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<sup>169</sup> *Supra* note 144 at 113 (referring to section 94 of the *Constitution Act, 1867*, which provides for uniformity of laws in relation to property and civil rights under parliamentary authority for the other three provinces should they so consent).

<sup>170</sup> See Roscoe Pound, “Mechanical Jurisprudence” (1908) 8:8 Colum L Rev 605.

<sup>171</sup> Alexander Hamilton, “No. 78: Hamilton” in Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, ed by Clinton Rossiter (New York: New American Library of World Literature, 1961) 464 at 465.

<sup>172</sup> Akhil Reed Amar, “The Supreme Court 1999 Term—Foreword: The Document and the Doctrine” (2000) 114:1 Harv L Rev 26.

<sup>173</sup> The literature here is vast. For a recent helpful statement in the United States, adopting a “historicist” methodology, see H Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* (Chicago: University of Chicago Press, 2002).

usurped constitutional functions performed by others (the people or some higher authority?<sup>174</sup>). The Court stands “vigilant to thwart policy decisions made by elected representatives”<sup>175</sup> in the service of a contemporary *sittlichkeit*. “This anti-majoritarian component of the new way of judging came in whispers; hardly anyone has taken notice of it. The literature is virtually silent on this astonishing innovation.”<sup>176</sup> With a stroke of the pen, Vaughan has erased a couple of decades of energetic and provocative critiques of the Court from both left and right wing critics issuing out of both law schools and departments of political science.<sup>177</sup> Vaughan describes the current Court’s mandate as follows: “judges are obliged to seek out and apply the ‘higher,’ ‘deeper’ principles of justice—[which] places Canada’s highest court in the tradition of modern jurisprudence which accords a primacy to judges within an intellectual context marked by Hegel’s historicism.”<sup>178</sup> Vaughan even asks whether it is “constitutionally legal for an act of the imperial Parliament, even in the form of a constitutional amendment, to confer such extraordinary powers on the judiciary.”<sup>179</sup>

At this stage of the argument, readers might expect Vaughan to take up a close reading of the 1982 constitutional text, in addition to the Court’s *Charter* jurisprudence, in order to answer these and related questions. Does section 52 of the *Constitution Act, 1982*, declaring the constitution to be “the supreme law of Canada” and that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect,” answer the question about whether it is legally binding?<sup>180</sup> He does not ask this question—perhaps there is some other authority that he wishes to appeal to? Turning to the substance of the Court’s rulings, Vaughan wonders why the Supreme Court of Canada would extend the constitutional guarantee of “‘equal benefit’ of the law to all persons who reside in Canada—not merely to all citizens but to all

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<sup>174</sup> On “natural law” being the source of that authority, see his earlier statements in Frederick Vaughan, “On Being a Positivist: Does It Really Matter?” (1991) 29:2 Osgoode Hall LJ 399.

<sup>175</sup> Vaughan, *Viscount Haldane*, *supra* note \* at 245.

<sup>176</sup> *Ibid.*

<sup>177</sup> The literature here is extensive. For a discussion see Richard Sigurdson, “Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics” (1993) 7-8 International Journal of Canadian Studies 95; Richard F Devlin, “The *Charter* and Anglophone Legal Theory” (1997) 4:1 Rev Const Stud 19. Vaughan acknowledged, and effectively endorsed, the right-wing critique in Frederick Vaughan, “Judicial Politics in Canada: Patterns and Trends” (1999) 5:1 Choices IRPP 4 [Vaughan, “Judicial Politics”].

<sup>178</sup> *Viscount Haldane*, *supra* note \* at 246.

<sup>179</sup> *Ibid* at 247.

<sup>180</sup> *Constitution Act 1982* (UK), 1982, c 11.

persons, including landed immigrants.”<sup>181</sup> One might begin to answer this question by going to the text of relevant sections of the *Charter* and related provisions, which distinguish between the conferral of rights and freedoms on citizens and on persons. Vaughan prefers not to go down this road. He complains about the Court having the *Charter* “trump” Alberta’s *Individual Human Rights Protection Act* in *Vriend* (1998).<sup>182</sup> What other order of priority does Vaughan envisage here? Particularly in light of the availability of the notwithstanding clause in section 33—which was enticingly available to then Alberta Premier Klein<sup>183</sup>—how is the constitution expected to operate in conjunction with provincial law? Does section 52, again, have anything to say about this question? Or is Vaughan advocating some kind of coordinate construction in constitutional interpretation, in which case, how does this square with his account of the 1867 act as being conclusive in containing provincial power?

Perhaps Vaughan really means to complain about the Court including sexual orientation among section 15 of the *Charter*’s prohibited grounds. If so, how does he reconcile this position with the text of section 15, the structure of which prohibits discrimination generally and then lists grounds by way of example, signalling that the list remains an open set?<sup>184</sup> Vaughan lays all of this innovation at the foot of the Supreme Court of Canada, including having “revised the definition of marriage.”<sup>185</sup> The Court might legitimately be accused of having laid the foundation for recognition of same-sex marriage federally, but it did not rule on this issue in the *Reference re Same-Sex Marriage*.<sup>186</sup> In fact, the justices declined to answer the fourth question (whether such recognition was required by the *Charter*) that was put to them by the Martin government (the original three questions were put to the Court by the Chrétien administration). The Court chose to answer only the original three questions, which concerned whether the proposed bill fell within federal spheres of jurisdiction. The Court concluded that it mostly did but, to the extent the legislation conferred exemption for religious officials, the proposed law treaded

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<sup>181</sup> *Viscount Haldane*, *supra* note \* at 247.

<sup>182</sup> *Ibid* at 251.

<sup>183</sup> The circumstances in which Premier Klein proposed and later abandoned invoking section 33 in this case are discussed in detail in Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006) at 71ff.

<sup>184</sup> In an earlier essay, Vaughan describes “the Parliament of Canada [as having] deliberately left out sexual orientation from the enumerated items protected by the Charter” (Vaughan, “Judicial Politics”, *supra* note 177 at 15), but then makes no mention of the actual text or structure of section 15 of the *Charter*.

<sup>185</sup> *Viscount Haldane*, *supra* note \* at 255.

<sup>186</sup> 2004 SCC 79, [2004] 3 SCR 698.

upon provincial authority over “solemnization of marriage”.<sup>187</sup> All of this a first-year law student should know. But Vaughan is not interested in the ways of the law that get in the way of his jeremiad.

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Vaughan’s book is not so much an exercise in historical retrieval as one of faulty interpretation, revealing an unfamiliarity with the period, drawing on a limited set of sources, and resulting in partial readings of Hegel and Haldane, all of which results in a tumble-down, “lean-to [shed] of inference.”<sup>188</sup> Readers will not be comforted by the fact that Vaughan now feels encouraged to produce a follow-up volume. He apparently is expanding the postscript into a book-length treatment of the Supreme Court’s linkages to supposed Hegelian relativism.<sup>189</sup> One would have thought that Hegel, Haldane, and the Supreme Court of Canada deserve much better than this.

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<sup>187</sup> *Ibid* at para 33.

<sup>188</sup> See Collingwood, *supra* note 1 at 216.

<sup>189</sup> Email from Frederick Vaughan to David Schneiderman (17 June 2011) (on file with author).